



Product Ruling

Income tax: Rewards Group Premium Vineyard Project 2009 Late Growers (Pre 31 December 2009)

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

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

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

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

No guarantee of commercial success

The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. The Commissioner recommends a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

Terms of use of this Product Ruling

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

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Product Ruling this scheme is referred to as the Rewards Group Premium Vineyard Project 2009 Late Growers or simply as 'the Project'.
2. All legislative references in this Product Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. Where used in this Product Ruling, the word 'associate' has the meaning given in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936). In this Product Ruling, terms defined in the Project agreements have been capitalised.

Class of entities

3. This part of the Product Ruling specifies which entities:

- are subject to the taxation obligations; and
- can rely on the taxation benefits,

set out in the Ruling section of this Product Ruling.

4. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and who have executed the relevant Project Agreements set out in paragraph 31 of this Ruling on or before 31 December 2009. They will stay in the scheme until its completion and derive assessable income from this involvement.

5. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- terminate their involvement in the scheme prior to its completion or do not derive assessable income from it;
- are accepted into this Project before the date of this Ruling or after 31 December 2009;
- participate in the scheme through offers made other than through the Supplementary Product Disclosure Statement, or who enter into an undisclosed arrangement with:
 - the promoter or a promoter associate, or
 - an independent adviser

that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits or harvest returns) in any way;

- Growers whose application money is not paid in full to the Responsible Entity on or before 31 December 2009 either by the Grower and/or on the Grower's behalf by a lending institution; or
- Growers who finance their participation in the Project with loans from QPR Capital Finance Pty Ltd (QPR) other than as described at paragraphs 76 to 81 of this Ruling.

Superannuation Industry (Supervision) Act 1993

6. This Product ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this product may contravene the provisions of SISA 1993.

Qualifications

7. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 31 to 82 of this Ruling.

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

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

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Date of effect

10. This Product Ruling applies prospectively from 28 October 2009, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 28 October 2009 until 31 December 2009, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to 30 June 2012. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

11. However this Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

Changes in the law

12. Although this Product Ruling deals with the income tax laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

13. Entities who are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

Note to promoters and advisers

14. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling is issued.

Goods and Services Tax

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

Ruling

Application of this Ruling

16. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters into the scheme described at paragraphs 31 to 82 of this Ruling.

17. The Grower's participation in the Project must constitute the carrying on of business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Sub-lease and Management Agreement.

Minimum subscription

18. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of the Supplementary Product Disclosure Statement (SPDS), a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 50 Groves is achieved. The SPDS advises that 59 Groves were allotted in the income year ended 30 June 2009 under the project detailed in Product Ruling PR 2009/37 Income tax: Rewards group Premium Vineyard Project 2009, and as a consequence there is no minimum subscription requirement for the Project.

Small business concessions

19. From the 2007-08 income year, a range of concessions previously available under the Simplified Tax System (STS), will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

20. A small business entity can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions the application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Product Ruling.

Assessable income

Sections 6-5 and 17-5

21. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

Deduction for management fees, rent, borrowing expenses, and interest***Sections 8-1, 25-25 and 40-880 and Division 27***

22. A Grower may claim tax deductions for the following fees and expenses on a per Grove basis, as set out in the Table below.

Fee Type	Year ending 30 June 2010	Year ending 30 June 2011	Year ending 30 June 2012
Management Services (Fixed Component) Fees	\$11,677.65 See Notes (i), (ii) and (iii)	\$1,808.71 See Notes (i), (ii) and (iii)	\$1,891.86 See Notes (i), (ii) and (iii)
Rent	\$526.62 See Notes (i), (ii) and (iii)	\$1,082.74 See Notes (i), (ii) and (iii)	\$1,113.06 See Notes (i), (ii) and (iii)
Management Services (Harvest Component) Fee	As incurred See Notes (i) and (ii)	As incurred See Notes (i) and (ii)	As incurred See Notes (i) and (ii)
Harvest costs	As incurred See Notes (i) and (ii)	As incurred See Notes (i) and (ii)	As incurred See Notes (i) and (ii)
Costs of sale	As incurred See Notes (i) and (ii)	As incurred See Notes (i) and (ii)	As incurred See Notes (i) and (ii)
Credit card merchant fee	As incurred See Notes (i) and (iv)	As incurred See Notes (i) and (iv)	As incurred See Notes (i) and (iv)
Interest on loans with QPR Capital Finance (only payable on overdue repayments)	As incurred See Notes (i) and (v)	As incurred See Notes (i) and (v)	As incurred See Notes (i) and (v)
Loan Application Fee payable for loans with QPR Capital Finance	Must be calculated See Note (vi)	Must be calculated See Note (vi)	

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits); Division 27.

