Australian Government
Australian Taxation Office

PAUL MITCHELL
AFFORDABLE HOUSING CONSULTING PTY. LTD.
C/- MURRAY SHUME
COOPER GRACE WARD
GPO BOX 834
BRISBANE
QLD 4001

Reply to: PO Box 3000
PENRITH NSW 2740
Our reference: 1012948554241
Contact officer: John Churchill
Phone: 13 28 69
Fax: 02 6225 0906

TFN: 893 532 348

29 January 2016

We are notifying you of your private ruling

Authorisation number: 1012948554241
Authorising officer: Charles Court

Dear Mr Mitchell

On 11 January 2016, you applied for a private ruling relating to the treatment of payments received from State Government under the National Rental Affordability Scheme.

Please find:
- below your private ruling and the reasons for our decision
- attached a fact sheet giving information about private rulings including how to have the decision reviewed by objecting, and
- attached an edited version of your ruling that we will publish on our website.

You have:
- 60 days (longer in some cases) to object to the private ruling if you disagree with it and have not had an assessment for the relevant period, and
- 28 days to comment on the edited version.

More information is included in the *Private rulings* fact sheet.

Notice of private ruling

This ruling applies to:

Client name

AFFORDABLE HOUSING CONSULTING PTY. LTD.	TFN	893 532 348
PAUL MITCHELL	TFN	[redacted]

Question 1

Will the proposed arrangement between Affordable Housing Consulting Pty Ltd (AHC) and Paul Mitchell (the Investor) constitute a partnership as defined in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997)?

Answer

No

Question 2

Will payments received by AHC from state government in relation to their participation in the National Rental Affordability Scheme (NRAS) be non-assessable non-exempt income under section 380-35 of the ITAA 1997?

Answer

Yes

Question 3

Will payments received by the Investor from AHC in relation to the Investors participation in the National Rental Affordability Scheme (NRAS) be non-assessable non-exempt income (NANE) under section 380-35 of the ITAA 1997?

Answer

Yes

This ruling applies for the following periods:

1 July 2015 to 30 June 2016
1 July 2016 to 30 June 2017
1 July 2017 to 30 June 2018
1 July 2018 to 30 June 2019
1 July 2019 to 30 June 2020
1 July 2020 to 30 June 2021
1 July 2021 to 30 June 2022
1 July 2022 to 30 June 2023
1 July 2023 to 30 June 2024
1 July 2024 to 30 June 2025

The scheme commences on:

1 July 2015

Relevant facts and circumstances

This ruling is based on the facts stated in the description of the scheme that is set out below. If your circumstances are materially different from these facts, this ruling has no effect and you cannot rely on it. The fact sheet has more information about relying on your private ruling.

1. The NRAS is a Commonwealth Government scheme designed to encourage large-scale investment in affordable housing by offering tax and cash incentives to providers of new rental dwellings.
2. Under the NRAS:
   - Rental properties (Eligible Properties) are made available to low or moderate income households (Eligible Tenants) at 20% below the market rental rate.
   - A person or entity (Approved Participant) is granted allocations (Allocations) to provide Eligible Properties to Eligible Tenants.
   - Approved Participants are responsible for the management of and compliance with NRAS conditions relating to their Allocations.
   - Provided the Approved Participant can provide Eligible Properties that satisfy the conditions of the NRAS they will receive:
     - NRAS refundable tax offsets (Tax Offsets) from the Commonwealth Government, and
     - cash payments from the relevant State Government (State Government Payments).

- Approved Participants may enter into arrangements with other parties (Property Owners) who wish to make their properties available to Eligible Tenants without the Property Owner becoming an Approved Participant.
- Approved Participants may pass on the economic benefit of Tax Offsets or State Government Payments to Property Owners.

