

PR 2000/72 - Income tax: Black George Warren River Project No.1

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Product Ruling

Income tax: Black George Warren River Project No.1

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Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product as an investment. Further, we give 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 investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

Terms of Use of this Product Ruling

This Product Ruling has been given on the basis that the person(s) who applied for the 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 Ruling.

Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Black George Warren River Project No.1, or just simply as 'the Project'.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
- section 8-1 (ITAA 1997);
- section 27-5 (ITAA 1997);
- section 42-15 (ITAA 1997);
- section 42-125 (ITAA 1997);
- section 387-55 (ITAA 1997);
- section 387-125 (ITAA 1997);
- section 387-165 (ITAA 1997);
- section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- section 82KZM and 82KZMB - 82KZMD (ITAA 1936); and
- Part IVA (ITAA 1936).

3. The Government is currently evaluating further changes to the tax system in response to the *Ralph Review of Business Taxation* and continuing tax reform is expected to be implemented over a number of years. Although this Ruling deals with the laws enacted at the time it was issued, future tax changes may effect the operation of those laws and, in particular, the tax deductions that are allowable. Where tax laws change, those changes will take precedence over the application of this Ruling, and to that extent, this Ruling will be superseded.

4. Taxpayers who are considering investing in the Project 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

5. Product Rulings were introduced for the purpose of providing certainty about tax consequences for investors in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that potential investors are fully informed of any changes in tax laws that take place after the Ruling is issued. Such action should minimise suggestions that potential investors have been negligently or otherwise misled.

Class of persons

6. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant agreements until their term expires) and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Wine Producers'.

7. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

Qualifications

8. The Commissioner rules on the precise arrangement identified in this Ruling. If the arrangements described in the Ruling are materially different from the arrangements that are actually carried out:

- the Ruling has no binding effect on the Commissioner, as the arrangements entered into are not the arrangements ruled upon; and
- the Ruling will be withdrawn or modified.

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Date of effect

10. This Ruling applies prospectively from 14 June 2000 the date the Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

11. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, the Product Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

12. This Product Ruling is withdrawn and ceases to have effect after 30 June 2003. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

13. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- Application for Product Ruling dated 14 March 2000;
- Prospectus for Black George Warren River Project No.1 undated;
- **Draft Constitution for the Black George Warren River Project No.1 between Primary Securities Ltd (the 'Responsible Entity'), Primary Securities Ltd ('the Bare Trustee') and the Wine Producer, undated;**
- **Draft Management Agreement between Black George Management Pty Ltd (the Manager), Primary Securities Ltd (the 'Responsible Entity'),**

Primary Securities Ltd ('the Bare Trustee') and the Wine Producer, dated 13 April 2000;

- **Draft Vinelot Lease Agreement between Warren River Property Ltd (the 'Developer'), Primary Securities Ltd (the 'Responsible Entity'), and the Wine Producer, dated 6 April 2000;**
- Draft Head Lease between R.J. Dawson, S.A. Dawson, R.S. Morris & C.A. Morris and Warren River Property Ltd (the 'Developer'), dated 28 February 2000;
- Option to Purchase Land between R.J. Dawson, S.A. Dawson, R.S. Morris & C.A. Morris and Warren River Property Ltd;
- **Draft Licence Agreement between Black George Management Pty Ltd (the 'Manager'), Primary Securities Ltd (the 'Responsible Entity'), Primary Securities Ltd (the 'Bare Trustee'), Warren River Holdings Pty Ltd ('the Licensor') and the Wine Producer, dated 6 April 2000;**
- Draft Agreement for Sale of Name and Marks between Warren River Property Ltd (the 'Developer') and Warren River Holdings Pty Ltd;
- Wine Production Agreement between Black George Management Pty Ltd (the 'Manager') and Black George Wines Ltd;
- Draft Project Supervision Agreement between Brand & Associates Pty Ltd and Black George Management Pty Ltd ('the Manager') dated 6 April 2000;
- Draft Vineyard Management Agreement between Roland John Dawson and Rodney Scott Morris ('the Vineyard Manager') and Black George Management Pty Ltd ('the Manager') dated 6 April 2000;
- Draft Wine Marketing Agreement between Global Wines (Australia) Pty Ltd and Black George Management Pty Ltd dated 6 April 2000;
- Compliance Plan for the Black George Warren River Project No.1, undated; and
- Additional correspondence received from the applicant dated 7 April 2000, 28 April 2000, 11 May 2000, 16 May 2000, 24 May 2000, 30 May 2000, 31 May 2000 and 2 June 2000.

Note: certain information received from Black George Management Pty Ltd has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

14. The documents highlighted are those the Wine Producers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Wine Producer, or any associate of the Wine Producer, will be a party to, with the exception of finance agreements to which paragraphs 40 and 41 apply. The effect of these agreements is summarised as follows.