- (ii) The Management Services (Fixed Component) Fees, Rent, Management Services (Harvest Component) Fees, Harvest costs and costs of sale are deductible under section 8-1 in the income year that the relevant fee is incurred.
- (iii) This Ruling does not apply to Growers who choose to prepay fees or who choose, or who are required to prepay interest under a loan, finance or similar agreement. Subject to certain exclusions, amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.
- (iv) Where Growers use a credit card to pay the fees for this Project, a credit card merchant fee may be incurred. This fee will be deductible under section 8-1.
- (v) The 12 month loan provided by QPR Capital Finance Pty Ltd (QPR) is interest free, other than interest that may be charged on overdue amounts. Any interest charged to a Grower on overdue amounts under the 12 month interest free Loan Agreement is deductible under section 8-1. The deductibility or otherwise of interest arising from agreements entered into with financiers other than QPR is outside the scope of this Ruling. Prepayments of interest to any lender, including QPR are not covered by this Product Ruling. Growers who enter into agreements with other financiers, or who enter finance agreements with QPR other than those described at paragraphs 76 to 81 of this Ruling, and/or prepay interest, may request a private ruling on the deductibility of the interest incurred.
- (vi) The Loan Application Fee (0.25% of the Loan Application Amount, subject to a \$250 minimum) payable to QPR is a borrowing expense and is deductible over the period of the loan under section 25-25. Any stamp duty related to the loan agreement, and payable by the Grower, is also a borrowing cost and deductible under section 25-25. Such fees are incurred for borrowing money that is used or is to be used during the period of the loan solely for income producing purposes. As the period of the loan is 12 months, extending over two income years, the deduction for the borrowing expenses must be apportioned over those two income years. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than QPR is outside the scope of this Ruling.

Deductions for Joint Venturer Growers

23. The **First Joint Venturer Grower** may claim the following deductions per Grove in respect of the items described in the table above (and in accordance with the accompanying Notes):

- the Management Services (Fixed Component) Fee and Rent for the period from commencement to 30 June 2010;
- 28% of the Management Services (Harvest Component) Fees;
- 28% of the Harvest costs and costs of sale; and
- if applicable, credit card merchant fee and Loan Application Fee.

24. Subject to the important qualification in paragraph 29 of this Ruling relating to when deductions can be claimed, the **Second Joint Venturer Grower** is entitled to the following deductions per Grove in respect of the items described in the table above (and in accordance with the accompanying Notes):

- Management Services (Fixed Component) Fee and Rent for the periods from 1 July 2010;
- 72% of the Management Services (Harvest Component) Fees;
- 72% of the harvest costs and costs of sale;
- any applicable credit card merchant fees.

Deductions for capital expenditure***Planting Cost Reimbursement Amount****Division 40*

25. Each Grower will incur an amount of \$595.73 per Grove for capital costs incurred in establishing the grapevines during the Planting Period. This amount, called the Planting Cost Reimbursement Amount, is not deductible when incurred. Deductions are allowed for the decline in value of the grapevines calculated using the write-off rate in the provisions relating to the establishment of horticultural plants in Division 40.

Fee Type	Year ended 30 June 2010	Year ended 30 June 2011	Year ended 30 June 2012
Establishment of horticultural plants	See Note (vii)	See Note (vii)	See Note (vii)

Notes:

- (vii) Grapevines are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a lease or a licence, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the grapevines is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. If the grapevines have an 'effective life' of greater than 13 but fewer than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the grapevines enter their first commercial season (section 40-530, item 2). The Project Manager will inform Growers of when the grapevines enter their first commercial season and the amount incurred by the Manager in establishing the grapevines.

