



# ***PR 2011/18 - Income tax: tax consequences for a Nominee Investor in the Australian Securities Property Fund***

 This cover sheet is provided for information only. It does not form part of *PR 2011/18 - Income tax: tax consequences for a Nominee Investor in the Australian Securities Property Fund*

 This document has changed over time. This is a consolidated version of the ruling which was published on *7 March 2012*



## Product Ruling

### Income tax: tax consequences for a Nominee Investor in the Australian Securities Property 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.

**[Note:** This is a consolidated version of this document. Refer to the ATO Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

## **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

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) 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 an investment in the Australian Securities Property Fund (the Fund) offered by Australian Securities Limited (ASL) and issued under a Product Disclosure Statement.
3. This Product Ruling does not address:
  - the taxation consequences for an Owner other than a Nominee Investor (i.e. Sole or Contributory Investors);
  - the taxation consequences for a Nominee Investor following the registration of their name by ASL on the Certificate of Title of the Sub-scheme Property;
  - the taxation consequences of a joint investment in the Fund by two or more entities that constitute a partnership between themselves for income tax purposes;
  - the deductibility or otherwise of interest and other borrowing costs arising from agreements entered into with financiers other than ASL;
  - the deductibility of prepaid interest on funds borrowed from ASL to finance the acquisition of a Membership Interest in a Sub-scheme and any repairs, renovations and/or maintenance of a Sub-scheme Property; and
  - whether this 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 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 Members and Owners specifically participating and referred to as Nominee Investors.

5. The class of entities who can rely on this Product Ruling consists of those Nominee Investors:

- that are accepted to participate in the scheme described in paragraphs 18 to 45 of this Product Ruling and execute the relevant agreements mentioned in paragraph 18 of this Product Ruling on or after the date this Product Ruling is published and on or before 30 June 2014; and

at the time of entering into the scheme,

- have a purpose of staying in the Sub-scheme until it is completed; and
- have a realistic expectation of deriving assessable income from the investment that exceeds the deductible expenditure incurred from this involvement.

6. 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:

- intend to terminate their involvement in the Sub-scheme prior to its completion, or who do not intend to derive assessable income from it in excess of their deductible expenditure;
- are accepted to participate in the scheme described in paragraphs 18 to 45 of this Product Ruling and execute the relevant agreements mentioned in paragraph 18 of this Product Ruling before the date of this Product Ruling or after 30 June 2014;
- are Sole or Contributory Investors;
- 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 adviser that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits) in any way;
- finance their participation in the scheme with loans from ASL, other than as described at paragraph 44 of this Product Ruling; or
- 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. 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**

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 18 to 45.

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.

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## **Date of effect**

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11. This Product Ruling applies prospectively from 2 November 2011, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme between 2 November 2011 and 30 June 2014 inclusive, 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.

12. 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**

13. 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.

14. 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**

15. 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**

16. 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 Product Ruling as a Nominee 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**

17. Subject to paragraph 3 of this Ruling and the assumptions in paragraph 45 of this Ruling:

- (a) Interest paid by ASL to the Member Account of a Nominee Investor in respect of Application Money that has not yet been allocated to a Sub-scheme will be assessable income of the Nominee Investor under section 6-5;
- (b) The Nominee Investor is assessable under section 97 of the *Income Tax Assessment Act 1936* (ITAA 1936) on so much of that share of the net income of the trust estate (as adjusted by Division 6E of the ITAA 1936) to which the Nominee Investor is presently entitled. The present entitlement of the Nominee Investor will reflect the Nominee Investor's fixed rights to income and capital gains derived from the Sub-scheme in which the Nominee Investor has a Membership Interest, commensurate to the proportion of the Sub-scheme Property funded by the Nominee Investor;