3. AHC is an Approved Participant and the Investor is not an Approved Participant.
4. The Investor is considering entering into a contractual arrangement (Proposed Agreement) with AHC to make rental property (Rental Property) owned by the Investor available to Eligible Tenants under the NRAS.
5. A draft template of the Proposed Agreement has been provided by AHC and the Investor as part of their ruling request.
6. Under the terms of the draft template of the Proposed Agreement, the Investor would:
   - agree to include their Rental Property, as set out in the schedule to the Proposed Agreement, in the NRAS scheme operated by AHC, and agree to the conditions imposed by the agreement (clause 1.3)
   - pay an establishment fee of $2,200 to AHC (clause 6.1)
   - receive the Tax Offsets that relate to his Rental Property (clause 2.8)
   - have the right to receive 50% of any State Government Payments that relate to his Rental Property (clause 5.19)
   - agree to only lease his Rental Property to Eligible Tenants (clause 4.9)
   - agree to enter into a property tenancy management agreement with an approved tenancy manager (clause 2.9), and
   - agree to the rights and responsibilities contained in clause 4.
7. Under the terms of the draft template of the Proposed Agreement, AHC:
   - would have the right to retain 50% of the State Government Payments that relate to the Investors Rental Property (clause 5.20),
   - have obligations with respect to NRAS compliance and reporting (clause 2.8), and
   - would agree to the rights and responsibilities contained in clause 5.
8. Other relevant clauses contained in the draft template of the Proposed Agreement:

   .....

   1.5 The relationship between you [the Investor] and us [AHC] is enshrined solely in this agreement and is limited to carrying out the activities in this agreement.

   1.6 Nothing contained in this Agreement constitutes us being your partner, or you being our partner nor does it create any partnership for any purpose.

   1.7 No action taken by us in satisfying our obligations under this agreement should be taken to mean that we have received a share of the income in relation to the ownership of your property or are in receipt of any income jointly with you.

   ....

9. Rental income (Rental Income) will be derived by the Investor from Eligible Tenants on his Rental Property, representing 80% of the market rental rate of the Rental Property. The investor will not be sharing any of this Rental Income with AHC and there will be no obligation or agreement for the Investor to do so.

Relevant legislative provisions

Income Tax Assessment Act 1997, section 380-35
Income Tax Assessment Act 1997, section 995-1
Tax Laws Amendment (2001 Measures No.5) Act 2011

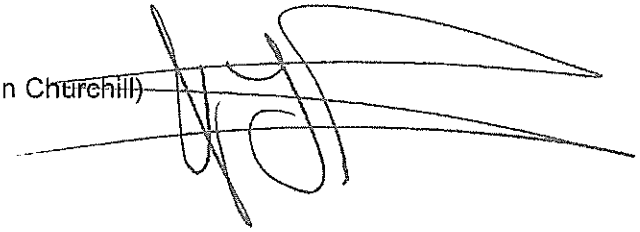
For more information
If you have any questions, please phone **13 28 69** between 8.00am and 5.00pm, Monday to Friday, and ask for John Churchill on extension **10258**.

What you need when you phone us
We need to know we're talking to the right person before we can discuss your tax affairs. We'll ask for details only you or someone you've authorised would know. An authorised person is someone who you've previously told us can act on your behalf. It will help if you quote 'Our reference', which you will find at the top of this letter and have your tax file number or Australian business number handy.

Yours sincerely

Michael Cranston
Deputy Commissioner of Taxation

Per
(John Churchill)



Reasons for decision

These reasons for decision accompany the *Notice of private ruling* for AFFORDABLE HOUSING CONSULTING PTY. LTD.

While these reasons are not part of the private ruling, we provide them to help you to understand how we reached our decision.

Issue 1

Question 1

Summary

To be a partnership for taxation purposes AHC and the Investor (the Parties to the Proposed Agreement) would need to be carrying on a business in partnership or in receipt of income jointly. Analysis of the terms of the Proposed Agreement between the Parties demonstrates that neither of these conditions would be met, consequently the relationship contained in the Proposed Agreement would not amount to a partnership for taxation purposes.

Detailed reasoning

Partnership is defined in section 995-1 of the ITAA 1997 to mean:

(a) an association of persons (other than a company or a limited partnership) carrying on business as partners or in receipt of ordinary income or statutory income jointly; or

(b) a limited partnership.

Carrying on business as partners

Taxation Ruling TR 94/8 *Income tax: whether business is carried on in partnership (including 'husband and wife' partnerships)* provides guidance in determining whether persons are carrying on business as partners for income tax purposes, paragraph 3 states:

> There are no statutory rules in the income tax law for deciding whether persons are carrying on business as partners. The question of whether a partnership exists is one of fact. The existence of a partnership is evidenced by the actual conduct of the parties towards one another and towards third parties during the course of carrying on business.

