



COOPER GRACE WARD  
LAWYERS

# Property joint ventures - getting them right

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## CONTENTS

<b>Introduction .....</b>	<b>1</b>
<b>Is there such thing as a property joint venture? .....</b>	<b>1</b>
<b>If not a joint venture - what is it? .....</b>	<b>2</b>
<b><i>Tax Law Partnerships - Goods and Services Tax Ruling GSTR 2004/6</i>.....</b>	<b>2</b>
<b>Recent private rulings .....</b>	<b>4</b>
<b>When are profit share projects appropriate?.....</b>	<b>5</b>
<b>Tax and GST treatment of profit share projects .....</b>	<b>6</b>
<b>Profit share projects - tax law partnership or separate enterprises .....</b>	<b>6</b>
<b>Who makes GST supplies? .....</b>	<b>7</b>
<b>Can a profit project partnership apply the margin scheme? .....</b>	<b>8</b>
<b>Can landowner deduct profit share paid to co-venturer? .....</b>	<b>9</b>
<b>Syndicated investments where nominee entity holds investment property .....</b>	<b>10</b>
<b>Conclusion .....</b>	<b>13</b>

## Introduction

It is very common for parties to combine their resources to undertake property developments or acquire income producing properties and these arrangements are often loosely referred to as joint ventures.

However, many people who are involved in property 'joint ventures' and, in many cases their advisers, do not have any clear understanding of the true nature of their arrangements nor, more importantly, of the tax and GST implications of their structures.

In this paper we will examine some tax and GST issues that arise in relation to structures commonly used to facilitate joint investment in income producing property and property development ventures, in particular arrangements where:

- the land owner retains title to the real estate and enters into an arrangement with a developer or financier to develop the property and share profits (profit share projects); and
- the property is owned by a syndicate of investors but the legal title is registered in the name of a nominee or manager (property syndicates).

I will primarily focus on issues relevant to small property syndicates and joint property developments that are not of a sufficient size to comprise a business.

## Is there such thing as a property joint venture?

It is common for clients to refer to syndicated investments or joint property developments as joint ventures. However it will be extremely rare for joint property ownership arrangements to qualify as a joint venture under the Tax Acts<sup>1</sup> or the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

The expression joint venture is not one that has a settled common law meaning. In *United Dominions v Brian Pty Ltd*<sup>2</sup> Dawson J indicated that 'the important distinction between a partnership and a joint venture is, for practical purposes, the distinction between an association of persons who engage in a common undertaking for profit and an association of those who do so in order to generate a product to be shared among the participants'.<sup>3</sup>

The concept of a non-entity joint venture is specifically defined in the *Income Tax Assessment Act 1997* (1997 Tax Act) as being one where two or more parties undertake an economic activity to obtain benefits in the form of a share of output from the arrangement.<sup>4</sup>

The same definition appears in the GST Act.

The critical importance of obtaining benefits in the form of a share of output rather than a share of profits was emphasised in the recent GST case of *Yacoub v FC of T*.<sup>5</sup>

Under sub-division 51-A of the GST Act the Commissioner may give approval for two or more entities to be registered as a GST joint venture.

Whilst subdivision 51-A does not specifically refer to a non-entity joint venture, this is implicit because the provisions necessarily require more than one entity as a party to the joint venture.

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<sup>1</sup> Income Tax Assessment Act 1936 and Income Tax Assessment Act 1997

<sup>2</sup> 157 CLR 1

<sup>3</sup> Ibid at p15

<sup>4</sup> s995-1(1) - 1997 Tax Act

<sup>5</sup> [2012] FCA 678

Importantly, the ATO considers that it is an essential feature of a registered GST joint venture that the parties share in the product or output of the venture as opposed to merely sharing the profits.<sup>6</sup>

Therefore, the typical joint property arrangements we have referred to above will not qualify as GST joint ventures.

### **If not a joint venture - what is it?**

It is important to determine exactly what is the nature of joint property arrangements as this may have significant GST, income tax and practical consequences.