Overview

15. This arrangement is called the Black George Warren River Project No.1.

Location	Pemberton in the South West Region of Western Australia.
Type of business each participant is carrying on	A commercial viticulture and wine production business.
Number of hectares under cultivation	35 hectares
Name used to describe the Project.	Black George Warren River Project No.1
Size of each Vinelot	0.035 hectares
Number of vines per hectare	1,666
Average yield of Grapes	10 tonnes per hectare
Expected wine production	72.2 cases per tonne of grapes crushed
The term of the investment in years	Approximately 25 years
Initial cost	\$7,781
Initial cost per hectare	\$222,314
Ongoing costs	Annual Management Fees and Rent

16. Wine Producers applying under the Prospectus enter into a Management Agreement and a Vinelot Lease Agreement. Under the Vinelot Lease Agreement Wine Producers lease an identifiable area of land called a 'Vinelot' from Warren River Property Ltd until the

Project is terminated on 29 June 2025. Each Vinelot is 0.035 hectares in size. Wine Producers are also required to subscribe for shares in Warren River Property Ltd.

17. The Project is situated on two parcels of land in the South West Region of Western Australia, approximately 10kms south of Pemberton, known as 'Dawson Land' and 'Warren Land'. Warren River Property Ltd has been granted a Head Lease and an option for purchase over the Dawson Land and the Warren Land.

18. Warren River Property Ltd will lease the Vinelot to the Wine Producer for the purpose of Cultivating Vines and Harvesting Grapes.

19. The Draft Prospectus states that there is a minimum subscription and no applications will be accepted unless there are applications for at least 350 Vinelots. Each investor may subscribe for a minimum of one Vinelot and 2,265 shares at \$1 each. The Manager will plant approximately 58 vines per Vinelot (1,666 per hectare) during the period up to 30 June 2001 following the execution of the Management Agreement and Vinelot Lease (cl 3.2 of Constitution).

20. Possible projected returns for Wine Producers are outlined in the Prospectus. The projected returns are subject to the inherent risks of primary production and the commercial risks of a long term venture. Black George Management Pty Ltd has outlined these risks in the Prospectus. Based on the example set out on pages 30 - 37 of the Prospectus, a Wine Producer could expect to achieve an internal rate of return of 12.0% per Vinelot on the Wine Production business and 11.9% per Vinelot including the final value of the shares.

21. The Viticultural Consultant has reported at pages 45 - 48 of the Draft Prospectus that with appropriate establishment procedures and sound management, this project can achieve its aims and objectives as outlined in the Prospectus.

Constitution

22. The Constitution for the project sets out the terms and conditions under which the Responsible Entity agrees to act for the Wine Producers and to manage the Project. The Responsible Entity will keep a register of Wine Producers. A Wine Producer is entitled to assign their Wine Producer's Interest in certain circumstances.

23. The Management Agreement will be executed on behalf of a Wine Producer following them signing the Application in the Prospectus. Wine Producers are bound by the Constitution, the Vinelot Lease, Management Agreement and Licence Agreement by virtue of their participation in the Project.

24. The Subscription Monies will be held in the Trust Account by the Bare Trustee formed under the Project's Constitution (cl 6.1(a)).

Compliance Plan

25. The Responsible Entity has prepared a Compliance Plan in accordance with the Corporations Law. Its purpose is to ensure that the Responsible Entity meets its obligations as the Responsible Entity of the Project and that the rights of the Wine Producers are protected.

Interest in Land

26. A lease is granted by the Developer, Warren River Property Ltd, to the Wine Producers under the terms of the Vinelot Lease (cl.2.1). Wine Producers are granted an interest in land in the form of a lease to use their Vinelots for the purpose of cultivating vines and harvesting grapes for commercial grape production (Recital E). Wine Producers must pay rent to the Developer of an amount specified in Part 5 the Schedule to the Vinelot Lease. Rent is payable in advance. An amount of \$52.50 per Vinelot is payable for the first year ending on 30 June 2001 and is paid proportion to the number of months remaining in the first year from the commencement date. The amounts payable for the years commencing 1 July 2001 and 1 July 2002 are \$52.50 and \$54 respectively. Rent will be reviewed and indexed annually commencing on 30 June 2005. The term of a Wine Producer's lease is from the Commencement Date until 29 June 2025.

Management Agreement

27. Each Wine Producer enters into a Management Agreement with the Manager. The termination of the project is the date on which all wine has been sold, proceeds from the sale of wine have been paid, and all accounts and reports have been given in relation thereto (cl.3). Wine Producers contract with the Manager to plant, manage, maintain and harvest grapes from the vines and to produce, package, market and sell wine from the grapes. Wine Producers pay a Management Fee of \$6,861.05 in Year One, \$2,465.50 in Year Two, \$2,595 in Year Three and an amount annually thereafter which is the Wine Producer's proportion of the Manager's actual costs for performing the services under this agreement.