Paragraph 4 of TR 94/8 goes on to list the relevant factors in deciding if persons are carrying on business as partners:

Intention

- the mutual assent and intention of the parties

Conduct

(a) joint ownership of business assets

(b) registration of business name

(c) joint business account and the power to operate it

(d) extent to which parties are involved in the conduct of the business

(e) extent of capital contributions

(f) entitlement to a share of net profits

(g) business records

(h) trading in joint names and recognition of the partnership.

Paragraph 5 of TR 94/8 goes on to qualify that:

> The weight to be given to these factors varies with the individual circumstances. The above list of factors is not exhaustive and no single factor is decisive, although the entitlement of a share of net profits is essential.

Under the terms of the Proposed Agreement between the Parties:

- Clause 1.5 expressly states that the relationship between the Parties is enshrined solely in the agreement.
- Clause 1.6 expressly states that it is the intention of the Parties that they will not be partners for any purpose.
- There is no requirement for any joint ownership of any business assets, rather under the terms of the Proposed Agreement the only substantial business asset, the Rental Property, is owned solely by the Investor.
- There is no requirement for the registration of a business name.
- There is no requirement for a joint business account.
- While there are rights and responsibilities relating to the Investor in clause 4 and rights and responsibilities relating to AHC in clause 5, these rights and responsibilities do not amount to conducting a joint business.
- There is no requirement for any joint capital contributions.
- There is no entitlement to any share of net profits.
- There is nothing requiring the maintenance of joint business records.
- There is nothing to indicate that the Parties will be trading in joint names.

Thus, consideration of the factors contained in TR 94/8 leads to the conclusion that if executed as drafted the Parties to the Proposed Agreement would not be carrying on a business as partners.

Joint receipt of ordinary income or statutory income

Taxation Ruling TR 93/32 *Income tax: rental property – division of net income or loss between co-owners* explains the basis upon which the net income or the loss from a co-owned rental property should be divided between its owners. Paragraph 3 of TR 93/32 explains that:

> Co-ownership of rental property is a partnership for income tax purposes but is not a partnership at general law unless the ownership amounts to the carrying on of a business.

Paragraph 6 of TR 93/32 goes on to say that:

> .... the income/loss from the rental property must be shared according to the legal interest of the owners except in those very limited circumstances where there is sufficient evidence to establish that the equitable interest is different from the legal title.

Thus, the principles outlined in TR 93/32 establish that under the extended income tax definition of partnership, it is sufficient for persons in joint receipt of income as a result of their ownership of joint property to be in partnership for income tax purposes.

Under the terms of the Proposed Agreement there is no jointly owned property from which the Parties to the agreement will receive joint income. The Investor will be the sole owner of their Rental Property which they will rent out to Eligible Tenants receiving all the rental income from that property. The amounts received by AHC under the Proposed Agreement (the establishment fee and 50% of the cash State Government Payments) reflect their role as an Approved Participant facilitating access by the Investor to NRAS incentives as a result of the provision affordable housing.

Because under the terms of the Proposed Agreement there is no receipt of joint income as a result joint ownership of property there will be no partnership under the extended taxation definition.

Limited Partnership

Limited partnership is defined in section 995-1 of the ITAA 1997 which requires:

- an association of persons (other than a company) carrying on business as partners or in receipt of ordinary income or statutory income jointly, where the liability of at least one of those persons is limited, or
- an association of persons with, a separate legal personality, formed for the sole purpose of becoming a venture capital limited partnership, an early stage venture capital limited

partnership, an Australian venture capital fund of funds or a venture capital management partnership.

In this situation the Proposed Agreement would not be a limited partnership because there is no association of persons:

- carrying on a business as partners or the receipt of joint income, or
- with a separate legal personality formed for any of the above purposes.

Conclusion partnership

The execution of the Proposed Agreement will not result in the Parties constituting a partnership for taxation purposes because under the terms of the Proposed Agreement:

- the Parties will not be carrying on a business as partners,
- the Parties will not be in receipt of joint income, and
- the proposed relationship of the Parties will not constitute a limited partnership.

Question 2

Summary

Because AHC is an Approved Participant in the NRAS, payments from a relevant state or territory department to them in relation to their participation in the NRAS will be non-assessable non-exempt income under section 380-35 of the ITAA 1997.

Detailed reasoning

Payments made by a Department of a State or Territory in relation to your participation in the NRAS are made non-assessable non-exempt income by virtue of section 380-35 of the ITAA 1997, which states:

> A payment made to you, or a non-cash benefit provided to you, (whether directly or indirectly, such as through an NRAS consortium of which you are a member) by:
>
> (a) a Department of a State or Territory; or
>
> (b) a body (whether incorporated or not) established for a public purpose by or under a law of a State or Territory;
>
> in relation to your participation in the National Rental Affordability Scheme is not assessable income and is not exempt income.

