

RULINGS > PRODUCT

Vivid Living Limited

Issued: 23 December 2022

BR Prd 22/16

The Arrangement is the occupation right agreement (ORA) between Vivid and residents (Residents) of a Vivid retirement village.

This Ruling provides that a payment (based on the increase in value of the unit) Residents receive under the ORA is not income of the Residents.

START DATE – END DATE

23/12/2022 – 31/03/2029

(THIS TITLE PAGE DOES NOT FORM PART OF THE RULING.)

Product Ruling – BR Prd 22/16

This is a product ruling made under s 91F of the Tax Administration Act 1994.

Name of person who applied for the Ruling

This Ruling has been applied for by Vivid Living Limited (Vivid).

Taxation Laws

All legislative references are to the Income Tax Act 2007 (Act) unless otherwise stated.

This Ruling applies in respect of s BD 1(1) and Part C of the Act.

The Arrangement to which this Ruling applies

The Arrangement is the occupation right agreement (ORA) between Vivid and residents (Residents) of a Vivid retirement village (Village).

Further details of the Arrangement are set out in the paragraphs below.

Documents

- 1) The following documents describe the Arrangement:
 - a) the draft ORA provided to Inland Revenue on 22 November 2022; and
 - b) the disclosure statement submitted to the Companies Office on 26 October 2022 (bar code 10066227710).
- 2) The final executed documentation will not be materially different from the draft documentation provided to Inland Revenue, as set out at para 1) above.

Vivid

- 3) Vivid carries on a business of operating retirement villages in New Zealand.
- 4) Vivid is a New Zealand tax resident that will enter into the ORA with Residents, granting them a personal contractual right to occupy a specified residential unit, chattels within the residential unit and a carpark (if applicable).

- 5) The Village in Red Beach is under construction and is expected to be complete in 2023. This Ruling will apply to the Red Beach Village Residents and Residents of other Villages where there is an ORA, with other terms and features, materially the same as those set out in this Arrangement description.

Terms of ORA

- 6) Under the ORA, the following terms apply:
- a) When Residents enter into the ORA, an amount based on the market value of their unit is payable to Vivid (Residence Advance) (cl 49). This amount is payable before the residency starts and Residents are not entitled to occupy their unit or enjoy other benefits under the ORA until the Residence Advance is paid in full.
 - b) The Residence Advance is refundable when Residents vacate their unit and is offset against any applicable costs or charges specified (Repayment Sum) (cl 46).
 - c) Residents pay a monthly fee for Village outgoings (Village Fee) (cl 50).
 - d) Residents pay the deferred management fee (DMF) on termination of the ORA. No liability for the DMF arises on Residents before then and Vivid cannot claim or issue an invoice for the DMF before then (cl 55).
 - e) The DMF is a payment made by Residents in exchange for the supply of accommodation over the entire period of the ORA (cl 3). The DMF has a maximum amount set at 15% of the Residence Advance (cl 3). If Residents vacate their unit before three years have expired, a reduced DMF is charged, based on a daily basis of 5% per annum (cl 56).
 - f) Residents are not liable for the DMF if:
 - i) a destructive event occurs and Vivid decides not to repair or rebuild the unit (cl 40.1(e) and cl 45.1(d)); or
 - ii) Residents cancel the ORA under s 28(1) of the Retirement Villages Act 2003, which allows Residents to give notice to cancel no later than 15 working days after signing the ORA (cl 8).
 - g) The ORA can be terminated (cls 39 and 40) by:
 - i) Residents giving written notice to permanently leave;
 - ii) a destructive event occurring;

- iii) death;
- iv) Vivid, if Residents:
 - materially breach the ORA;
 - abandon their unit;
 - health deteriorates; or
 - have caused or may cause serious damage to their unit or Village, or to another person in a Village.
- h) On termination of the ORA, Vivid pays the Repayment Sum to Residents (cl 46), being:
 - i) an amount equal to the Residence Advance; less
 - ii) any agreed deductions (ie, the DMF); plus
 - iii) the Capital Gain Share (see Part G of the ORA).
- i) A portion of the Repayment Sum is paid within five working days following vacation and removal of all personal items from the unit (cl 45). The remainder of the Repayment Sum is payable at the earlier of:
 - i) Vivid relicensing the unit (where a new Resident has signed the ORA and paid the Residence Advance); and
 - ii) four months after termination of the ORA (except the Capital Gain Share – this is only payable after Vivid has relicensed the unit).
- 7) For financial reporting purposes, the industry standard revenue recognition approach will be adopted under which the DMF is recognised on a straight-line basis over the expected tenure of the residency. This period of spreading for accounting purposes is yet to be determined but is expected to be between 7- 10 years.
- 8) For accounting purposes, a Village will be revalued annually using external valuers.
- 9) Vivid will not spread the DMF income over six years under s EI 7.

Capital Gain Share

- 10) The ORA sets out the following terms for the Capital Gain Share:
 - a) The Capital Gain Share is payable if Residents (cl 46):

- i) die;
 - ii) elect to permanently leave;
 - iii) leave because of health conditions; or
 - iv) receive notice to leave from Vivid, because they have materially breached the ORA or because they have caused or may cause serious damage to their unit or Village, or to another person in a Village
- b) The Capital Gain Share is not payable if a destructive event occurs.
- c) The Capital Gain Share is calculated under cl 46.2. Broadly, if the unit has been relicensed, the Capital Gain Share is calculated as 50% of the gain (being the Residence Advance from the incoming Resident less the Residence Advance of the outgoing Resident, refurbishment costs and a 2% sales and marketing fee). In detail, this calculation is:

$$0.5 \times (a - (b + c))$$

where:

a = the Residence Advance received by Vivid for the relicensing;

b = the Residence Advance paid by the Resident; and

c = the costs incurred by Vivid in relicensing the unit, which are:

- refurbishment costs under cl 47.1.2; and
- a sales and marketing fee of 2% (cl 3).