28. The Manager will carry out the following services under this agreement:

- prepare and cultivate the Vinelots in a proper and skilful manner pursuant to the Management Plan;
- take any necessary steps to prevent or combat land degradation in relation to the Vinelots;

- purchase and plant rootlings and vines in a healthy condition;
- tend to the rootlings and vines according to the principles of good husbandry, including applying fertiliser;
- maintain existing fences to prevent soil degradation and protect the placement of vines;
- keep the Vinelots in good and substantial repair and condition and conduct activities on them in a commercial manner in keeping with accepted viticulture industry standards;
- repair damage to roads and fences on the Vinelots resulting from the performance of the Manager; and
- do such things as may reasonably be required to eradicate, exterminate and keep the Vinelots and the land free from disease, vermin, noxious weeds, rabbits, insect pests and all other pests.

29. The Manager will harvest (cl 7) each season (except for the initial growing seasons) as and when deemed appropriate in keeping with sound viticultural practice, to produce the best results for the Wine Producer. The Manager will be responsible for paying for the cost of annual insurance on the Vinelots (cl. 12).

Fees

30. The total fee payable in the first year under the Management Agreement for the Project is \$7,728.50 per Vinelot. This fee includes the Management Fee which is payable in two instalments. The first instalment of \$3,080.05 is payable on or before 31 July 2000 or 30 days from the Commencement Date whichever is the later and the second instalment of \$3,781 is payable on or before 30 September 2000 or 30 days from the Commencement Date whichever is the later. The balance of the fee is made up of fees for rootlings expenses of \$204.20, irrigation costs of \$262.50, landcare expenses of \$139.20 and trellising expenses of \$261.55 which are all payable on or before 31 July 2000 or 30 days from the Commencement Date whichever is the later (schedule to the Management Agreement). These services will be provided in the period from the Commencement Date to 30 June 2001.

31. A Management Fee of \$2,465.50 is payable for services to be carried out in the period commencing 1 July 2001 until 30 June 2002 which is payable in the following instalments. \$1,192.50 is payable on 1 July 2001 and \$1,273 is payable by quarterly instalments of

\$318.25 each at the beginning of each quarter commencing 1 July 2001.

32. A Management Fee of \$2,595 is payable for services to be carried out in the period commencing 1 July 2002 until 30 June 2003 which is payable in the following instalments. \$887 is payable on 1 July 2002 and \$1,708 is payable by quarterly instalments of \$427 each at the beginning of each quarter commencing 1 July 2002.

33. For the years from 1 July 2003 to 30 June 2025, Management Fees are payable by the Wine Producer each year for the Wine Producer's proportion of the actual cost to the Manager of performing the services under the Management Agreement for the relevant financial year.

34. Rent is payable by the Wine Producer under the Vinelot Lease Agreement. Rent for the first year shall be \$52.50 if the lease commencement date is on or before 30 June 2000 or a proportion of that amount determined by the number of whole months remaining in the first year.

35. Rent of \$52.50 is payable on 1 July 2001 for the year 1 July 2001 to 30 June 2002.

36. Rent of \$54 is payable on 1 July 2002 for the year 1 July 2002 to 30 June 2003.

Note: A 10% Goods and Services Tax (GST) component will apply in respect of all services provided from 1 July 2000. The above amounts do not include this component.

Planting

37. During the first year to 30 June 2001 the Manager will be responsible for planting rootlings and vines on the leased area. After planting the Manager will tend to the rootlings and vines according to the principles of good husbandry. The services to be provided by the Manager over the term of the project are outlined in the Management Agreement (cl 5).

Wine Production

38. The Manager will be responsible for the harvesting of the grapes, and/or purchase of the grapes and delivery of the grapes to the winery and for production of wine from those grapes and storage of the wine. The harvest will take place each season (except for the initial growing seasons) as and when deemed appropriate by the Manager in keeping with sound viticultural practice to produce the best results for the Wine Producer.

39. The receipts from the sale of wine will be paid into the Trust Account held by the Bare Trustee in the name of the Custodian. Receipts received by the Bare Trustee are to be distributed in the following order of priority:

- to the Responsible Entity for any outstanding fees and expenses payable by the Wine Producer to the Responsible Entity under the Constitution;
- to the Manager for any outstanding fees, costs or interest owing by the Wine Producer to the Manager under the Management Agreement;
- to the Developer for any outstanding rent or other fees, costs, interest or expenses owing by the Wine Producer to the Owner under the Lease; and then
- to the Wine Producer provided that if the aggregate sum to be distributed to all of the Wine Producers is less than \$1,000, then, at the discretion of the Responsible Entity, distribution to Wine Producers may be postponed. (cl 12 of Constitution).

Finance

40. All Wine Producers are required to fund their investment in the Project themselves or borrow from an independent lender.