In this instance AHC is an Approved Participant in the NRAS with Allocations to provide Eligible Properties to Eligible Tenants. It is accepted that any payments from a relevant Department of a State or Territory to AHC in relation to their participation in the NRAS will be non-assessable non-exempt income under section 380-35 of the ITAA 1997.

Question 3

Summary

Once the Proposed Agreement is executed the Investor will be a member of a NRAS consortium with AHC as the Approved Participant. As such if AHC passes on the economic benefit of NRAS related cash payments from a State Government or Territory Department to the Investor those payments will be non-assessable non-exempt income by virtue of section 380-35 of the ITAA 1997.

Detailed reasoning

Amendments were made by the *Tax Laws Amendment (2001 Measures No.5) Act 2011* which expands the operation of section 380-35 of the ITAA 1997 to ensure indirect payments made by a Department of a State or Territory to a member of an NRAS consortium indirectly (via an approved participant) in relation to their participation in the NRAS are non-assessable non-exempt income.

The Explanatory Memorandum to the Tax Laws Amendment (2001 Measures No.5) Bill 2011 provides the following example (example 3.45 in paragraph 3.78) of the intended operation of

section 380-35 of the ITAA 1997 to indirect NRAS payments received by NRAS Consortium members relating to state government payments:

> **Example 3.45: Treatment of a state government NRAS-related payment received indirectly by the taxpayer**
>
> Mr Smith is part of the XYZ Housing Group, an NRAS consortium providing 400 rental dwellings under the NRAS across South Australia. Mr Smith owns one of these dwellings.
>
> The South Australian Government elects to make its contribution to the NRAS incentive through a cash payment. In the case of NRAS consortiums, the South Australian Government makes a single cash payment to the approved participant of the consortium, in respect of all of the dwellings operated by the consortium which are eligible for an NRAS incentive.
>
> In 2010-11, all of XYZ Housing Group's dwellings are eligible for the full NRAS incentive. Accordingly, the South Australian Government makes a payment in May 2011 to the approved participant of XYZ Housing Group of $914,000 (that is, $2,285 * 400).
>
> This amount is non-assessable non-exempt income in the hands of the approved participant of XYZ Housing Group.
>
> The practice of XYZ Housing Group is to have the economic benefit of the NRAS incentive flow to the individual dwelling owners. Accordingly, in May 2011 the manager makes a payment of $2,285 to Mr Smith.
>
> This amount is an NRAS-related payment made by a state government which is received indirectly by Mr Smith. Therefore, it is non-assessable, non-exempt income.

Thus if the approved participant of an NRAS consortium chooses to pass on a state government payment, relating to participation in the NRAS, to an NRAS consortium member who owns an NRAS dwelling, section 380-35 of the ITAA 1997 will operate to make that payment non-assessable non-exempt income in the hands of the property owner.

NRAS consortium is defined in section 995-1 of the ITAA 1997 to mean:

> .... a consortium, joint venture or non-equity joint venture:
>
> (a) established by one or more contractual arrangements, the purpose of which are to facilitate the leasing of NRAS dwellings; and
>
> (b) that is not a corporate tax entity, a superannuation fund, a trust or a partnership.

In the event that the Proposed Agreement is executed, it is accepted that the Investor will be a member of an NRAS consortium with AHC as the Approved Participant. It is accepted that any cash payment made by a State Government or Territory Department, under the NRAS to AHC, which is passed on to the Investor under the terms of the Proposed Agreement will be non-assessable non-exempt income of the Investor under section 380-35 of the ITAA 1997.

Fact sheet

Private rulings

Income tax, Medicare levy and franking tax

HOW DOES YOUR PRIVATE RULING PROTECT YOU?

Your ruling only applies in the circumstances set out in the 'Relevant facts and circumstances' section of the ruling.

If you 'rely' on your ruling, that is, conduct your tax affairs in a way that is consistent with your ruling, we must apply the law to you in the way set out in the ruling.

If we find out later that your ruling is incorrect – for example, it does not correctly set out how the law applies, and you would have to pay more tax under the correct interpretation – you can rely on the ruling and will not have to pay any more tax. The ruling also protects you from penalties and from paying any interest. This protection applies to the period specified in the notice.