Joint Venturer Growers

26. The **First Joint Venturer Grower** may claim a deduction per Grove in respect of the Planting Cost Reimbursement Amount for the capital costs of establishing the grapevines as described in paragraph 25 and the table of this Ruling (and in accordance with the accompanying Note).

Division 35 – deferral of losses from non-commercial business activities***Section 35-55 – exercise of Commissioner's discretion***

27. Growers who stay in the Project until its completion will be considered to be carrying on a business of primary production. Those Growers, other than Second Joint Venture Growers, who are individuals, accepted into the Project in the income year ended 30 June 2010, may make losses from the Project that may be affected by the loss deferral rule in section 35-10.

28. The discretion in paragraph 35-55(1)(b) will be exercised for these Growers for the income years ended **30 June 2010 to 30 June 2012**. The discretion not to apply the loss deferral rule allows the Growers, other than Second Joint Venture Growers, to claim deductions relating to their participation in the Project in the year the losses are incurred. Exercise of the discretion in this case however is conditional on the Project being carried out in the manner described in paragraphs 31 to 82 of this Ruling.

Second Joint Venture Growers

29. The Commissioner's discretion under paragraph 35-55(1)(b) is not exercised for individuals who are Second Joint Venture Growers, and the loss deferral rule in section 35-10 applies. The deductions for individuals who are Second Joint Venture Growers that are set out in paragraph 24 of this Ruling are quarantined and, unless one of the tests in Division 35 is passed, the quarantined losses can only be offset against profits from the Project (or a like activity) in a future income year.

Prepayment provisions and anti-avoidance provisions

Sections 82KZME, 82KZMF and 82KL and Part IVA

30. For a Grower who commences participation in the Project and incurs expenditure as required by the Lease and Management Agreement, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 90 to 94 of this Ruling);
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Scheme

31. The scheme that is the subject of this Ruling is specified below. This scheme incorporates the following documents:

- Application for a Product Ruling received on 10 July 2009 and additional correspondence from the Applicant dated 31 August 2009 and 1 October 2009;
- additional correspondence between Rewards Projects Ltd and the Tax Office concerning the earlier Product Ruling PR 2009/37 Income tax: Rewards Group Premium Vineyard Project 2009 dated 13 February 2009, 9 April 2009, 14-17 April 2009, 22-24 April 2009, 30 April 2009, 6 May 2009, 12 May 2009 and 13 May 2009;
- Grape Sale and Purchase Agreement dated 3 July 2008 in respect of the Kemp Road property for the period 1 July 2007 to 30 June 2015;

- Grape Sale and Purchase Agreement dated 13 October 2008 in respect of the Stirling Road property for the period 1 July 2008 to 30 June 2015;
- Draft Compliance Plan, received on 1 October 2009;
- Draft Supplementary Product Disclosure Statement, received on 10 July 2009;
- Draft **Application Guide**, including Application Form, Direct Debit Request Service Agreement, and Loan Agreement, received on 10 July 2009;
- Draft Replacement Constitution, received 10 July 2009;
- Draft **Management Agreement**, received on 10 July 2009;
- Draft Operations Agreement, received on 10 July 2009;
- Draft **Sub-lease**, received on 10 July 2009;
- Product Disclosure Statement for the Rewards Group Premium Vineyard Project 2009, received 24 July 2009;
- Lease of Lot 11938 on Deposited Plan 161273 (Stirling Road Pemberton) for 20 years by Rewards Projects Ltd, received 31 August 2009; and
- Lease of Lot 500 on Deposited Plan 60842 (Kemp Road Pemberton) for 20 years by Rewards Projects Ltd, received 31 August 2009.

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

32. The documents highlighted are those that a Grower may enter into. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are a part of the scheme. The effect of these agreements is summarised as follows.

33. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of these agreements is summarised as follows.