41. This Ruling does not apply if a Wine Producer enters into a finance agreement that includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- entities associated with the Project are involved in the provision of finance for the Project;
- 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 or the funding arrangements transform the Project into a 'scheme' to which Part IVA 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; or

- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

Ruling

Goods and Services Tax

42. For a Wine Producer who invests in the Project, sections 27-5 or 27-30 of the ITAA 1997 will apply to reduce the amount of any deductions allowable by any GST input tax credit to which the Wine Producer is entitled or, in the case of section 27-5, a decreasing adjustment that a Wine Producer has.

Section 8-1

43. For a Wine Producer who invests in the Project by 30 June 2001, the following deductions will be available for the years ended 30 June 2001 to 30 June 2003:

Deductions available each year

Fee Type	ITAA 1997 Section	Year 1 30/6/2001	Year 2 30/6/2002	Year 3 30/6/2003
Management Fee	8-1	\$6,509.85 see note (i) below	\$2,465.50	\$2,595
Lease Fee	8-1	\$52.50	\$52.50	\$54
Rootlings and Planting	387-165	Nil see note (ii) below	Nil	Nil
Irrigation	387-125	\$87 see note (iii) below	\$87	\$87
Landcare	387-55	\$139	Nil	Nil

(Note: All figures shown are exclusive of GST)

Notes:

- A deduction under section 8-1 is allowable to the extent that the fee is incurred in producing assessable income

and is not capital in nature. An amount of \$210 per Vinelot has been identified as capital expenditure in respect of buildings and \$141.20 in respect of pre-planting and planting costs.

- (ii) A deduction under section 387-165 for expenditure on acquiring and planting the vines is calculated on the basis of the grapevines, as horticultural plants, entering their first commercial season in the year ended 30 June 2004 and a Wine Producer determining, under section 387-175, that they have an 'effective life' for the purposes of section 387-185 of greater than 13 but less than 30 years. This results in a write-off rate of 13%. The relevant expenditure has been identified as \$204.20 for the cost of rootlings and \$141.20 for planting costs.
- (iii) A deduction under section 387-125 for capital expenditure for the irrigation system is calculated on the basis of one third of the capital expenditure in the year in which the expenditure is incurred, and one third in each of the next 2 years of income.

44. For a Wine Producer who is a **'small business taxpayer'** and invests in the Project by 30 June 2001, the following additional deductions will be available for the years ended 30 June 2001 to 30 June 2003:

Fee Type	ITAA 1997 Section	Year 1 30/6/2001	Year 2 30/6/2002	Year 3 30/6/2003
Trellising	42-15	see note (iv) below	\$34	\$34

- (iv) For Wine Producers who are 'small business taxpayers' and who comply with the conditions in section 42-345, the deduction for depreciation of trellising is determined using the rates in section 42-125 and the formula in either subsection 42-160(1), 'diminishing value method', or subsection 42-165(1), 'prime cost method'. For the year ended 30 June 2001, the deduction allowed will depend on the number of 'days owned', being the number of days in the income year in which the Wine Producer owned an interest in the trellising. The Manager is to advise Wine Producers of this for the year ended 30 June 2001. The deductions available for succeeding years have been calculated using the prime cost method at a rate of 13%, assuming that is the method that the Wine Producer has chosen

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under section 42-25. If the Wine Producer elects to use the diminishing value method the rate for calculating the deduction will be 20%.

45. For a Wine Producer who invests in the Project before 30 June 2001 who is **not a 'small business taxpayer'** and is carrying on a business, the deductions available in respect of capital expenditure are shown in the Table below:

Expenses	ITAA 1997 Section	Year 1	Year 2	Year 3
		30/6/2001	30/6/2002	30/6/2003
Trellising	42-15	See note (v) below	\$10	\$10

(Note: All figures shown are exclusive of GST)

Notes:

- (v) For Wine Producers who are not 'small business taxpayers' the deduction for depreciation of trellising is determined using the formula in either subsection 42-160(3), 'Diminishing value method', or subsection 42-165(2A), 'Prime cost method'. Those formulae use 'effective life' to determine the deduction for depreciation. For the year ended 30 June 2001, the deduction allowed will depend on the number of 'days owned', being the number of days in the income year in which the Wine Producer owned an interest in the trellising. The Manager is to advise Wine Producers of this for the year ended 30 June 2001. The deduction for each year has been calculated using the prime cost method on the assumption that the effective life of the trellising is 25 years – (that is, the length in years of the project).

Sections 82KZM, 82KZMB, 82KL and Part IVA

46. For a Wine Producer who invests in the Project the following provisions of the ITAA 1936 have applications as indicated:

- (i) the expenditure by Wine Producers does not fall within the scope of section 82KZM;
- (ii) the expenditure by Wine Producers does not fall within the scope of sections 82KZMB-82KZMD;
- (iii) section 82KL does not apply to deny the deductions otherwise allowable; and

- (iv) 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.