However, if the correct interpretation of the law is to your advantage, we will apply the law to give you the advantage (unless a time limit prevents us from doing so).

You will not have this protection if:

- you already have a ruling on the same matter and for the same period, and you have not told us about it (then the later ruling is taken not to have been made), or
- another ruling revises or changes this ruling before you begin the arrangement described in the ruling, and before any income year or other period stated in the ruling starts (then this ruling does not apply).

DO YOU HAVE TO FOLLOW THE RULING?

If you disagree with this ruling, you can choose not to follow it. You can change your mind at any time (subject to time limits imposed by the law).

If you choose not to follow your ruling and your tax position is later found to be incorrect, you will owe any tax shortfall, plus interest. That is, if you have not followed it, merely having a ruling does not protect you from having to pay more tax.

You may also have to pay penalties unless you can show that you have exercised reasonable care in deciding to adopt your tax position or have adopted a 'reasonably arguable' tax position.

DOES THE RULING AFFECT A TAX ASSESSMENT?

If your ruling affects a tax assessment you have already received, you may need to ask us for an amendment. We do not amend your assessments automatically because you may choose not to follow the ruling.

If you choose to rely on your private ruling, and think you may need an amendment, advise your contact officer.

DO YOU DISAGREE WITH THE RULING?

If you are not satisfied with this ruling you can ask us to review it. There are two ways of doing this, depending on whether or not you have a tax assessment for the matter (or period) that your ruling covers. If you:

- don't have an assessment, you may object to the ruling itself within
  - 60 days of the date of the ruling, or
  - two years after the last day for lodging the relevant return (four years in some circumstances), if that is later.
- have an assessment, you object to the assessment rather than the ruling. You have at least two years after the date of the assessment to object to it, and up to four years in some circumstances.

Australian Government
Australian Taxation Office

How to object to a ruling

You must make your objection in writing and it must:

- be signed and dated
- state fully and in detail the grounds you are relying on.

You can submit your objection:

- via the tax agent or business portals
- by fax to , or
- by mail to:

Please quote the authorisation number of the ruling in your objection. This is located towards the top right hand corner of the first page of the ruling.

Our website has more information on how to lodge an objection. Go to **www.ato.gov.au** and type 'objection' in the search box.

Alternatively, phone **13 28 69** between 8.00am and 5.00pm, Monday to Friday, and ask to speak to the contact officer named in your *Notice of private ruling*.

If you are not satisfied with our decision on your objection you may be able to:

- have it reviewed by the Administrative Appeals Tribunal, or
- appeal to the Federal Court.

We will include more information about these processes when we give you our decision.

PUBLISHING YOUR RULING ON OUR WEBSITE

To ensure the integrity of our advice, we publish a version of every private ruling on our website **www.ato.gov.au** in the *Register of private binding rulings*.

Before we publish, we edit each ruling to remove all identifying details. This ensures that your privacy is protected. A copy of this edited version is included with your ruling.

Do you want to change the edited version?

If you are concerned that the edited version may still allow you to be identified, contact us within **28 days** of the date of your ruling at:

TCN Practice Management
Australian Taxation Office
PO Box 9977
NEWCASTLE NSW 2300

If you do not contact us within 28 days, we will publish the edited version in the *Register of private binding rulings*.

This publication was current at **July 2009**

Edited version of your private ruling

Authorisation Number: 1012948554241

This edited version of your ruling will be published in the public register of private binding rulings after 28 days from the issue date of the ruling. The attached private rulings fact sheet has more information.

Please check this edited version to be sure that there are no details remaining that you think may allow you to be identified. If you have any concerns about this ruling you wish to discuss, you will find our contact details in the fact sheet.

Ruling

Subject: Income tax: National Rental Affordability Scheme

Question 1

Will the proposed arrangement between the Approved Participant and the Investor constitute a partnership as defined in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997)?

Answer

No

Question 2

Will payments received by the Approved Participant from state government in relation to their participation in the National Rental Affordability Scheme (NRAS) be non-assessable non-exempt income under section 380-35 of the ITAA 1997?

Answer

Yes

Question 3

Will payments received by the Investor from the Approved Participant in relation to the Investors participation in the National Rental Affordability Scheme (NRAS) be non-assessable non-exempt income (NANE) under section 380-35 of the ITAA 1997?