The alternatives generally are that the arrangements will be:

- general law partnerships;
- tax law partnerships; or
- some other form of profit sharing venture.

In most cases the joint ownership of investment properties will not be a general law partnership because the parties will not be carrying on business.

Similarly, small scale development projects will rarely qualify as a business and will more often be profit making undertakings.

However there will be a tax law partnership if the parties are in receipt of income jointly<sup>7</sup> and therefore arrangements for joint ownership of investment properties or joint property developments where the profits from the development are shared will often constitute a tax law partnership.

Also, if parties are sharing profits and therefore some form of partnership exists, the question arises as to who is actually carrying on an enterprise. Is it the partnership or the individual partners?

In the case of a general law partnership it is clear that the partnership is carrying on the enterprise as it necessarily must be carrying on a business and is therefore eligible to register for GST.

For tax law partnerships, it can be less clear as to which 'entity' for GST purposes is carrying on the enterprise and therefore which entity is eligible to register for GST.

### ***Tax Law Partnerships - Goods and Services Tax Ruling GSTR 2004/6***

The ATO has outlined its views on the GST implications of a tax law partnership in relation to jointly owned investment properties in *GSTR 2004/6*.

The ruling focuses primarily on jointly owned rental properties rather than arrangements where parties are involved in a development project, but the views expressed provide some guidance as to how the ATO is likely to characterise joint property development projects that are not of a sufficient scale to constitute a business.

If the arrangement qualifies as a tax law partnership then the parties:

- will not be jointly and severally liable;
- can lodge tax returns and register for GST as a separate partnership entity as long as they are carrying on an enterprise;

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<sup>6</sup> Goods and Services Tax Ruling GSTR 2004/2 – paragraph 11

<sup>7</sup> See definition of 'partnership' in section 995-1(1) - *Income Tax Assessment Act 1997*

- can claim their share of any losses of the partnership as tax deductions in the year in which they are incurred; and
- will each be liable for tax on their share of profits.

There are a number of interesting points that emerge from *GSTR 2004/6*.

Firstly, the ATO indicate that, although the definition of a tax law partnership requires an association of persons in receipt of income jointly, the ATO will accept that there can be a tax law partnership prior to the actual derivation of any income (time of association approach).<sup>8</sup>

The ruling provides an example of several persons who jointly acquire vacant land with the intention of building commercial premises for leasing. The ruling accepts that the acquisition of the land can be the first step in a series of consecutive steps leading to the right to receive income and therefore will accept that a tax law partnership exists from the time of the acquisition of the vacant land.

This time of association approach allows the partnership (or the partners) to claim input tax credits on creditable acquisitions made prior to actually deriving any income from their enterprise. There is an interesting discussion as to the features that indicate whether the tax law partnership is carrying on an enterprise as opposed to a situation where the individual co-owners carry on separate enterprises.<sup>9</sup>

While this distinction may appear to be somewhat esoteric, it can have significant practical implications particularly around who can claim input tax credits for creditable acquisitions.

The factors the ATO considers are indicative that the tax law partnership is carrying on an enterprise include:

- an oral or written agreement outlining the rights of the parties;
- the income producing property is jointly acquired under a single contract;
- the co-owners hold their interest as joint tenants;
- the co-owners borrow jointly to fund the project;
- the co-owners appoint a single agent to manage the property;
- income is paid into a joint bank account;
- expenses are paid from the joint bank account of the co-owners.

On the other hand, factors that suggest that each individual owner may be carrying on a separate enterprise include the following:

- each co-owner is separately registered;
- there is a specific agreement not to form a partnership or jointly carry on an enterprise;
- any loan funds are borrowed individually by the separate co-owners rather than under a joint loan arrangement;
- the revenue from the property is paid into a trust or clearing account operated for convenience only with each co-owner's share being distributed directly to them;
- each co-owner contributes separately to expenses;

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<sup>8</sup> Paragraphs 38 & 39

<sup>9</sup> Paragraphs 62 to 66

- the property is held as tenants in common and not joint tenants.