Section 6-5 ITAA 1997: assessable income

47. Gross sale proceeds derived from the sale of wine from the project will be assessable income of the Wine Producers under section 6-5 of ITAA 1997.

48. Once harvested, a Wine Producer's grapes will be trading stock of the Wine Producer, as will any bottled wine. As a consequence, if grapes or grape juice or bottled wine are on hand at the end of the income year, the Wine Producer will need to account for that trading stock in accordance with the trading stock provisions in Part 2-25 of ITAA 1997.

49. Each Wine Producer will be notified by Black George Management Pty Ltd of the respective amounts to be brought to account in proportion to their total holding in the Project, in accordance with Part 2-25 and Taxation Ruling IT 2001.

Proposed new laws

Losses from non-commercial business activities

50. Provisions introduced into Parliament, but not yet enacted, will mean that in some circumstances, losses arising from a business activity will not be allowed as deductions in the year that they arise. These provisions will only apply from 1 July 2000 to individual taxpayers (including individual taxpayers in general law partnerships) carrying on a business activity. They will not apply however, to an individual with a loss from a primary production business activity where their non primary production assessable income for the income year (excluding any net capital gain) is less than \$40,000 (proposed subsection 35-10(4)).

51. Under proposed subsection 35-10(2), where an individual taxpayer's business activity does not meet one of the objective tests set out in proposed sections 35-30, 35-35, 35-40 and 35-45 then, unless the Commissioner exercises the discretion in proposed section 35-55, a loss arising in an income year from the taxpayer's business activity cannot be claimed as a deduction in that year. A loss, in this context, refers generally to the excess of a taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

52. The Project's agreements, its Prospectus, and its cash flow projections, show that Wine Producers are expected to incur losses relating to interests in the Project during the Project's early years and, that none of the objective tests are expected to be met in those years. However, provided that a Wine Producer's business activity under the Project is carried on during the income years specified below in the manner described in the Arrangement, the Commissioner will exercise his discretion under proposed paragraph 35-55(1)(b). The discretion will be exercised for each of the income years commencing 1 July 2000 and ending 30 June 2003.

53. In accordance with the decision to exercise the discretion during this period, and subject only to the above condition relating to the Arrangement (discussed below at paragraphs 100 and 101), Wine Producers can deduct losses arising from interests they hold in the Project in the years that such losses arise.

Explanations

Sections 27-5 and 27-30 ITAA 1997 - Goods and Services Tax

54. Section 27-30 of the ITAA 1997 operates to deny a deduction that would be otherwise available under section 8-1 for the year ended 30 June 2000 to the extent that the loss or outgoing (incurred after 30 November 1999 and before 1 July 2000) includes an amount relating to an input tax credit to which a Wine Producer will be entitled after 1 July 2000.

55. Section 27-5 of the ITAA 1997 operates to deny a deduction, that would be otherwise available under section 8-1, to the extent that the loss or outgoing incurred (on or after 1 July 2000) includes an amount relating to an input tax credit to which a Wine Producer is entitled or a decreasing adjustment that a Wine Producer has.

Subdivision 960-Q ITAA 1997 - Small business taxpayers

56. In this product ruling the term 'small business taxpayer' is relevant for the purposes of the depreciation of trellising.

57. Whether a Wine Producer is a 'small business taxpayer' depends upon the individual circumstances of each Wine Producer and is beyond the scope of this product ruling. It is the individual responsibility of each Wine Producer to determine whether or not they are within the definition of a 'small business taxpayer'.

58. A 'small business taxpayer' is defined in section 960-335 of the ITAA 1997 as a taxpayer who is carrying on a business and either

their 'average turnover' for the year is less than \$1,000,000 or their turnover recalculated under section 960-350 is less than \$1,000,000.

59. 'Average turnover' is determined under section 960-340 by reference to the average of the taxpayer's 'group turnover'. The group turnover is the sum of the 'value of business supplies' made by the taxpayer and entities connected with the taxpayer during the year (section 960-345).

Section 8-1 ITAA 1997

60. It is appropriate, as a starting point, to consider whether the lease and management fees are deductible under paragraph 8-1(1)(a). This consideration proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoing is not deductible under paragraph 8-1(1)(b) if it is incurred when the business has not commenced; and
- where a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced and, hence, whether paragraph 8-1(1)(b) applies. However, that does not preclude the application of paragraph 8-1(1)(a) in determining whether the outgoing in question would have a sufficient connection with activities to produce assessable income of the taxpayer.

61. A vineyard and wine production project can constitute the carrying on of a business. Where there is a business, or a future business, the gross sale proceeds from wine from the scheme will constitute gross assessable income under section 6-5 of the ITAA 1997. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income. These operations will be the planting, tending, maintaining and harvesting the vines and the production and marketing of the wine.