- (c) The Nominee Investor is assessable under Division 102 on so much of the share of the net capital gain of the trust estate as determined by Subdivision 115-C. The Nominee Investor's share of the net capital gain of the trust estate will include fixed rights to capital gains derived from the sale of the Sub-scheme Property in which the Nominee Investor has an interest and in proportion to that interest held;
- (d) CGT event E4 under section 104-70 happens if and when the Nominee Investor receives a payment from ASL as Trustee of the Sub-scheme that is not wholly assessable income of the Nominee Investor as per paragraphs 17(b) and (c) of this Product Ruling;
- (e) The Management Fees, Managing Agent's Fees, Project Management Fees and Performance Fees incurred by a Nominee Investor will be deductible to the Nominee Investor under section 8-1 in the income year incurred;
- (f) Interest expenses incurred by the Nominee Investor under the Finance Facility Agreement with ASL to fund the acquisition of the Nominee Investor's Membership Interest in a Sub-scheme and any repairs, renovations and/or maintenance of a Sub-scheme Property are deductible under section 8-1 in the income year incurred;
- (g) Borrowing expenses incurred by the Nominee Investor under or in respect of the Finance Facility Agreement with ASL to fund the acquisition of the Nominee Investor's Membership Interest in a Sub-scheme and any repairs, renovations and/or maintenance of a Sub-scheme Property are deductible under section 25-25;
- (h) Section 51AAA of the ITAA 1936 will not apply to deny the Nominee Investor a deduction for fees and expenses allowable under section 8-1 of the ITAA 1997 or a deduction for borrowing expenses allowable under section 25-25 of the ITAA 1997;
- (i) The Membership Interest of the Nominee Investor in a Sub-scheme is a CGT asset under subsection 108-5(1);
- (j) CGT Event A1 under section 104-10 happens if and when the Nominee Investor disposes of their Membership Interest in a Sub-scheme. That is, this event occurs when the Nominee Investor assigns their Membership Interest in a Sub-scheme to another Member or Members either upon roll over of the Sub-scheme for an additional term, or during the term of the Sub-scheme in the limited circumstances set out in paragraph 40 of this Product Ruling;

- (k) A capital gain will arise under section 104-10 to the Nominee Investor if the capital proceeds from the disposal of their Membership Interest in a Sub-scheme are greater than the cost base of that Membership Interest. A capital loss will arise under section 104-10 to the Nominee Investor if the capital proceeds from the disposal of their Membership Interest in a Sub-scheme are less than the reduced cost base of that Membership Interest.
- (l) The capital proceeds under section 116-20 from this CGT event A1 will be the amount of proceeds the Nominee Investor receives or is entitled to receive from the assignee of the Membership Interest.
- (m) The cost base or reduced cost base of the Nominee Investor's Membership Interest includes their Membership Contribution, the Contribution Fee and the Acquisition and Due Diligence Fees paid by the Nominee Investor (subsections 110-25(2), 110-25(3) and 110-55(2));
- (n) Any capital gain realised by a Nominee Investor from the disposal of a Membership Interest acquired in a Sub-scheme will be treated as a discount capital gain pursuant to section 115-5 where the Nominee Investor is an individual, a complying superannuation entity, or a trust and has held the Membership Interest for at least 12 months; and
- (o) The anti avoidance provisions in Part IVA of the ITAA 1936 will not be applied to deny the deductibility of the fees and expenses incurred by the Nominee Investor, as per paragraphs 17(e), (f) and (g) of this Product Ruling, in respect of their participation in the scheme described in paragraphs 18 to 45 of this Product Ruling.

## **Scheme**

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

- application for a Product Ruling as constituted by documents and correspondence received on 16 September 2010, 27 September 2010, 5 October 2010, 14 October 2010, 15 October 2010, 29 October 2010, 15 November 2010, 17 December 2010, 9 February 2011, 25 March 2011, 6 June 2011, 1 July 2011, 7 September 2011, 12 September 2011, 14 September 2011 and 29 September 2011;



- draft Product Disclosure Statement for the Fund, received on 29 September 2011;
- draft **Property Description Certificate (Supplementary Product Disclosure Statement)**, received on 16 September 2010;
- draft Property Trust Declaration, received on 16 September 2010;
- draft **Constitution** for the Fund, received on 12 September 2011;
- draft Compliance Plan for the Fund, received on 16 September 2010; and
- draft **Finance Facility Agreement**, received on 16 September 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.