Overview

34. The main features of the Rewards Group Premium Vineyard Project 2009 Late Growers are as follows:

Location	Pemberton, Western Australia
Type of business to be carried on by each Grower	Viticulture
Term of the Project	Approximately 20 years
Number of hectares offered for cultivation	146 hectares
Size of each Interest or Grove	0.25 hectares
Minimum allocation per Grower	One Grove
Minimum subscription	Not applicable
Initial cost	\$12,800 per Grove
Ongoing costs	Management Services (Fixed Component) Fee, Rent, Harvest and costs of sale, Management Services (Harvest Component) Fee

35. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Rewards Projects Limited has been issued with an Australian Financial Service Licence number 224000 and will be the Responsible Entity for the Project.

36. The Project will involve the cultivation of vineyards for the purpose of producing wine grapes for sale.

37. An offer to participate in the Project will be made through a Supplementary Product Disclosure Statement (SPDS). The vineyard activities carried out for the project described in this Product Ruling are an extension of the project described in PR 2009/37. The maximum size of the vineyard will be 146 hectares, with 91 hectares at a site on Stirling Road Pemberton and another 55 hectares on Kemp Road Pemberton. As 14.75 hectares (or 59 Groves) were sold under PR 2009/37, the offer under the SPDS is for the remaining 313.25 hectares, which corresponds to 525 Groves in the Project.

38. A Grower that participates in the Project will do so by acquiring an interest in the Project which will consist of a minimum of one Grove of 0.25 hectares in size.

39. Applicants execute a Power of Attorney contained in the SPDS. The Power of Attorney irrevocably appoints the Responsible Entity to enter into, on behalf of the Grower, a Management Agreement, Sub-lease, and any other documents required to hold an interest in the Project.

40. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Lease and the Management Agreement on or before 31 December 2009 will become Growers.

41. Under the terms of the SPDS, there is no minimum subscription requirement for the acceptance of Growers in the Project.

42. The Responsible Entity is currently leasing the Land for the Project at two sites near Pemberton in the south-west of Western Australia:

- the 91 hectare property located at Stirling Road contains the older fully established vines, and is identified as Lot 113938 on Deposited Plan 161273 being part of the land in Certificate of Title Volume 1849 Folio 197; and
- the 55 hectare property located at Kemp Road contains vines established in July 2008 (35 hectares) and July 2009 (20 hectares), and is identified as Lot 500 on Deposited Plan 60842 being part of the land in Certificate of Title Volume 2698 Folio 67.

43. Growers will sub-lease Groves from the Responsible Entity. Each 0.25 hectare Grove comprises 50% fully established vines from Stirling Road, 25% vines planted in July 2008 from Kemp Road and 25% vines planted in July 2009 from Kemp Road.

44. The Responsible Entity advises that irrigation systems have been installed at both properties and they are sufficient to irrigate the entire vineyards.

Replacement Constitution

45. The Replacement Constitution establishes the Project and operates as a deed binding all Growers and the Responsible Entity. The Replacement Constitution sets out the terms and conditions under which Rewards Projects Limited agrees to act as Responsible Entity and thereby manage the Project. Upon acceptance into the Project, Growers are bound by the Replacement Constitution by virtue of their participation in the Project.

46. In order to acquire an interest in the Project, the Grower must make an application for Groves pursuant to a current Offer Document such as the SPDS made by the Responsible Entity (clauses 1.1 and 3.2). There are no other application requirements specified in the Replacement Constitution, and the Responsible Entity can accept or refuse an application in whole or part without providing any reason (clause 3.1).

47. Under clause 8.2 of the Replacement Constitution, the Responsible Entity holds the Subscription Money on trust for applicants in a Subscription Fund.

48. According to clause 3.3, money may not be released from the Subscription Fund until:

- minimum subscription has been reached;
- a legal expert advises that the lessor can grant the sub-leases to the Growers and the Project land is not subject to any detrimental encumbrances;
- the Sub-lease and Management Agreement are in the proper form, any matters necessary for their creation have been attended to, and they have been entered into by all parties; and
- there are no outstanding material breaches of the Replacement Constitution.