62. Generally, a Wine Producer will be carrying on a vineyard and wine production business where:

- the Wine Producer has an identifiable interest in specific grape vines coupled with a right to harvest and sell the grapes produced;

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- the vineyard activities are carried out on the Wine Producer's behalf; and
- the weight and influence of the general indicators of a business, as used by the Courts, point to the carrying on of a business.

63. Under the Vinelot Lease, Wine Producers have rights in the form of a lease over an identifiable area of land consistent with the intention to carry on a business of a commercial vineyard. Under the Management Agreement, Wine Producers appoint Black George Management Pty Ltd, as Manager, to carry out viticulture farming in accordance with the agreement. The agreements give Wine Producers full right, title and interest in the grapes produced and the right to have the wine sold for their benefit.

64. Under the Management Agreement, Wine Producers appoint the Manager to provide services such as purchasing and planting rootlings and vines in a healthy condition on the Vinelots, installing trellising and irrigation, and tending to the rootlings and vines according to the principles of good husbandry. The Manager is also responsible for harvesting and purchasing grapes, arranging for the grapes to be processed into wine and marketing the wine. The specific cost of these services provided in the first year is \$7,728.50.

65. The Lease gives Wine Producers an identifiable interest in specific vines and a legal interest in the land by virtue of a lease. Wine Producers elect to use the Manager, Black George Management Pty Ltd, to market the produce for them.

66. Wine Producers have the right to use the land in question for the cultivation of vines and harvesting of grapes and to have the Manager enter the land to carry out its obligations under the Management Agreement. The Wine Producers' degree of control over the Manager, as evidenced by the Agreement and supplemented by the Corporations Law, is sufficient. Under the Project, Wine Producers are entitled to receive regular progress reports on the Manager's activities. Wine Producers are able to terminate arrangements with the Manager in certain instances, such as cases of neglect, failure to satisfy any substantial duty or the Manager going into liquidation. The activities described in the Management Agreement are carried out on the Wine Producers' behalf.

67. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Wine Producers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections in the Prospectus that suggest the Project should return a 'before-tax' profit to the Wine Producers, i.e., a 'profit' in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

68. Wine Producers will engage the professional services of a Manager with appropriate credentials. The services are based on accepted viticulture practices and are of the type ordinarily found in viticulture activities. In addition, the Manager will provide winemaking and marketing services.

69. Wine Producers have a continuing interest in the vines from the time they are acquired until they reach the end of the most productive period of their life. There is a means to identify which vines Wine Producers have an interest in. The vineyard and wine production activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. The Wine Producers' vineyard and wine production activities will constitute the carrying on of a business. In addition, the Wine Producers have an interest in the wine produced.

70. The management fees and lease fees associated with the vineyard activities will relate to the gaining of income from this business and, hence, have a sufficient connection to the operations by which this income (from the sale of wine) is to be gained from the business. They will, thus, be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The tests of deductibility under paragraph 8-1(1)(a) are met. The amount deductible under section 8-1 is \$6,509.85 after removing the capital component identified in the fee.

Expenditure of a capital nature

71. Any part of the expenditure of a Wine Producer entering into a horticultural business 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, the costs of irrigation, trellising, rootlings and planting, landcare operations and buildings are considered to be capital in nature. The fees for these expenditures are not deductible under section 8-1. However, expenditure of this nature can fall for consideration under specific capital write-off provisions of the ITAA 1997.

Section 42-15 ITAA 1997: trellising expenditure

72. Wine Producers accepted into the Project incur expenditure on trellising upon which the vines are attached and are to be used on their behalf in the operation of the vineyard business. The trellising is attached to the land as a fixture. This expenditure is of a capital nature.

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73. Under section 42-15, a taxpayer can deduct an amount for depreciation of a unit of plant used for the purpose or purposes of producing assessable income where they are the owner or quasi-owner of that plant. However, where an item is affixed to land so that it becomes a fixture, at common law it becomes part of the land and is legally, absolutely owned by the owner of the land.

74. It is, however, accepted in certain circumstances that a lessee is entitled to claim depreciation where they are considered to be the owner of those improvements. Income Tax Ruling IT 175 sets out the Australian Taxation Office's (ATO's) views on this issue. Where a lessee is considered to own the improvements under a state law, as detailed in the Ruling, or where they have a right to remove the fixture or are entitled to receive compensation for the value of the fixture, the ATO accepts the lessee is entitled to claim depreciation for the fixture.

75. Under section 42-15 Wine Producers are entitled to depreciation deductions for expenditure of \$261, relating to the acquisition and installation of trellises on the land. The deduction available, however, will depend on when the plant is installed ready for use and whether or not a Wine Producer is a 'small business taxpayer' as defined in section 960-335 and, if so, whether the Wine Producer complies with the conditions contained in section 42-345.