19. The documents highlighted in paragraph 18 of this Ruling are those that a Nominee Investor will/may enter into or be a party to. 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 Nominee Investor or any associate of a Nominee Investor, will be a party to, which are a part of the scheme.

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

## Overview

21. The Fund is an unlisted property fund comprising multiple individual Sub-schemes, registered as a managed investment scheme under the *Corporations Act 2001* with ARSN 153 029 264 and managed by ASL as the Responsible Entity.

22. An offer to participate in the Fund will be made through the PDS issued by ASL. To participate in the Fund, Applicants execute the Application Form contained in the PDS and lodge the executed form together with their Application Money.

23. Subject to ASL's right to establish a higher minimum investment amount for some or all Sub-schemes, the minimum initial investment in the Fund per Applicant is \$50,000 for those who invest directly and \$35,000 for those who invest via a financial adviser.

24. Upon ASL's acceptance of an Application, the Applicant becomes a Member of the Fund bound by the Constitution, and appoints ASL under an irrevocable Power of Attorney to, among other things, execute contracts of sale and lease agreements on the Member's behalf.

25. The Member's Application Money will be deposited by ASL into an ASL Trust Account and may earn interest at rates set by ASL pending its allocation to a particular Sub-scheme.

26. ASL will allocate a property to, and prepare a Property Description Certificate (PDC) for, each Sub-scheme. The PDC outlines details in relation to the specific property of a Sub-scheme (the Sub-scheme Property) in which the Members will be offered entry into in order of receipt by ASL of completed Applications and in accordance with the preferences of Members outlined in their respective Application.

27. ASL sets a minimum subscription amount for each Sub-scheme which will equate to the purchase price of the Sub-scheme Property plus upfront fees and expenses. When ASL receives the minimum subscription amount from contributing Members, subscriptions for the Sub-scheme will be closed.

28. When the minimum subscription for the relevant Sub-scheme has been reached, the Member's Application Money will be redeemed from the ASL Trust Account and contributed into the relevant Sub-scheme in the following circumstances:

- upon receipt of the Member's written approval to enter into a particular Sub-scheme; or
- in the event that the Member does not lodge a written objection to their entry into or acceptance of a particular Sub-scheme within 14 days of ASL sending the PDC to the Member.

29. The Member becomes an Owner at the time their Membership Contribution is allocated to a Sub-scheme. Every \$1 of that Membership Contribution allocated to a Sub-scheme is equal to a Membership Interest in that Sub-scheme.

30. The Assets of a Sub-scheme are not pooled with those of other Sub-schemes. Sub-scheme Properties operate independently and separately from all other Sub-scheme Properties.

31. All Sub-scheme Properties are sourced by ASL in accordance with its property investment criteria on an ongoing basis within the following property categories:

- commercial office buildings;
- retail properties comprising of retail premises or small shopping centres;
- industrial properties comprising factories and warehouses; and
- residential properties comprising properties used for domestic purposes.

These properties will predominantly be located within a 100 kilometre radius of the Melbourne CBD, but may be located in other parts of Australia if appropriate and where there are Members willing to invest in those areas.

## Investment options

32. A Sub-scheme Property may be registered in one of the following ways:

- as a Direct Property Investment under which a single Owner, referred to in the PDS as a Sole Investor, is the sole participant in a Sub-scheme and has their name registered on the Certificate of Title of the Sub-scheme Property;
- as a Contributory Property Investment under which two or more Owners, referred to in the PDS as Contributory Investors, invest in a particular Sub-scheme and each have their names registered on the Certificate of Title of the Sub-scheme Property; or
- as a Nominee Property Investment under which ASL is registered on the Certificate of Title of the Sub-scheme Property in the capacity as bare Trustee for one or more Owners, referred to in the PDS as Nominee Investors, who can call on ASL to transfer the legal interest in the Sub-scheme Property to them by registering their name on the Certificate of Title of the Sub-scheme Property at any time.

33. Each Nominee Property Investment under the Fund will be a separate trust, the beneficiaries of which will be the Owner(s) that contributed their Membership Contribution into the relevant Sub-scheme.