Therefore, if clients who have joint property assets do not wish to be characterised as a tax law partnership, it should be possible to structure their arrangements by reference to these guidelines so that each individual will be carrying on an enterprise.

*Yacoub v FC of T* highlights the importance of having correctly drafted agreements. This case concerned the question of whether the parties involved in a development project were jointly and severally liable for the GST liability of the venture. The case turned on whether the arrangements between the parties could be characterised as a joint venture or whether the arrangements were a partnership.

The Court found in this case that the parties had formed a general law partnership and as such each partner was liable for all of the GST liabilities. There were actually two agreements entered into on separate occasions. The first, if read separately, would have resulted in the arrangement being a joint venture because the original intention had been that individual lots from the development were to be transferred to each party thereby sharing in the produce of the agreement rather than the profit of the venture.

Unfortunately for the Yacoub, they entered into a further agreement in 2007 where they agreed to share all costs liabilities and proceeds derived from the venture. The Court applied the principle that the later agreement prevails to the extent of any inconsistency between the two agreements, and found that, because there was an agreement to share in the profits, a partnership existed.

While the Court found that the Yacoub and their co-venturer were in a partnership under general law the decision suggests that tax law partners will also be jointly and separately liable for GST liabilities.

For example, Jagot J specifically referred to section 444-30 of Sch 1 to the *Taxation Administration Act 1953*, which provides that:

(2) The partners are jointly and severally liable to pay any amount that is payable under this Schedule or an indirect tax law by the partnership.

### Recent private rulings

Two recent private rulings also demonstrate the importance of a carefully drafted agreement when entering into a joint venture arrangement.<sup>10</sup>

In the first private ruling (authorisation no. 1011458899318) the key factors were that:

- only one of the parties had legal title of the land;
- the agreement specified that the rights, duties, obligations and liabilities to third parties were several and not joint and several;
- the agreement did not constitute a partnership agreement;
- they appointed a project manager who acted as an agent for each of the participants severally;
- when development lots were sold title was transferred directly from the landowner to the buyer;
- the sale proceeds were paid into a joint venture account;
- there was no joint borrowing by the parties;
- the developer party had a right to receive a balance of the funds in accordance with the agreement.

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<sup>10</sup> Authorisation No 1011458899318 and Authorisation No 1011841788044

In the private ruling the ATO determined that the arrangement was a joint venture as opposed to a tax law partnership because the landholder held title to the land and received the proceeds of the sale.

The parties did not receive the proceeds jointly rather the developer received a share of the distribution of receipts from the sale of the land as a contractual right arising from the agreement rather than as proceeds of the sale.

According to the ATO's reasoning:

You (the landholder) are the sole legal owner of the freehold interest in a developed lot and are therefore entitled to the whole of the proceeds of sale. The right of the other participant to be paid an amount calculated partly by reference to the proceeds on the sale of each lot is due to a contractual right.

In the second ruling (authorisation no. 1011841788044) the key features of this agreement were:

- only one of the parties held an interest in the land;
- the financing of the development was to be obtained jointly, secured by a mortgage over the land;
- all funds were to be received into a development account;
- proceeds for the sale of the subdivided blocks were to be used to:
  - firstly to pay the financier;
  - secondly to pay any outstanding project costs; and then
  - divided equally between the participants.

The ATO ruled the arrangement constituted a tax law partnership, because the two parties shared the costs and the profits.

The substance of the arrangements was very similar but the drafting of each agreements resulted in a completely different GST outcomes,

### **When are profit share projects appropriate?**

This approach is often adopted to avoid having to pay stamp duty on a transfer of the project land into a new project entity.

Also, the land owner will be subject to tax on the sale of their land, this approach will postpone the derivation of that taxable income.

In some cases, the land owner may also have the objective of arguing that their share of proceeds from the development is capital and/or to defer the date on which the land owner derives taxable income or capita gain from the sale of the land.