Answer

Yes

This ruling applies for the following periods:

1 July 2015 to 30 June 2016
1 July 2016 to 30 June 2017
1 July 2017 to 30 June 2018
1 July 2018 to 30 June 2019
1 July 2019 to 30 June 2020
1 July 2020 to 30 June 2021
1 July 2021 to 30 June 2022
1 July 2022 to 30 June 2023
1 July 2023 to 30 June 2024
1 July 2024 to 30 June 2025

The scheme commences on:

1 July 2015

Relevant facts and circumstances

10. The NRAS is a Commonwealth Government scheme designed to encourage large-scale investment in affordable housing by offering tax and cash incentives to providers of new rental dwellings.

11. Under the NRAS:
    - Rental properties (Eligible Properties) are made available to low or moderate income households (Eligible Tenants) at 20% below the market rental rate.
    - A person or entity (Approved Participant) is granted allocations (Allocations) to provide Eligible Properties to Eligible Tenants.
    - Approved Participants are responsible for the management of and compliance with NRAS conditions relating to their Allocations.
    - Provided the Approved Participant can provide Eligible Properties that satisfy the conditions of the NRAS they will receive:
      - NRAS refundable tax offsets (Tax Offsets) from the Commonwealth Government, and
      - cash payments from the relevant State Government (State Government Payments).
    - Approved Participants may enter into arrangements with other parties (Property Owners) who wish to make their properties available to Eligible Tenants without the Property Owner becoming an Approved Participant.
    - Approved Participants may pass on the economic benefit of Tax Offsets or State Government Payments to Property Owners.

12. X is an Approved Participant and the Investor is not an Approved Participant.

13. The Investor is considering entering into a contractual arrangement (Proposed Agreement) with X to make rental property (Rental Property) owned by the Investor available to Eligible Tenants under the NRAS.

14. A draft template of the Proposed Agreement has been provided by the Approved Participant and the Investor as part of their ruling request.

15. Under the terms of the draft template of the Proposed Agreement, the Investor would:
    - agree to include their Rental Property, as set out in the schedule to the Proposed Agreement, in the NRAS scheme operated by the Approved Participant, and agree to the conditions imposed by the agreement,
    - pay an establishment fee to the Approved Participant,
    - receive the Tax Offsets that relate to the Rental Property,
    - have the right to receive 50% of any State Government Payments that relate to the Rental Property,
    - agree to only lease the Rental Property to Eligible Tenants,
    - agree to enter into a property tenancy management agreement with an approved tenancy manager, and
    - agree to other rights and responsibilities.

16. Under the terms of the draft template of the Proposed Agreement, the Approved Participant:
    - would have the right to retain 50% of the State Government Payments that relate to the Investors Rental Property,
    - have obligations with respect to NRAS compliance and reporting, and
    - would agree to other rights and responsibilities.

17. Other relevant clauses contained in the draft template of the Proposed Agreement:

    .....

    > The relationship between you and us is enshrined solely in this agreement and is limited to carrying out the activities in this agreement.

1.6 Nothing contained in this Agreement constitutes us being your partner, or you being our partner nor does it create any partnership for any purpose.

1.7 No action taken by us in satisfying our obligations under this agreement should be taken to mean that we have received a share of the income in relation to the ownership of your property or are in receipt of any income jointly with you.

....

18. Rental income (Rental Income) will be derived by the Investor from Eligible Tenants on the Rental Property, representing 80% of the market rental rate of the Rental Property. The investor will not be sharing any of this Rental Income with the Approved Participant and there will be no obligation or agreement for the Investor to do so.

Relevant legislative provisions

Income Tax Assessment Act 1997, section 380-35
Income Tax Assessment Act 1997, section 995-1
Tax Laws Amendment (2001 Measures No.5) Act 2011

Reasons for decision

Issue 1

Question 1

Summary

To be a partnership for taxation purposes the Approved Participant and the Investor (the Parties to the Proposed Agreement) would need to be carrying on a business in partnership or in receipt of income jointly. Analysis of the terms of the Proposed Agreement between the Parties demonstrates that neither of these conditions would be met, consequently the relationship contained in the Proposed Agreement would not amount to a partnership for taxation purposes.

Detailed reasoning

Partnership is defined in section 995-1 of the ITAA 1997 to mean:

(a) an association of persons (other than a company or a limited partnership) carrying on business as partners or in receipt of ordinary income or statutory income jointly; or

(b) a limited partnership.