49. Once the Responsible Entity has accepted the application, the applicant is deemed to have become a party to the Replacement Constitution, the Sub-lease, and the Management Agreement, and the applicant becomes a Grower in the Project on allotment of Groves (clause 3.4). The Responsible Entity will confirm to each Grower the acceptance of the application, the allotment of Groves, and the entry into the Sub-lease on the Grower's behalf (clause 3.5).

50. After acceptance, and after refund of any application moneys, the Subscription Fund becomes the Project Fund (clause 8.3), and the Subscription Money shall be treated as the Grower's Project Fees (clause 3.6).

51. In summary, the Replacement Constitution also sets out provisions relating to:

- powers and responsibilities of the Responsible Entity (clause 6);
- sale of a Grower's interest in the Project if a Grower default's in payment of Project Fees (clause 9.4);
- payment of monies from the Proceeds Fund (clause 11);
- complaints, alternative dispute resolution and legal proceedings (clause 12);
- commencement and termination of the Project (clause 14);
- Growers rights (clause 15);
- Destruction and insurance of Groves (clauses 18 and 19); and
- Joint Venturers (clause 20).

Compliance Plan

52. As required by the *Corporations Act 2001*, Rewards Projects Limited has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that the Responsible Entity manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

Head Lease

53. The Responsible Entity has entered into Head Leases with the Lessor(s) in respect of Land required for the Project. The Land is located in the Pemberton region of Western Australia, as detailed at paragraph 42 of this Ruling.

54. The Responsible Entity must use the Land only for the purpose of growing wine grapes for commercial sale.

55. Under the Head Leases, the Responsible Entity is able to Sub-lease the Land or any part of the Land to Growers in the Project for a term equivalent of the term of the Head Lease.

56. The Head Leases commence 10 June 2009 and end on the earlier of 9 June 2029 or the completion of the Final Harvest (items two and three of the Schedule).

Sub-lease

57. Each Grower will execute a Sub-lease with the Responsible Entity as the Sub-Lessor. The Responsible Entity will grant to the Grower the right to exclusively possess, occupy, use and enjoy the Groves for the conduct of the Grower's business of growing, harvesting and selling wine grapes for a commercial profit.

58. The Sub-lease commences on the date the Responsible Entity first accepts an application for this Project, and expires on the earlier of 8 June 2029, the termination of the Management Agreement, or such other agreed date to accommodate payment of proceeds from the Final Harvest (Item 3 of the Schedule).

59. Item 2 of the Schedule to the Sub-Lease states that the Commencement Date is 'The later of the dates on which the Responsible Entity first accepts Applications under an Offer Document and the Sub-Lessor enters into the Head Lease...'. The Responsible Entity has further advised that Rent for the year ended 30 June 2010 has been calculated on the basis that the Growers would enter the arrangement on or before 31 December 2009, and that the services would be provided in the period from 1 January 2010 to 30 June 2010.

60. The Sub-lease sets out the rights and obligations of the parties to the agreement. Under the terms of the Sub-lease, the Responsible Entity as Sub-Lessor is responsible for installation of suitable irrigation and trellising at the Kemp Road site at no cost to the Grower, and will allow water stored in dams at both sites to be used for irrigation of the Groves (clauses 5.3 and 5.4).

Management Agreement

61. Under the Management Agreement the Grower appoints the Responsible Entity to carry out the Initial Services and Ongoing Services on behalf of each Grower. The Initial Services to be carried out from the acceptance of a Growers application until 30 June 2010 are detailed at Annexure A of the Management Agreement and include:

- review the vines, irrigation systems and trellis systems on the new vineyard;
- negotiate sales agreements with wineries; and
- on the established vineyard, undertake Pruning and grafting, fertilising, weed control, and replanting of dead plants, etc.

62. Clause 4 and the Schedule to this agreement provide that, in respect of the Planting Services carried out during the Planting Period, the Planting Cost Reimbursement Amount is payable by the Grower to the Responsible Entity on acceptance of the Grower's application.

63. Ongoing Services will be carried out by the Responsible Entity from 1 July 2010 until 30 June 2029, and are detailed in Annexure B of the Management Agreement.