34. Two or more Owners participating in a Sub-scheme as Contributory or Nominee Investors by separate Membership Contributions shall have distinct interests as tenants in common, such interest being in proportion to the Membership Contributions the respective Owner bears to the total of the funds invested in the Sub-scheme.

35. This Product Ruling only applies to Nominee Investors participating in a Nominee Property Investment. Any Sole or Contributory Investors are not covered by this Ruling and may apply for a private ruling regarding their participation in a Direct Property Investment and Contributory Property Investment respectively.

## Distributable Amounts

36. ASL will collect rental income from the Sub-scheme Properties on a monthly basis on behalf of the Owners and distribute that rental income, less any fees and expenses, to the Owners no later than the last day of the month following a Distribution Period. ASL will also collect the proceeds from the sale of a Sub-scheme Property on behalf of the Owners and, unless the Owners request that those capital proceeds be invested in another Sub-scheme, distribute them, less any fees and expenses, to the Owners within 60 days of the settlement of the sale. All distributions to Owners will be in proportion to their respective Membership Contributions.

**Maturity of and/or withdrawal from a Sub-scheme**

37. The Fund is for a term of 80 years and each Sub-scheme under the Fund will typically have a term of 5 to 7 years, maturing when the Sub-scheme Property is due to be sold under the terms of its PDC. At that time each Owner in the Sub-scheme may elect to:

- reinvest part or all of their Membership Interest in the Sub-scheme on further terms and conditions contained in a Rollover Notice if the Member wishes to continue to hold the Sub-scheme Property and, if required, other Owners are willing to invest in the Sub-scheme Property; or
- invest in another Sub-scheme on the terms and conditions applying to that Sub-scheme set out in its PDC; or
- withdraw their funds from the Fund.

38. ASL individually approves Sub-schemes for settlement or rollover for an extended holding period and sets the terms and conditions for any extension of a maturing Sub-scheme. Those terms and conditions are submitted to the Owners of that Sub-scheme to approve in a Rollover Notice or, where required due to the withdrawal of an existing Owner of that Sub-scheme, submitted to new Members in a PDC.

39. Withdrawals from the Fund may be made in any of the following circumstances:

- on the maturity of a Sub-scheme and the sale of the Sub-scheme Property;
- upon the provision of written notice by the Owner to ASL before the Sub-scheme is rolled over to withdraw the investment at the end of the first (or any subsequent) term of the Sub-scheme, and the acquisition of the withdrawing Owner's interest in the Sub-scheme by a Member or Members; or
- upon approval by ASL of a withdrawal request prior to the end of the first (or any subsequent) term of the Sub-scheme.

40. ASL is under no obligation to, and will not, process a withdrawal and release an Owner from a Sub-scheme during its term unless:

- the request is made as a consequence of unforeseen and exceptional circumstances or hardship being experienced by the withdrawing Owner;
- another Member is willing to take an assignment of the withdrawing Owner's Membership Interest; and
- the withdrawing Owner will pay the fees and expenses determined by ASL (including the Early Withdrawal Fee) to facilitate the premature redemption and substitution.

41. Where ASL accepts the request by a Member to withdraw from a particular Sub-scheme, the Owner must withdraw wholly, and not partly, from that Sub-scheme.