For example, it is quite common for primary producers whose farm land becomes suitable for development as a result of the encroachment of urban development to be approached by developers offering to develop the land in a 'joint venture' under which the landowner contributes the land and the developer contributes cash and/or expertise.

In these situations, it will usually be advantageous for the landowner if their share of the profit from the project can be characterised as capital gain rather than ordinary income from property development.

If the profit is received on capital account the landowner will generally get the benefit of the 50% exemption under division 115 of the *Income Tax Assessment Act 1936* (1936 Tax Act) and possibly the small business capital gains tax concessions in division 152 of the 1997 Tax Act. If the land was acquired before 20 September 1985, the entire profit may be tax free.

The question of whether the development of a property is a mere realisation of the capital asset or a profit making undertaking can be problematical and will almost always involve some element of subjective judgement.

The ATO outlined the factors it will take into account in determining whether there is a mere realisation or a profit making undertaking in *Taxation Ruling TR 92/3*. These factors include<sup>11</sup>:

- the extent to which the taxpayer is actively involved in the project;
- will the taxpayer rely on town planners, engineers, contractors and consultants to design, plan and sell the allotments.

A landowner who is more of a passive participant in the property development and who engages a third party who effectively project manages the development is more likely to succeed in an argument that they are merely realising a capital asset rather than developing the land as part of a commercial undertaking.

### **Tax and GST treatment of profit share projects**

The correct characterisation of profit share projects can be quite complex, but it may be critical that the arrangement between the parties is correctly characterised for both tax and GST purposes.

If, the arrangement is a tax law partnership:

- the partnership will be a tax entity and each partner will be taxed on their share of profits;
- the partnership may have to register for GST, but in some cases the individual partners may have to register separately;<sup>12</sup>
- the parties may need to have an agreement under subdivision 153-B of the GST Act authorising the land owner to issue tax invoices on behalf of the partnership.

If the arrangement is neither a general law nor tax law partnership then:

- each of the parties will generally be required to include their share of profits from the project in their assessable income;
- the parties may be deemed to be carrying on separate enterprises (but may not necessarily need to be registered);
- the land owner will be required to account for GST on sales (if registered or required to be registered); and
- the dealings between the land owner and other joint venturer(s) may constitute taxable supplies.

### **Profit share projects - tax law partnership or separate enterprises**

The issue of whether a profit share project should be structured as a tax law partnership or as separate enterprises will depend on the circumstances in each case.

Our view is that, in the majority of cases, the best approach will be for each party to register separately for GST and to structure the agreement so that the arrangement does not involve a sharing of profits and there is no tax law partnership.

For example, the prospects of a landowner succeeding with an argument that the development and sale of their land is nothing more than the mere realisation of a capital asset, will be enhanced if the

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<sup>11</sup> TR 92/3 – paragraph 13

<sup>12</sup> GSTR 2004/6 paragraph 64



arrangement is structured as a project agreement where the other party is the active party in the development.

Also, if joint ownership arrangements are deemed to constitute a tax law partnership, individual owners who have at least 40% equity stake in the partnership will have to include the 'partnership' assets in their net assets when determining whether they satisfy the \$5m net asset test under the small business capital gains tax concessions<sup>13</sup>.

If the parties do not want their arrangements to be characterised as a tax law partnership, careful drafting will be required to ensure that they are not 'in receipt of income jointly'.

This outcome can generally be achieved if the land owner is designated as being the 'entity' who is carrying on the project.

The other parties may carry on a separate enterprise involving the supply of services and expertise as project manager and/or funder.

In those circumstances, provided that the return to the non-land owning parties is expressed as a fee or charge that is taken into account in determining the net profit for the project and not as a share of that profit, the arrangement should not be characterised as a tax law partnership.

### **Who makes GST supplies?**

The issue of who can issue tax invoices for sales of developed lots is very important in profit share projects.

If the incorrect party issues tax invoices or incorrectly claims input tax credits then substantial penalties could be assessed even if the correct amount of GST has been remitted on sales.