76. The depreciation deduction available to a Wine Producer who is a 'small business taxpayer' and who complies with the conditions contained in section 42-345 is calculated using the cost of the trellising and a rate of 13% prime cost or 20% diminishing value. These accelerated rates of depreciation are shown in section 42-125 and apply to plant with an effective life of between 13 and 30 years.

77. Wine Producers who are not 'small business taxpayers' will have entered the Project after 11:45am, AEST, 21 September 1999, and will not be able to claim accelerated depreciation on plant used in the Project because of section 42-118. The deduction for such Wine Producers is calculated using the cost of the trellising and its effective life only. Subdivision 42-C provides the choice of methods available for determining the effective life of plant.

78. A Wine Producer accepted into the Project enters into a lease for a right to occupy certain land upon which they are entitled to grow grapes to conduct a viticulture business. Subject to the terms and conditions of the Lease, they have a right to remove all grapes or other vegetation not harvested, plant, equipment, implements and any other items they may have brought onto the Vinelot.

79. The Manager will advise Wine Producers of the date the trellising is installed and begins to be used for the purpose of producing assessable income. Therefore, the cost that relates to the acquisition and installation of trellises on the land will be eligible for depreciation deduction by the Wine Producers, who are small business

taxpayers, under section 42-125, at a rate of 13% prime cost or 20% diminishing value from this date. Wine Producers, who are not small business taxpayers, will be eligible for a depreciation deduction under subsections 42-160(3) or 42-165(2A), at a rate of 4% prime cost or 6% diminishing value from this date.

Subdivision 387-B ITAA 1997: irrigation expenditure

80. Subdivision 387-B allows a taxpayer, who is carrying on a business of primary production on land in Australia, to claim a deduction for capital expenditure on conserving or conveying water. The deduction is allowed over a three year period and applies to plant or a structural improvement primarily or principally used for the purpose of conserving or conveying water for use in a primary production business. Irrigation systems of the kind proposed would be covered by this Subdivision.

81. As the taxpayer who can claim the deduction does not have to actually own the land but can be a tenant or lessee, a deduction would be available to the Wine Producers in the Project at a rate of 33.3% per annum for the cost of the irrigation system.

Section 387-165 ITAA 1997: horticulture expenditure

82. Section 387-165 allows capital expenditure on establishing horticultural plants for use in a horticultural business to be written off for tax purposes. Costs of establishing horticultural plants may include the cost of acquiring the plants, the cost of establishing the plants, and the costs of ploughing, contouring, top dressing, fertilising and stone removal. Expressly excluded is expenditure incurred on draining swamps or clearing land. Under subsection 387-170(3), the definition of 'horticulture' includes the cultivation of grapevines. For the purpose of this Subdivision, a lessee or licensee of land carrying on a business of horticulture is treated as owning the plants growing on that land rather than the actual owner of the land.

83. The write-off commences from the time the vines are used or held ready for use for the purpose of producing assessable income in commercial horticulture. The write-off deductions will commence when the vines enter their first commercial season. Where the vines are planted in or about September 2000, it is projected that these vines will become commercially productive after a period of 2.5 years. The Manager will advise the Wine Producer of this event.

84. Under this Subdivision, if the effective life of the plant is more than 3 years, an annual deduction is allowable on a prime cost basis during the plant's maximum write-off period.

85. The effective life of a plant is to be determined objectively and should take into account all relevant circumstances. It is estimated that the vines will have an effective life in excess of 13 years. The write-off rate for horticultural plants with an effective life of 13 to 30 years is 13%.

Section 387-55 ITAA 1997: Landcare Expenses

86. Section 387-55 allows a deduction for capital expenditure that is incurred on a landcare operation for land in Australia that is being used for carrying on a business of primary production, or rural land in Australia that is used for carrying on a business for the purpose of producing assessable income from the use of that land.

87. 'Landcare Operation' for land includes an operation primarily and principally for the purposes of eradicating or exterminating from the land animals that are pests or eradicating, exterminating or destroying plant growth detrimental to the land. It also includes constructing surface or subsurface drainage works on the land if the construction is primarily and principally for the purpose of controlling salinity or assisting in drainage control.

88. Under the Management Agreement, the Wine Producer incurs expenditure to eradicate, exterminate and keep the Vinelots and the land free from disease, vermin, noxious weeds, rabbits, insect pests and other pests. The Wine Producers are accepted as carrying on businesses of primary production and these expenses will be deductible under section 387-55 of the ITAA 1997 in the year they are incurred.

Section 82KZM ITAA 1936

89. Section 82KZM operates to spread over more than one income year a deduction for prepaid expenditure that would otherwise be immediately deductible, in full under section 8-1 of the ITAA 1997. The section applies to certain expenditure incurred under an agreement in return for doing of a thing under the agreement that is not wholly done within the same year of income as the execution of the relevant agreement.