## **Fees**

42. In consideration of ASL properly performing its duties, ASL is entitled to the following fees out of the scheme:

- a Contribution Fee of up to 2.5% of each Membership Contribution, taken from the Membership Contribution;
- Acquisition and Due Diligence Fees (referred to as Acquisition Fees in the Constitution) of up to 2% of the value of the Sub-scheme Property, charged for all work undertaken upon the acquisition of a property, including identifying, negotiating, due diligence of and attending to the acquisition of the Sub-scheme Property at the settlement of the Sub-scheme Property acquisition, taken from the Membership Contribution;
- a Debt Arranging Fee, if applicable, of up to 0.55% of the amount initially drawn down, charged for the arrangement of a debt facility for the Owner, payable at the settlement of the Sub-scheme Property acquisition from the debt drawn down;
- Management Fees of 0.95% of the gross value of the Assets of the Sub-scheme for the management of an Owner's investment, payable by the Owner monthly in arrears over the term of the Sub-scheme from the rental income received from the Sub-scheme and then, if necessary, out of the capital proceeds received from the Sub-scheme;
- any Managing Agent's Fees payable by the Owner to cover the costs incurred by ASL arising from the appointment of a managing agent to manage the Sub-scheme Property on ASL's behalf;
- any Project Management Fees set out in the PDC, charged for any project works (eg. building repairs or refurbishment) that are managed by ASL, payable by the Owner when required;
- a Performance Fee payable by the Owner if and when the Sub-scheme outperforms an acceptable property industry benchmark set out in the PDC;
- a Disposal Fee (referred to as a Sale Fee in the Constitution) of 2% of the sale price of the Sub-scheme Property, charged to cover the usual costs incurred when selling assets, such as agents and legal fees incurred by ASL, payable by the Owner on the settlement of the sale of the Sub-scheme Property from the proceeds of that sale; and

- an Early Withdrawal Fee of up to 3% of the amount withdrawn, charged to cover a portion of the future Management Fees that would otherwise be payable to ASL, as well as ASL's costs of processing an early withdrawal, finding an appropriate Member to invest in the Sub-scheme, obtaining a valuation report etc., payable by the Owner at the time of their early withdrawal from a Sub-scheme from the withdrawal proceeds.

### **Finance**

43. An Owner may fund their Membership Interest in a Sub-scheme from their own financial resources, via a borrowing from an independent lender external to the Fund and/or, to some extent, via a borrowing from ASL under the Finance Facility Agreement. Only the finance arrangement set out below is covered by this Product Ruling. A Nominee Investor who enters into a finance arrangement with an independent lender external to the Fund may request a private ruling on the deductibility of interest and other borrowing costs incurred under a finance arrangement that is not covered by this Product Ruling.

44. Subject to ASL accepting an Owner's application for finance, the Owner will be bound by the terms and conditions of the Finance Facility Agreement. The key features of the Finance Facility Agreement and the finance arrangement that may be entered into with ASL generally include:

- where there is more than one Owner in a Sub-scheme, all Owners of that Sub-scheme borrow in the same proportion to their respective Membership Interest and are a party to the same Finance Facility Agreement;
- the loan funds can be used to assist in acquiring a Membership Interest in a Sub-scheme, and/or to fund repairs/renovations to the Sub-scheme Property at the time of acquisition, and/or to fund repairs and maintenance of the Sub-scheme Property during the term of the Sub-scheme;
- the maximum amount of the loan will be determined by the Owner(s) but will be within a total gearing ratio not exceeding 60% of the total value of the Sub-scheme Property at the time the loan is advanced, up to 50% of which may be used to purchase their Membership Interest and up to 10% of which may be used for the purpose of repairs and maintenance of the Sub-scheme Property;
- monthly principal and interest instalments on day 15 of each month during the term of the loan are payable. The interest portion of these instalments will generally be met from the gross rental income of the relevant Sub-scheme and the balance of these instalments will be paid by direct debit (or by other means as agreed to by ASL);

- interest is charged at either a fixed rate, variable rate, or both;
- an additional rate of interest applying to payments in arrears; and
- the loan will be provided on a non-recourse basis, whereby it is secured over the Sub-scheme Property and ASL has no other recourse to the Assets of the Sub-scheme or its Owner(s) in an event of default to recover repayment of the loan.

## Assumptions

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

- (a) the Nominee Investor is an Australian resident for taxation purposes;
- (b) the Nominee Investor is not a trader in investments and is not treated for taxation purposes as trading in Membership Interests in a Sub-scheme, carrying on a business of investing in a Sub-scheme, or holding their Membership Interests in a Sub-scheme as trading stock or on revenue account;
- (c) the Nominee Investor is not under a legal disability for the purposes of Division 6 of Part III of the ITAA 1936;
- (d) the dominant purpose of the Nominee Investor in entering the scheme is to derive an amount of assessable income from the investment that exceeds the deductible expenses incurred;
- (e) the scheme will be executed in the manner described in this Ruling and in accordance with the scheme documentation mentioned in paragraph 18 of this Ruling; and
- (f) all dealings by and between the Nominee Investor and ASL under the scheme will be at arm's length.