If:

- the arrangement is a tax law partnership; and
- it is the partnership entity that is carrying on the enterprise;

the land owner will still be the party who is named as vendor in the contracts for sale of developed lots. It will therefore be more practical, for the land owner to provide tax invoices where required.

However, the land owner may not be the entity carrying on the enterprise.

In those circumstances, it appears the ATO may accept that the party who owns the land can actually issue a tax invoice in their own name on behalf of the tax partnership.<sup>14</sup>

In our opinion it is safer where there is a tax law partnership if the land owner issues tax invoices to purchasers as agent for the tax law partnership pursuant to an agency agreement under sub-division 153-B of the GST Act.

The requirements for and implications of an agent making taxable supplies or creditable acquisitions under sub-division 153-B are outlined in some detail in *Goods and Services Taxation Ruling GSTR 2000/37*. The ATO position is illustrated by the following extracts from the ruling:

#### ***Principals and agents as separate suppliers and/or acquirers under Subdivision 153-B***

*74. Section 153-50 provides that entities may enter into an arrangement under which an agent is treated as a separate supplier and/or acquirer. That is, the agent is treated as a principal in its own right. Further, nothing in this section prohibits supplies that are not taxable supplies and acquisitions that are not creditable acquisitions from being included in such an arrangement. This includes supplies and*

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<sup>13</sup> s 152-15 – Income Tax Assessment Act 1997

<sup>14</sup> GSTR 2004/6 – paragraph 212

acquisitions that are GST-free, input taxed or subject to the determination of the Treasurer under Division 81.32. ...

#### **Written agreement**

76. To enter this arrangement there must be a written agreement under which:

- the agent arranges to make supplies and/or acquisitions to or from third parties on behalf of the principal;
- the kinds of supplies and/or acquisitions to which the arrangement applies are specified;
- the agent is treated for the purposes of GST law as a principal in making supplies or acquisitions;
- the agent will issue all tax invoices and adjustment notes relating to those supplies to third parties in the agent's name and the principal will not issue such documents; and
- both parties must be registered.

#### **The effects of the arrangements on taxable supplies**

77. The effect of entering into these arrangements is that the principal and the agent treat the taxable supply of goods or services that the principal makes to third parties through the agent as two separate supplies, and that they are treated as acting between themselves as principal to principal for GST purposes.

78. A taxable supply made to a third party is taken to be a taxable supply made by the agent. In addition, the principal is taken to have made a taxable supply to the agent of the same thing that the agent is taken to supply. The value of that second supply is determined by reference to the amount the agent is actually required to pay the principal. This amount is the price charged and paid by the third party for the supply, less the amount the agent is permitted (under the contract with the principal) to keep as a commission or similar remuneration for the agency services. In these circumstances, the agent's supply of services is not a taxable supply and the principal is not entitled to claim input tax credits relating to the commission or similar payment.

79. As the supply by the principal to the agent is a taxable supply under the arrangement, the principal is required to account for the amount of GST payable on the supply, being 10% of the value discussed in the previous paragraph, to the ATO. The agent can claim 10% of the value as an input tax credit.

#### **Can a profit project partnership apply the margin scheme?**

Particular care is required with a profit project where the land owner retains title to the land and the parties want to apply the margin scheme on sales of developed lots.

If the arrangements between the parties is structured so that there is a tax law partnership that is carrying on the enterprise, there is a question as to whether the margin scheme can be applied. There are several reasons for this.

Firstly, section 75-5 of the GST Act provides that the margin scheme only applies to supplies that the registered entity makes by 'selling a freehold interest in land'. If the project is undertaken by a registered tax partnership but only one of the partners is the registered owner of the land, the partnership will not be able to sell a freehold interest in the land.

The ATO may accept that the sale of the land by the land owning party is a supply on behalf of the tax law partnership<sup>15</sup> and therefore allow the margin scheme to be applied, but this is not free from doubt.