64. The Responsible Entity is irrevocably appointed to arrange each harvest at any time it deems appropriate (clause 6).

Operations Agreement

65. The Responsible Entity will enter into an Operations Agreement with Rewards Management Pty Ltd, whereby the latter is appointed as Manager to carry out, in accordance with sound agricultural and environmental practices adopted within the agricultural industry, the Responsible Entity's obligations under the Management Agreement.

66. Clause 4 and the Schedule to this agreement provide for the remuneration of the Manager. This includes the Planting Cost Reimbursement Amount that is payable to the Manager by the Responsible Entity on acceptance of a Grower's application.

Pooling of Crops and Grower's Entitlement to Net Proceeds

67. The Management Agreement at clause 6.3 requires the Responsible Entity to pool all Fruit from each harvest, and clause 7.3 requires that the pooled Fruit from each harvest be sold collectively.
68. Clause 6.1(u) of the Replacement Constitution requires the Responsible Entity to hold the Receipts (which includes the proceeds from sale of the Grower's Fruit and the proceeds from any insurance claims to which the Grower is entitled) in the Proceeds Fund.
69. Clause 11 of the Replacement Constitution provides that at the end of each Harvest Period, the Responsible Entity shall deal with the money in the Proceeds Fund by paying the Grower's Share of the costs of harvest and other amounts outstanding or owing under the Project, after which the balance of the Proceeds Fund will be distributed to each Grower according to their share of the Receipts.
70. The 'Rights to Receipts' of the Joint Venturer Growers are set out at clause 21.5 of the Replacement Constitution.
71. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:
- only Growers who have contributed Fruit or insurance proceeds are entitled to benefit from distributions of Harvest Proceeds from the pool; and
 - any pooled Fruit and or Receipts must consist only of Fruit or Receipts contributed by Growers of the same Project Class.

Fees

72. The initial subscription payable by a Grower is \$12,800 per Grove, consisting of:
- \$11,677.65 for Management Services (Fixed Component) Fees under Item 2 of the Schedule to the Management Agreement, for services to be provided from the Commencement Date to 30 June 2010;
 - \$595.73 for the Planting Cost Reimbursement Amount under Item 3 of the Schedule to the Management Agreement, for reimbursement of the Planting Services provided 15 June 2009 to 30 September 2009; and
 - \$526.62 for Rent under Item 2 of the Schedule to the Sub-lease, for the period from 31 December 2009 to 30 June 2010.

73. The fees payable per Grove from 1 July 2010 are:

- Management Services (Fixed Component) Fees under Item 2 of the Schedule to the Management Agreement of:
 - \$1,808.71 for services from 1 July 2010 to 30 June 2011, payable on or before 1 October 2010; and
 - \$1,891.86 for services to be provided from 1 July 2011 to 30 June 2012, payable on or before 1 October 2011; and
 - thereafter until the end of the Project, the fee is calculated with reference to the previous year's fee increased by the Index Factor, and payable on or before 1 October of the relevant year.
- Management Services (Harvest Component) Fee equal to 11% of the Grower's share of the net sale proceeds of each harvest after deducting the Harvest costs and the costs of sale (Item 4 of the Schedule to the Management Agreement);
- Harvest costs, being all costs incidental or otherwise for picking, packing and transport of Fruit from the Groves, payable out of the Receipts (clause 6.2 of the Management Agreement and clause 11.1 of the Replacement Constitution);
- the Grower's share of the costs of sale of any saleable Fruit derived from the Vineyards including royalties or sale commissions, payable out of the Receipts (clause 7.5 of the Management Agreement and clause 11.1 of the Replacement Constitution); and
- Rent (Item 4 of the Schedule to the Sub-lease) of
 - \$1,082.74 for the period 1 July 2010 to 30 June 2011, payable on or before 1 October 2010; and
 - \$1,113.06 for the period 1 July 2011 to 30 June 2012, payable on or before 1 October 2011; and
 - thereafter until the end of the Term, the fee is calculated with reference to the previous year's fee increased by the Index Factor, and payable on or before 1 October of the relevant year.