90. Under the Management Agreement, fees of \$7,728.50 per Vinelot will be incurred for the year ended 30 June 2001. The fees are charged for providing services to a Wine Producer by 30 June 2001. The fee is expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the arrangement's description that the fee has been inflated to result in reduced fees being payable for subsequent years.

91. There is also no evidence that might suggest the services covered by the fee could not be provided in the same year of income as the expenditure in question is incurred. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial fee is for the Project Manager doing 'things' that are not to be wholly done within the year of income of the fee being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditure incurred by the Wine Producer. New sections 82KZMB, 82KZMC and 82KZMD also have no application to this Project since the services to be provided in respect of the initial fee are completed in the same year of income as the expenditure is incurred (see paragraph 82KZMA(3)(c)).

Section 82KL ITAA 1936

92. The operation of section 82KZL depends, among other things, on the identification of a certain quantum of 'additional benefits'. In the project, insufficient 'additional benefits' will be provided to trigger the application of section 82KZL. It will not apply to deny the deductions otherwise allowable under section 8-1.

Part IVA ITAA 1936

93. For Part IVA 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). The Project will be a 'scheme', commencing when the Prospectus is issued. The Wine Producers will obtain an initial 'tax benefit' from entering into the scheme, in the form of tax deductions per leased area that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

94. Wine Producers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the sale of bottled wine from the Project. The Viticulturist's Report contained in the Prospectus states that the Project can achieve its aims and objectives if appropriate establishment and sound management procedures are put in place. There are no features of the Project that might suggest the Project was so 'tax driven', and so designed to produce a tax deduction of a certain magnitude that it would attract the operation of Part IVA.

Proposed changes to losses from non-commercial business activities

95. Under the rule in proposed subsection 35-10(2), a deduction for losses incurred by individuals (including individuals in general law

partnerships) from certain business activities will not be allowable in an income year unless:

- one of four statutory objective tests is met; or
- the Commissioner exercises a discretion to allow the losses.

96. In broad terms, the statutory tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);
- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year) (section 35-35);
- (c) at least \$500,000 of real property is used on a continuing basis in carrying on the business activity in that year (section 35-40); or
- (d) at least \$100,000 of certain other assets are used on a continuing basis in carrying on the business activity in that year (section 35-45).

97. For the purposes of applying the tests, subsection 35-10(3) allows taxpayers to group business activities of a similar kind. And, under subsection 35-10(4), there is an 'Exception' to the general rule in section 35-55(2) where the losses are from primary production business activities and the individual taxpayer has other assessable income for the income year of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of taxpayers they are beyond the scope of this Product Ruling and are not considered further.

98. Information provided with the application for this Product Ruling indicates that investors in the Project are unlikely to pass one of the statutory tests until the income year ended 30 June 2008 and therefore, unless the Commissioner exercises a discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer the loss from the business activity to a future year.

99. The discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, for individual investors who acquire interests in the Project, the Commissioner has determined that it would be unreasonable not to exercise the discretion in paragraph 35-55(1)(b).

100. The discretion in paragraph 35-55(1)(b) may be exercised where:

- (i) the business activity has started to be carried on; and

- (ii) there is an objective expectation that the business activity of an individual taxpayer with an interest in the Project will either pass one of the statutory tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

101. This Product Ruling is issued on a prospective basis (i.e., before an individual Wine Producer's business activity starts to be carried on). Therefore, if the Project fails to be carried on during the income years specified above in the manner described in the Arrangement, the Commissioner's discretion will not have been exercised as one of the key conditions in paragraph 35-55(1)(b) will not have been met.

102. In deciding to exercise his discretion the Commissioner has relied upon

- the report of the independent Viticulturist and additional expert or scientific evidence provided with the application by the Responsible Entity;
- independent, objective and generally available information relating to the viticulture industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity.

Detailed contents list

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Related Rulings/Determinations:
PR 1999/95; TR 92/1; TR 92/20;
TR 97/11; TR 97/16; TR 98/22;
TD 93/34; IT 175; IT 2001

Subject references:

- carrying on a business
- commencement of business
- primary production
- primary production expenses
- management fee expenses
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters

- ITAA 1997 42-125
- ITAA 1997 42-160
- ITAA 1997 42-160(1)
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- ITAA 1997 42-165(2A)
- ITAA 1997 42-345
- ITAA 1997 Pt 2-25
- ITAA 1997 387-55
- ITAA 1997 387-125
- ITAA 1997 387-165
- ITAA 1997 387-170
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- ITAA 1997 387-185
- ITAA 1997 960-335
- ITAA 1997 960-340
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- ITAA 1936 82KZMD
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 Part IVA

Legislative references:

- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 27-5
- ITAA 1997 27-30
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-55(1)(b)
- ITAA 1997 35-55(1)(a)
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