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<sup>15</sup> GSTR 2004/6 – paragraph 114

Another obstacle is that the margin is the amount by which the sale price exceeds 'the consideration for **your** acquisition' of the land<sup>16</sup> or the difference between the sale price and the value of the land at an earlier date if the party who is making the supply owned the land at 30 June 2000<sup>17</sup>.

Applying these provisions may be problematical if the GST registered entity is a tax law partnership but only one of the 'partners' actually acquired the land after 30 June 2000 or owned the land at that date.

In our opinion, the uncertainty surrounding the application of the margin scheme is a good reason to ensure that profit share projects are not structured as tax law partnerships.

### **Can landowner deduct profit share paid to co-venturer?**

If the arrangement between a land owner and the other party to a development project provides that the non-land owning party will receive a share of the profits from the project, some care will be required in drafting the agreement if the arrangement is not characterised as a tax law partnership.

There are authorities that suggest that, where one joint venture party initially receives all of the profits from a project and agrees to pay a share of the profits to another party, the payment of this profit share may not be an allowable tax deduction.

In *City Link Melbourne Ltd -v- FCT*<sup>18</sup> the Full Federal Court had to consider whether a concession fee paid by the developer of the Melbourne City Link Project to the Victorian Government was an allowable deduction.

The ATO argued the arrangement between the developer and the Government effectively constituted a joint venture and that the concession fees were akin to a sharing of profit or a dividend and therefore not deductible.

The ATO argument relied on a number of earlier cases<sup>19</sup>.

At first instance<sup>20</sup>, Merkel J found that the concession arrangements were akin to sharing profit or the payment of a dividend<sup>21</sup>.

On appeal the Full Federal Court did not consider the sharing of profits argument and the ATO did not pursue the 'profit sharing' argument in the High Court appeal.<sup>22</sup>

The risk of this argument being raised by the ATO would be reduced if:

- the amount payable to the non-land owing party is described as a fee rather than a sharing of profits;
- this fee is to be deducted before determining net profit; and
- rather than using the expression joint venture the parties have a 'project agreement'.

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<sup>16</sup> s 75-10(2) – GST Act

<sup>17</sup> s 75-10(3) – GST Act

<sup>18</sup> 2004 ATC 4945

<sup>19</sup> *United Energy Ltd -v- FCT* 97 ATC 4796, *Commissioner of Taxation (Western Australia) -v- Boulder Perseverance Ltd* 58 CLR 223 and *FCT -v- The Midland Railway Company of Western Australia Ltd* 85 CLR 306

<sup>20</sup> 2004 ATC 4084

<sup>21</sup> *Ibid* p 4124

<sup>22</sup> *FCT v Citylink Melbourne Limited* 2006 ATC 4404

## Syndicated investments where nominee entity holds investment property

It is quite common where several investors join together to buy an investment property, for the investors to acquire the beneficial ownership of the property as tenants in common but actually have the legal title held by an entity as nominee for the investors for administrative convenience.

This structure is commonly used to avoid the inconvenience of having to get individual owners signing documentation, etc. It is mandatory for managed investment schemes.

In most cases the parties involved will regard the joint investment arrangements as either an investment partnership or joint venture.

The correct characterization may be particularly important if the investors anticipate they will be incurring losses in the initial period of ownership (because of gearing levels and/or capital write off deductions).

If the joint property ownership is a partnership for tax purposes, the individual investors/partners will be able to claim these start-up losses as deductions against other ordinary income. However, if the nominee arrangement constitutes a trust, these initial losses may be trapped in the trust estate.

In the past, the ATO appeared to accept in these situations that there was a partnership between joint owners of investment property notwithstanding that the legal title was registered in the name of a nominee.

There are a number of authorities where the courts (and the ATO) appear to have accepted that there can be a partnership for tax law purposes even though the investment property is held in the name of a nominee entity<sup>23</sup>.

In *A.R.M. Constructions*, a company held a development property on behalf of itself and four other companies. The main issue in the case was whether the property constituted trading stock of the partnership.

It appears from the decision that both the ATO and the Court accepted that there was a partnership between the four companies notwithstanding that the property was registered in the name of only one of the parties.