## 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.*

### **Assessability of amounts received by Nominee Investors**

#### ***Interest income***

46. Interest paid to the Nominee Investor on Application Money deposited into the Member Account opened and maintained by ASL in the name of the Nominee Investor is ordinary income and will be assessable income of the Nominee Investor under section 6-5.

#### ***Trust income***

47. To the extent that the net income of a trust created under a Nominee Property Investment constitutes net income other than capital gains (that is, rental income), the Nominee Investor shall be assessable under section 97 of the ITAA 1936 on so much of the share of that net income of the trust as reflects the proportion of income of the trust estate to which the Nominee Investor is presently entitled, as adjusted by Division 6E of the ITAA 1936.

48. Where the net income of a trust created under a Nominee Property Investment includes a net capital gain from the sale of a Sub-scheme Property, the Nominee Investor is assessable under Division 102 on so much of the share of the net capital gain of the trust estate as determined and adjusted by Subdivision 115-C. Subsection 115-215(3) may deem the Nominee Investor to have made a capital gain referable to their attributable gain as calculated under section 115-225. This deemed amount may then be used to determine the assessable capital gain of the Nominee Investor in order to take into account certain capital gains tax concessions claimed by ASL as the Trustee. The capital gains of the Nominee Investor may be further adjusted by subsection 115-215(4), if applicable, to ensure they are taxed on the gain as if they had made the gain and not the Trustee.

### **Section 104-70 – CGT event E4**

49. A payment by ASL as Trustee of a trust created under a Nominee Property Investment to a Nominee Investor in respect of their Membership Interest in a Sub-scheme (except for CGT event A1, C2, E1, E2, E6 or E7 happening in relation to it), will give rise to a CGT event E4 under section 104-70 where some or all of the payment (the non-assessable part) is not included in the Nominee Investor's assessable income as per paragraphs 17(b) and (c) of this Product Ruling.



50. Where the sum of the non-assessable parts of payments made by ASL in the income year in respect of the Nominee Investor's Membership Interest is not more than the cost base of the Nominee Investor's Membership Interest, the cost base and reduced cost base of their Membership Interest will be reduced by that amount (subsection 104-70(6)).

## **Deductibility of amounts incurred by Nominee Investors**

### ***Fees***

51. A loss or outgoing is deductible under section 8-1 if its essential character is that of expenditure that has a sufficient connection with the operations or activities which more directly gain or produce a taxpayer's assessable income, provided that the expenditure is not of a capital, private or domestic nature.

52. The Management Fees, Managing Agent's Fees, Project Management Fees and Performance Fees incurred by a Nominee Investor in respect of their Membership Interest in a Sub-scheme, from which they are expected to derive assessable income, are deductible under section 8-1 in the year in which they are incurred (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7). The tests of deductibility under the first limb of section 8-1 are met, the exclusions do not apply and the amount of assessable income from the Nominee Investor's investment is expected to be in excess of the deductible expenditure they incur.

### ***Interest expenses***

53. For the purposes of section 8-1, the essential character of an interest expense is derived from the purpose of the borrowing and the application or the use of the borrowed funds. The laying out of the borrowed money for the purpose of gaining assessable income furnishes the required connection between the interest paid upon it by the taxpayer and the income derived by that taxpayer from its use (*Ure v. Federal Commissioner of Taxation* (1981) 50 FLR 219; 81 ATC 4100 at 4104; (1981) 11 ATR 484 at 488).

54. Applying the same principles as that used for the Management Fees, Managing Agent's Fees, Project Management Fees and Performance Fees, interest incurred by the Nominee Investor under the Finance Facility Agreement with ASL to finance the acquisition of the Nominee Investor's Membership Interest in a Sub-scheme and any repairs, renovations and/or maintenance of a Sub-scheme Property, insofar that they are not an improvement (capital works or structural improvements), has sufficient connection with the gaining of assessable income to be deductible under section 8-1 in the year in which it is incurred.