Carrying on business as partners

Taxation Ruling TR 94/8 *Income tax: whether business is carried on in partnership (including 'husband and wife' partnerships)* provides guidance in determining whether persons are carrying on business as partners for income tax purposes, paragraph 3 states:

> There are no statutory rules in the income tax law for deciding whether persons are carrying on business as partners. The question of whether a partnership exists is one of fact. The existence of a partnership is evidenced by the actual conduct of the parties towards one another and towards third parties during the course of carrying on business.

Paragraph 4 of TR 94/8 goes on to list the relevant factors in deciding if persons are carrying on business as partners:

Intention

- the mutual assent and intention of the parties

Conduct

(a) joint ownership of business assets

(b) registration of business name

(c) joint business account and the power to operate it

(d) extent to which parties are involved in the conduct of the business

(e) extent of capital contributions

(f) entitlement to a share of net profits

(g) business records

(h) trading in joint names and recognition of the partnership.

Paragraph 5 of TR 94/8 goes on to qualify that:

> The weight to be given to these factors varies with the individual circumstances. The above list of factors is not exhaustive and no single factor is decisive, although the entitlement of a share of net profits is essential.

Under the terms of the Proposed Agreement between the Parties:

- It is expressly stated that the relationship between the Parties is enshrined solely in the agreement.
- It is expressly stated that it is the intention of the Parties that they will not be partners for any purpose.
- There is no requirement for any joint ownership of any business assets, rather under the terms of the Proposed Agreement the only substantial business asset, the Rental Property, is owned solely by the Investor.
- There is no requirement for the registration of a business name.
- There is no requirement for a joint business account.
- While there are rights and responsibilities relating to the Investor and rights and responsibilities relating to the Approved Participant, these rights and responsibilities do not amount to conducting a joint business.
- There is no requirement for any joint capital contributions.
- There is no entitlement to any share of net profits.
- There is nothing requiring the maintenance of joint business records.
- There is nothing to indicate that the Parties will be trading in joint names.

Thus, consideration of the factors contained in TR 94/8 leads to the conclusion that, if executed as drafted, the Parties to the Proposed Agreement would not be carrying on a business as partners.

Joint receipt of ordinary income or statutory income

Taxation Ruling TR 93/32 *Income tax: rental property – division of net income or loss between co-owners* explains the basis upon which the net income or the loss from a co-owned rental property should be divided between its owners. Paragraph 3 of TR 93/32 explains that:

> Co-ownership of rental property is a partnership for income tax purposes but is not a partnership at general law unless the ownership amounts to the carrying on of a business.

Paragraph 6 of TR 93/32 goes on to say that:

> .... the income/loss from the rental property must be shared according to the legal interest of the owners except in those very limited circumstances where there is sufficient evidence to establish that the equitable interest is different from the legal title.

Thus, the principles outlined in TR 93/32 establish that under the extended income tax definition of partnership, it is sufficient for persons in joint receipt of income as a result of their ownership of joint property to be in partnership for income tax purposes.

Under the terms of the Proposed Agreement there is no jointly owned property from which the Parties to the agreement will receive joint income. The Investor will be the sole owner of their Rental Property which they will rent out to Eligible Tenants receiving all the rental income from that property. The amounts received by the Approved Participant under the Proposed Agreement (the establishment fee and 50% of the cash State Government Payments) reflect their role as an Approved Participant facilitating access by the Investor to NRAS incentives as a result of the provision affordable housing.

Because under the terms of the Proposed Agreement there is no receipt of joint income as a result joint ownership of property there will be no partnership under the extended taxation definition.

Limited Partnership

Limited partnership is defined in section 995-1 of the ITAA 1997 which requires:

- an association of persons (other than a company) carrying on business as partners or in receipt of ordinary income or statutory income jointly, where the liability of at least one of those persons is limited, or
- an association of persons with, a separate legal personality, formed for the sole purpose of becoming a venture capital limited partnership, an early stage venture capital limited partnership, an Australian venture capital fund of funds or a venture capital management partnership.

In this situation the Proposed Agreement would not be a limited partnership because there is no association of persons:

- carrying on a business as partners or the receipt of joint income, or
- with a separate legal personality formed for any of the above purposes.

Conclusion partnership

The execution of the Proposed Agreement will not result in the Parties constituting a partnership for taxation purposes because under the terms of the Proposed Agreement:

- the Parties will not be carrying on a business as partners,
- the Parties will not be in receipt of joint income, and
- the proposed relationship of the Parties will not constitute a limited partnership.