In *Ryvitch*, a development property was acquired in the name of a company, but one of the shareholders contended the company merely acted as the nominee of a partnership consisting of herself and three other people and claimed a deduction for losses arising from the project.

The Court found that there was no partnership but not because of the nominee arrangement. The major reason the taxpayer failed was that there was no documentation evidencing a partnership and the annual returns for the company indicated it was the beneficial owner of the property.

It does not appear that the ATO argued that the nominee arrangement precluded the existence of a partnership.

Also, in *Howland Rose and Ors -v- FCT*<sup>24</sup> the court accepted that it is an established principle ... that a person may carry on a business notwithstanding that management of the business has been delegated to an agent<sup>25</sup>.

The recent case of *Wynnum Holdings No 1 Pty Ltd & Anor V FC of T*<sup>26</sup> involved a situation where a group of investors formed a syndicate to develop a retirement village and established a company to hold the real estate as a nominee for the syndicate members.

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<sup>23</sup> *A.R.M. Constructions Pty Ltd -v- FCT*, 87 ATC 4790 and *Ryvitch -v- FCT* 2001 ATC 4403

<sup>24</sup> 2002 ATC 4200

<sup>25</sup> *Ibid* p 4251

The nominee entity made a claim for input tax credits in relation to the acquisition and development costs of the retirement village but the ATO argued that the nominee could not claim input tax credits because the syndicate (and not the nominee) was carrying on the enterprise.

The AAT accepted the ATO arguments that the nominee was not carrying on an enterprise and therefore was not entitled to claim input tax credits. It was the syndicate that was carrying on the enterprise and the parties had failed to register the correct entity for GST purposes.

The AAT did not determine whether the investors were joint venturers or in a partnership.

This case is also significant in light of the potential disconnect between the tax treatment of the structure for GST purposes and treatment for income tax purposes.

This decision of the ATO appears to be inconsistent with several rulings and draft rulings that suggest that the ATO may be adopting a harder line in relation to nominee structures and may treat the nominee as trustee of a separate trust estate.<sup>27</sup>

The ATO's response to the recent case of *Colonial First State Investments Ltd v C of T*<sup>28</sup> is also a strong indication that in most cases the ATO will consider that nominee companies hold their assets on a separate trust estate.

If this approach is followed, individual syndicate investors will not be able to claim deductions for their share of start-up or ongoing losses. Instead those losses will be quarantined in the trust.

In *Taxation Determination TD 2005/28* the ATO considered whether a syndicate that is a registered managed investment scheme under the *Corporations Act*, should be taxed as a partnership or as a trust estate under division 6 of the 1936 Tax Act

The view of the ATO in *TD 2005/28* is that where the real estate is held by the responsible entity, and not by the investors or syndicate members directly, it is held on trust.... The assessable income and allowable deductions of the... syndicate compose the net income of the trust estate for the purposes of division 6<sup>29</sup>.

*TD 2005/28* replaced draft *Taxation Determination TD 2004/D78*. In the draft determination the ATO seemed to place considerable weight on the fact that the *Corporations Act* provisions actually state that the responsible entity holds the scheme property on trust<sup>30</sup>.

It may be significant that, notwithstanding some strong submissions put to the ATO that the draft determination was incorrect, the final determination appears to be an even stronger statement that the ATO considers there is a trust in such nominee situations.

In the final determination the ATO indicate that irrespective of whether the relevant property was held on trust because of the provisions of the *Corporations Act* or pursuant to the scheme's constituent documents the relationship of the nominee entity to the syndicate investors was that of a trustee.

In *Colonial First State*, the court held that Colonial, as trustee of a retail investment trust was a beneficiary of a wholesale fund despite the units in the wholesale fund being held by an intermediary custodian company.

The Court reasoned that equity is about substance rather than form (and that while the custodian was to be the conduit by which payments needed to flow it was the retail trust that was the true beneficiary and was the that Colonial as trustee of the retail fund was the entity that was entitled to enforce the fiduciary obligations of the trustee of the wholesale fund.