Joint Venturer Growers

74. Two entities can participate in the Project as Joint Venturers. The obligations, rights and interests of such applicants are set out at clause 21 of the Replacement Constitution. The First Joint Venture is required to pay the following amounts:

- the \$12,800 initial subscription fee; and
- 28% of each of the Management Services (Harvest Component) Fee, Harvest costs, costs of sale and any other amounts due to the Responsible Entity under the Replacement Constitution, Sub-Lease, or Management Agreement.

75. The Second Joint Venturer Grower is required to pay the following amounts:

- the Management Services (Fixed Component) Fee specified in the Management Agreement for all years after the year ended 30 June 2010;
- the rent payable under the Sub-lease for all years after the year ended 30 June 2010;
- 72% of each of the Management Services (Harvest Component) Fee, Harvest costs, costs of sale and any other amounts due to the Responsible Entity under the Replacement Constitution, Sub-Lease, or Management Agreement.

Finance

76. A Grower who does not pay the subscription monies in full upon application can borrow from QPR, or from an independent lender external to the Project.

77. Growers cannot rely on any part of this Ruling if the Application Amount is not paid in full on or before 31 December 2009 by the Grower or on the Grower's behalf by a lending institution.

78. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with QPR that materially differs from those set out in the documentation provided to the Tax Office with the application for this Product Ruling and summarised below. A Grower who enters into a finance arrangement with an independent lender external to the Project may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements that are not covered by this Product Ruling.

12 month interest free loan offered by QPR

79. Where the Responsible Entity accepts an application made on the Application Form for a 12 month interest free loan, the Grower must make 12 monthly loan repayments of \$1,066.67 per Grove, plus applicable stamp duty, Australian Securities and Investment Commission registration fees and a minimum \$250 Loan Application Fee. The full amount of the Loan Application Amount must be paid no later than 12 months from the date the Grower is accepted to participate in the Project.

80. The full terms of the 12 month interest free loan offered by QPR are included in the Loan Agreement section of the PDS. Subject to QPR accepting the Grower's loan application, the Grower will be bound by the terms and conditions of the Loan Agreement.

81. The Loan Agreement offered by QPR requires that:

- QPR will take security over the Grower's Groves;
- a loan Application Fee of 0.25% of the loan amount (subject to a minimum of \$250) is payable on the date of the first monthly instalment, being no later than 31 January 2010;
- the term of the loan is 12 months;
- the loan is interest free except that interest will be charged on overdue amounts at the Base Rate plus 4.5% interest per annum, calculated daily and accruing monthly; and
- monthly repayments commence no later than 31 January 2010 and are due in the manner indicated by the Application Form and Loan Agreement.

Other qualifications relating to finance

82. This Ruling does not apply if the finance arrangement entered into by the Grower includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;
- the loan or rate of interest is non-arm's length;

- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than QPR, are involved or become involved in the provision of finance to Growers for the Project.

Commissioner of Taxation28 October 2009

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Is the Grower carrying on a business?

83. For the amounts set out in paragraphs 22 to 26 of this Ruling to constitute allowable deductions the Grower's viticulture activities as a participant in the Rewards Group Premium Vineyard Project 2009 Late Growers must amount to the carrying on of a business of primary production.

84. The general indicators used by the Courts in determining whether an entity is carrying on a business are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

85. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Ruling, the Full Federal Court in *Hance v. FC of T*; *Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 applied these principles to conclude that 'Growers' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

86. Application of these principles to the arrangement set out above leads to the conclusion that Growers (as described in paragraphs 3 and 4 of this Ruling), who stay in the Project until its completion, will be carrying on a business of primary production involving growing and harvesting grapes for sale.

Deductibility of the Management Services (Fixed Component) Fees, Rent, Management Services (Harvest Component) Fees, credit card merchant fees, Harvest costs, costs of sale, and interest on loans with QPR

Section 8-1

87. The Management Services (Fixed Component) Fees, Rent, Management Services (Harvest Component) Fees, credit card merchant fees, Harvest costs, costs of sale, and any interest from the 12 month loans with QPR are deductible under section 8-1. A 'non-income producing' purpose is not identifiable in the arrangement and there is no capital component evident.

88. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Provided that the prepayment provisions do not apply (see paragraphs 90 to 94 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7).