Question 2

Summary

Because the Approved Participant receives payments from a relevant state or territory department in relation to their participation in the NRAS these payments will be non-assessable non-exempt income under section 380-35 of the ITAA 1997.

Detailed reasoning

Payments made by a Department of a State or Territory in relation to your participation in the NRAS are made non-assessable non-exempt income by virtue of section 380-35 of the ITAA 1997, which states:

> A payment made to you, or a non-cash benefit provided to you, (whether directly or indirectly, such as through an NRAS consortium of which you are a member) by:
>
> (c) a Department of a State or Territory; or
>
> (d) a body (whether incorporated or not) established for a public purpose by or under a law of a State or Territory;
>
> in relation to your participation in the National Rental Affordability Scheme is not assessable income and is not exempt income.

In this instance, the Approved Participant has NRAS Allocations to provide Eligible Properties to Eligible Tenants. It is accepted that any payments from a relevant Department of a State or Territory to the Approved Participant in relation to their participation in the NRAS will be non-assessable non-exempt income under section 380-35 of the ITAA 1997.

Question 3

Summary

Once the Proposed Agreement is executed the Investor will be a member of a NRAS consortium with the Approved Participant. As such if the Approved Participant passes on the economic benefit of NRAS related cash payments from a State Government or Territory Department to the Investor those payments will be non-assessable non-exempt income by virtue of section 380-35 of the ITAA 1997.

Detailed reasoning

Amendments were made by the *Tax Laws Amendment (2001 Measures No.5) Act 2011* which expands the operation of section 380-35 of the ITAA 1997 to ensure indirect payments made by a Department of a State or Territory to a member of an NRAS consortium indirectly (via an approved participant) in relation to their participation in the NRAS are non-assessable non-exempt income.

The Explanatory Memorandum to the Tax Laws Amendment (2001 Measures No.5) Bill 2011 provides the following example (example 3.45 in paragraph 3.78) of the intended operation of section 380-35 of the ITAA 1997 to indirect NRAS payments received by NRAS Consortium members relating to state government payments:

> **Example 3.45: Treatment of a state government NRAS-related payment received indirectly by the taxpayer**
>
> Mr Smith is part of the XYZ Housing Group, an NRAS consortium providing 400 rental dwellings under the NRAS across South Australia. Mr Smith owns one of these dwellings.
>
> The South Australian Government elects to make its contribution to the NRAS incentive through a cash payment. In the case of NRAS consortiums, the South Australian Government makes a single cash payment to the approved participant of the consortium, in respect of all of the dwellings operated by the consortium which are eligible for an NRAS incentive.
>
> In 2010-11, all of XYZ Housing Group's dwellings are eligible for the full NRAS incentive. Accordingly, the South Australian Government makes a payment in May 2011 to the approved participant of XYZ Housing Group of $914,000 (that is, $2,285 * 400).
>
> This amount is non-assessable non-exempt income in the hands of the approved participant of XYZ Housing Group.
>
> The practice of XYZ Housing Group is to have the economic benefit of the NRAS incentive flow to the individual dwelling owners. Accordingly, in May 2011 the manager makes a payment of $2,285 to Mr Smith.
>
> This amount is an NRAS-related payment made by a state government which is received indirectly by Mr Smith. Therefore, it is non-assessable, non-exempt income.

Thus if the approved participant of an NRAS consortium chooses to pass on a state government payment, relating to participation in the NRAS, to an NRAS consortium member who owns an NRAS dwelling, section 380-35 of the ITAA 1997 will operate to make that payment non-assessable non-exempt income in the hands of the property owner.

NRAS consortium is defined in section 995-1 of the ITAA 1997 to mean:

> .... a consortium, joint venture or non-equity joint venture:
>
> (a) established by one or more contractual arrangements, the purpose of which are to facilitate the leasing of NRAS dwellings; and
>
> (b) that is not a corporate tax entity, a superannuation fund, a trust or a partnership.

In the event that the Proposed Agreement is executed it is accepted that the Investor will be a member of an NRAS consortium with the Approved Participant. It is accepted that any cash payment made by a State Government or Territory Department, under the NRAS to the Approved Participant, which is passed on to the Investor under the terms of the Proposed Agreement will be non-assessable non-exempt income of the Investor under section 380-35 of the ITAA 1997.

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