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<sup>26</sup> [2012]AATA 616

<sup>27</sup> E.g. *Taxation Determination TD2005/28* and *Taxation Ruling TR2004/D25*

<sup>28</sup> [2011] FCA 16

<sup>29</sup> para 6

<sup>30</sup> s 601FC(2)

The ATO Decision Impact Statement in relation to *Colonial First State* accepts that in this situation or facts materially the same, the nominee can be ignored but it also confirms the ATO view that, outside of the CGT provisions, assets that are held on trust for beneficiaries will form part of a trust estate and income tax consequences will be determined under the trust provisions.

Also, PS LA 2000/2 has recently been amended to make it clear that any exemption from furnishing an income tax return does not mean that the trust estate is ignored implying that where there are losses these will be trapped in the trust estate.

The ATO has also issued draft *Taxation Ruling TR 2004/D25*, which suggests they consider there is a separate trust estate where property is held by a nominee.

That draft ruling considers the concept of when a person is absolutely entitled to a CGT asset as against the trustee of a trust.

The main significance of this is that, if a person is absolutely entitled to an asset as against the trustee, anything done by the trustee is deemed to be done by the beneficiary who was absolutely entitled.

However, the concept may also be relevant in determining whether syndicate members will be accepted as the beneficial owners of syndicated property held by a nominee.

Significantly, the ATO view in *TR 2004/D25* is that, if a nominee entity holds an item of indivisible property (such as land) on behalf of several parties, none of those parties can be absolutely entitled to the asset as against the trustee<sup>31</sup>.

This appears to be inconsistent with a number of earlier authorities<sup>32</sup>.

In the *Booth* case in particular the court considered that it was possible for several beneficiaries to be jointly and absolutely entitled as against the trustee to the assets vested in the trustee.

If the ATO position in *TR 2004/D25* is maintained when the ruling is finalised, this will make it significantly more difficult to argue that there is a partnership where property is held by a nominee for a syndicate of investors.

The finalisation of this ruling has been deferred pending completion of Treasury's *Modernising the Taxation of Trust Income* project<sup>33</sup>.

In the meantime there are a number of practical steps that clients can take to try to ensure that arrangements where a nominee holds the property for a syndicate are not treated as a separate trust estate.

- The syndicate agreement should expressly state that the individual investors are beneficially entitled to the land as tenants in common and that the title has been registered in the name of the nominee for convenience only.
- The documents should provide that the nominee entity is required to act in accordance with the directions of the syndicate.
- All decisions in relation to the property should be made by a committee representing the syndicate, as opposed to the directors of the nominee company.

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<sup>31</sup> paragraph 23

<sup>32</sup> *Wharton -v- Masterman* [1895] AC 186, *Sermosis Montefiore Jewish Homes -v- Howell & Co (No. 7) Pty Ltd* [1984] 2 NSWLR 406 and *Booth -v- Ellard* [1978] 3 ALL ER 298

<sup>33</sup> Refer NTLG Public Rulings Steering Committee minutes 25 November 2011

- The syndicate and nominee company should enter into an agreement that complies with sub-division 152-B of the GST Act appointing the nominee as agent for the syndicate for the purpose of issuing tax invoices and making creditable acquisitions.
- All income from the property should be banked to a bank account in the name of the syndicate and similarly all expenses should be paid from that account.

## Conclusion

Our objective in this paper has been to highlight that there are some quite complex issues that have to be considered in choosing the appropriate structure for joint property investments and developments and that describing these arrangements as 'joint ventures' can be quite misleading.

There is no right or wrong way to structure these arrangements. What is important is that clients and advisers are aware of the issues and how they may impact on the clients' desired outcomes.

I trust the paper will assist you to advise clients on the joint property structures that will best suit their needs.

*This paper is only intended as a general overview of issues relevant to the topic and is not legal advice. If there are any matters you would like us to advise you on in relation to this paper, please let us know.*

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