55. This Ruling does not apply to Nominee Investors who choose, or who are required to prepay any fees or interest. Subject to certain exclusions, amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in Subdivision H of Division 3 of Part III of the ITAA 1936. Any Nominee Investor who prepays such amounts may request a private ruling on the tax consequences of their participation in a Sub-scheme.

### ***Borrowing expenses***

56. The Debt Arranging Fee payable to ASL is a borrowing expense, incurred for borrowing money that is used or is to be used during that income year solely for income producing purposes, and therefore deductible under section 25-25. Where the borrowing expenses are \$100 or less, they are deductible in the income year incurred. Where the borrowing expenses exceed \$100, the deduction is spread on a straight line basis over the period of the shorter of the term of the borrowing, or five years.

### ***Section 51AAA***

57. Under the scheme, it is contemplated that the Nominee Investor will derive assessable income other than by way of capital gains from their Membership Interest in a Sub-scheme (i.e. by way of their present entitlement to a share of the net income of the trust estate created under their Nominee Property Investment). As the Management Fees, Managing Agent's Fees, Project Management Fees, Performance Fees and interest will be deductible under section 8-1 of the ITAA 1997 and the Debt Arranging Fee will be deductible under section 25-25 of the ITAA 1997, notwithstanding the potential inclusion of a net capital gain in their assessable income, section 51AAA of the ITAA 1936 has no application to the Nominee Investor.

### **Application of the CGT provisions on assignment of a Membership Interest**

#### ***CGT asset***

58. Under subsection 108-5(1) a CGT asset is any kind of property or a legal or equitable right that is not property. The Membership Interest of a Nominee Investor in a Sub-scheme is property and therefore a CGT asset according to the definition in subsection 108-5(1).

## ***CGT event A1***

59. An assignment by the Nominee Investor of their Membership Interest in a Sub-scheme to another Member or Members gives rise to a CGT event A1 (section 104-10).

60. The Nominee Investor will make a capital gain from this CGT event if the capital proceeds from the disposal of the Nominee Investor's asset are more than the asset's cost base or, alternatively, a capital loss from this CGT event if those capital proceeds are less than the asset's reduced cost base (subsection 104-10(4)).

61. The Nominee Investor's capital proceeds will be the amount they receive, or are entitled to receive, from the disposal (section 116-20).

62. At the time of acquiring the Membership Interest the Nominee Investor acquires a CGT asset with a cost base or reduced cost base that includes, as its first element, their Membership Contribution and the Contribution Fee (subsections 110-25(2) and 110-55(2)). The cost base or reduced cost base of the Nominee Investor's Membership Interest also includes, as its second element, all Acquisition and Due Diligence Fees incurred by the Nominee Investor (subsections 110-25(3) and 110-55(2)).

## ***Discount capital gains***

63. Division 115 allows a taxpayer a discount on capital gains in certain circumstances. In accordance with section 115-5, any capital gain realised by a Nominee Investor as a result of the assignment of their Membership Interest will be treated as a discount capital gain where the Nominee Investor is an individual, a complying superannuation entity, or a trust and has held that Membership Interest for at least 12 months (excluding the days of acquisition and disposal).

## **Part IVA – anti-avoidance**

64. Provided that the scheme ruled on is entered into and carried out in the manner described in the scheme documentation and in the Scheme section of this Ruling including the Assumptions (see paragraphs 18 to 45 of this Ruling), it is accepted that the scheme is an ordinary commercial transaction and that Part IVA of the ITAA 1936 will not apply.

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

65. 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

*Related Rulings/Determinations:*  
TR 97/7

*Subject references:*

- Capital Gains Tax
- fee expenses
- income tax
- interest expenses
- interest income
- management fees
- producing assessable income
- product rulings
- public rulings
- taxation administration
- trust income

*Legislative references:*

- ITAA 1936 51AAA
- ITAA 1936 Pt III Div 3 Subdiv H
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*Case references:*

- Ure v. Federal Commissioner of Taxation (1981) 50 FLR 219; 81 ATC 4100; (1981) 11 ATR 484

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