If (b + c) is greater than a, the Capital Gain Share payable to Residents is zero.

- d) If Vivid elects not to relicense the unit under cl 44, the Capital Gain Share is instead calculated as:

$$0.5 \times (a - (b + c))$$

where:

a = the market value, as assessed by an independent valuer;

b = the Residence Advance paid by the Resident; and

c = refurbishment costs payable to Vivid under cl 35.1.

- 11) Page 23 of the disclosure statement provides example calculations of the Capital Gain Share:

2.0 example calculations of Repayment Sum and Capital Gain Share

Term	Residence Advance you paid	Deferred Management Fee (15%)	Repayment Sum without Capital Gain Share	Estimated Refurbishment Cost	Residence Advance received under Agreement for Resale	Sales and Marketing Fee (2% of resale Residence Advance)	Capital Gain Share	Total (Repayment Sum + Capital Gain Share)
2 Years	\$850,000	\$85,000	\$765,000	\$10,000	\$900,000	\$18,000	\$11,000	\$776,000
2 Years	\$850,000	\$85,000	\$765,000	\$10,000	\$850,000	\$17,000	0	\$765,000
5 Years	\$850,000	\$127,500	\$722,500	\$20,000	\$1,000,000	\$20,000	\$55,000	\$777,500
10 years	\$850,000	\$127,500	\$722,500	\$38,500	\$1,300,000	\$26,000	\$192,750	\$9515,250

- 12) The Capital Gain Share is payable by Vivid under cl 46.2 of the ORA:
- a) on the date the Repayment Sum is payable under cl 45, if the unit is relicensed within four months of the ORA ending;
 - b) five working days after the unit is relicensed, if the unit is not relicensed within four months of the ORA ending, but Vivid continues to market the occupation rights to the unit under cl 43.1; or
 - c) five days after Vivid has received an assessment of the market value for the unit, if Vivid elects not to relicense the occupation rights to the unit under cl 44.

Summary of ORA termination terms

Termination event	Termination date	Repayment Sum date	DMF payable	Capital Gain Share
Cancel within 15 days of signing ORA or within 60 days of moving in (cl 8)	Notice	Later of date vacated or five days after cancelling (cl 45.1(a))	No	No
By Residents giving two months written notice to permanently leave (cl 39.1(a))	Expiry of notice period	10% after leaving, and 90% at the earlier of resale and four	Yes	Yes

Termination event	Termination date	Repayment Sum date	DMF payable	Capital Gain Share
		months after notice expires (cl 45.1(b))		
Destructive event occurs (cl 39.1(b))	Notice period expires or destructive event date	Receipt of insurance proceeds (cl 45.1(c) and (d))	Yes (unless Vivid elects not to rebuild unit)	No
Death (cl 39.1(c))	Date of death (unless joint Residents)	At the earlier of relicensing and four months after death (cl 45.1(e))	Yes	Yes
Health deteriorates – transfer to a third-party health care facility (cl 36)	Transfer date (unless joint Residents)	See next row	Yes	Yes
Residents materially breach the ORA, abandon their unit, cause serious damage to the unit or Village, or to another person in a Village (cl 40.1(a) – (d)) or their health deteriorates under cl 36	After final notice given	Five days after final notice given (cl 45.1(f))	Yes	Yes

Notes for above table

- 13) Relicensing of the unit is defined as a new signed ORA and payment of the Residence Advance.

- 14) If Vivid does not elect to relicense the unit under cl 44, the Repayment Sum is payable five days after receipt of a market value assessment (cl 45.1(g)).
- 15) The Capital Gain Share is payable on the dates stated at para 12) above. This may occur after the Repayment Sum is payable if the unit is not sold within four months.

Residents

- 16) The Residents meet all of the following requirements:
 - a) are not associated with Vivid under subpart YB;
 - b) do not use their unit for commercial or business purposes;
 - c) do not acquire their unit for the purpose of disposal;
 - d) occupy their unit as a place to live and do not derive income from the unit; and
 - e) are not engaged in a regular pattern of acquiring and disposing of their main home.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- The Capital Gain Share is not income of Residents under s BD 1(1) and Part C.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 23 December 2022 and ending on 31 March 2029.

This Ruling is signed by me on the 23rd day of December 2022.

Howard Davis
Group Leader, Tax Counsel Office

About this document

Product Rulings are issued by the Tax Counsel Office and Customer and Compliance Services. Product Rulings set out the Commissioner's view on how tax laws apply to a particular "product" – which is an arrangement that a specified taxpayer is likely to enter into with a number of people on identical terms. Taxpayers who enter into the arrangement described in a Product Ruling may apply the ruling but are not obliged to do so. Product Rulings are binding on the Commissioner. This means that if you are entitled to apply a Product Ruling and you have calculated your tax liability in accordance with the ruling, the Commissioner must accept that assessment. A Product Ruling applies only to the taxation laws and arrangement set out in the ruling, and only for the period specified in the ruling. It is important to note that a general similarity to an arrangement covered by a Product Ruling will not necessarily lead to the same tax result.