89. Other than where the prepayment provisions apply, a Grower can claim a deduction for such interest in the year in which it is incurred.

Prepayment provisions

Sections 82KZL to 82KZMF

90. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (for example, the performance of management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

91. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 (operative provisions).

Application of the prepayment provisions to this Project

92. Under the scheme to which this Product Ruling applies Management Fees, Rent and other fees are incurred annually and the interest payable to QPR is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

93. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project chooses to prepay all or some of the expenditure payable under the Management Agreement and/or the Sub-lease, or prepays interest under a loan agreement (including loan agreements with lenders other than QPR). Where such a prepayment is made these prepayment provisions will also apply to 'small business entities' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

94. As noted in the Ruling section above, Growers who prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

Borrowing costs

Section 25-25

95. A deduction is allowable for expenditure incurred by an Investor in borrowing money to the extent that the borrowed money is used for the purpose of producing assessable income (subsection 25-25(1)).

96. In this Project the Loan Application Fee payable to QPR Capital Finance Pty Ltd and any related stamp duty on the loan agreement is incurred to borrow money that is used or is to be used solely for income producing purposes during each income year over the term of the loan.

97. As the borrowing expense is greater than \$100, the deduction for the borrowing expense is spread over the period of the loan or 5 years, whichever is the shorter (subsection 25-25(4)).

Expenditure of a capital nature

Division 40

98. Any part of the expenditure of a Grower that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, expenditure attributable to the establishment of the grapevines is of a capital nature. This expenditure falls for consideration under Division 40.

Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion

99. In deciding to exercise the discretion in paragraph 35-55(1)(b), for individual Growers, other than Second Joint Venture Growers, on a conditional basis for the income years **30 June 2010 to 30 June 2012**, based on the evidence supplied, the Commissioner has determined that for those income years:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the viticulture industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

100. A Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

101. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) for Growers who will stay in the Project until its completion is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Second Joint Venture Growers

102. For Second Joint Venture Growers there is no objective expectation that within a period that is commercially viable for the viticulture industry, that their business activity will satisfy one of the four tests set out in Division 35, and it is not because of the nature of the business activity that one of the four tests will not be satisfied.

103. The Commissioner will not exercise the discretion in paragraph 35-55(1)(b) for Second Venture Growers, and accordingly they are required to defer losses from participation in the Project under subsection 35-10(2). The losses from the Project can be applied to the extent of any future profits from the business activity, or are deferred until one of the four tests is passed (sections 35-30, 35-35, 35-40 or 35-45), the discretion is exercised, or the exception applies (subsection 35-10(4)).

104. The exception under subsection 35-10(4), to the general rule in subsection 35-10(2), applies where the loss is from a primary production business activity (such as is the case with the Project) and the individual taxpayer has other assessable income for the income year from sources not related to that activity, of less than \$40,000 (excluding any net capital gain).

Section 82KL – recouped expenditure

105. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefits(s)'. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL of the ITAA 1936. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA – general tax avoidance provisions

106. For Part IVA of the ITAA 1936 to apply there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

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107. The Rewards Group Premium Vineyard Project 2009 Late Growers will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 22 to 26 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

108. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the grapes. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/7; TR 97/11; TR 98/22;
PR 2009/37

Subject references:

- carrying on a business
- management fee expenses
- non-commercial losses
- primary production
- producing assessable income
- product rulings
- public rulings
- scheme

Legislative references:

- ITAA 1936
- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1936 318

- ITAA 1997
 - ITAA 1997 6-5
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 - ITAA 1997 17-5
 - ITAA 1997 25-25
 - ITAA 1997 25-25(1)
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 - ITAA 1997 Div 35
 - ITAA 1997 35-10
 - ITAA 1997 35-10(2)
 - ITAA 1997 35-10(4)
 - ITAA 1997 35-30
 - ITAA 1997 35-35
 - ITAA 1997 35-40
 - ITAA 1997 35-45
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 - ITAA 1997 35-55(1)(b)
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 - ITAA 1997 40-515(1)(b)
 - ITAA 1997 40-520(2)
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 - TAA 1953
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 - Corporations Act 2001
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- Case references:*
- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085

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