

PR 2000/86 - Income tax: Australian Premium Coffee Project

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *28 June 2000*



Product Ruling

Income tax: Australian Premium Coffee Project

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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 laws' 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 Australian Premium Coffee Project (APCP), or just simply as 'the Project', or the 'product'.

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 6-10 (ITAA 1997);
- section 8-1 (ITAA 1997);
- section 27-5 (ITAA 1997);
- section 995-1 (ITAA 1997);
- section 387-355 (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 (ITAA 1936);
- Part IVA (ITAA 1936).

3. On 11 November 1999 the Government announced further changes to the tax system a part of the New Business Tax System. A number of those changes, especially those to do with 'tax shelters', could affect the tax laws dealt with in this Ruling. Some of the changes apply from the date of the announcement and others are proposed to apply from nominated dates in the future. Although this Ruling mentions certain of these announced changes, the information given on the treatment of expenditure which may be affected by them is not binding on the Commissioner. Legally binding advice in respect of those changes cannot be given until the relevant law(s) are enacted.

4. However, if the changes become law, the operation of that law will take precedence over the application of this Ruling, and to that extent, this Ruling will be superseded. If requested, when the relevant law(s) are enacted, the Commissioner will formalise the non-binding

information shown in this Ruling by issuing a new Product Ruling that describes the operation of those law(s).

5. This Ruling does not deal with the application of Goods and Services Tax (GST).

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.

7. In this Ruling the class of persons is divided into Unit holders and Growers. A Unit holder acquires an interest in the landholding trust while either the Unit holder or a related party may take up the Growers interest. Reference will be made to Unit holders and Growers separately, notwithstanding that a Grower may also be a Unit holder and vice-versa. Unit holders will have the purpose of remaining as Unit holders and Growers will have the purpose of remaining as Growers until the completion of the arrangement

8. 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

9. The Commissioner rules on the precise arrangement identified in the Ruling.

10. The class of persons defined in the Ruling may rely on its contents, provided the arrangement (described below at paragraphs 15 to 68) is carried out in accordance with details described in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out:

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

Note: A material difference may arise in relation to a variation in the facts of the arrangement described in the Ruling. It may also arise in circumstances where the person otherwise included in the class of persons enters into the arrangement as described, but also enters into

transactions or arrangements (including financing arrangements) that, when viewed as a whole with the arrangement described in the Ruling, will produce a different taxation consequence for the arrangement. This might include, for example, where the Grower borrows to enter into the arrangement by way of a limited or non-recourse loan and the overall consequence might be that the arrangement is one that would have attracted the application of a tax avoidance provision.

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Date of effect

12. This Ruling applies prospectively from (date), the date this 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).

13. 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, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

14. 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 material difference in the arrangement or in the persons' involvement in the arrangement.

Arrangement

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

- Draft Prospectus
- Constitution for Australian Premium Coffee Project dated 7 April 2000
- Constitution of Australian Premium Coffee Plantations Ltd dated 14 January 2000
- Constitution of Australian Premium Coffee Processors Ltd dated 14 January 2000
- Constitution of Coffee Landholdings Pty Ltd dated 18 January 2000
- Trust Deed of Australian Premium Coffee Landholdings Trust
- Compliance Plan for Australian Premium Coffee Project dated 7 April 2000
- Draft Land Preparation Agreement between Australian Premium Coffee Plantations Ltd and Coffee Landholdings Pty Ltd as trustee for Australian Premium Coffee Landholdings Trust
- **Draft Farm Development Agreement between Australian Premium Coffee Plantations Ltd and Grower**
- **Draft Management Agreement between Australian Premium Coffee Plantations Ltd and Grower**
- **Draft Allotment Agreement between Australian Premium Coffee Landholdings Trust and Unit holder**
- Agency Agreement between Australian Premium Coffee Plantations Ltd and Australian Rural Group Limited dated 1 March, 2000
- Memorandum of Agreement dated 3 April 2000 between Robert Ellis Carter, Audrey Merle Carter and John David Carter and Australian Premium Coffee Plantations Ltd re option to purchase land
- Deed of Option to Purchase dated 8 March 2000 between Harold Leslie Whitney and

Daphne Irene Whitney and Australian Premium Coffee Plantations Ltd re option to purchase land

- Flow Chart showing flow of funds between the investor and the Project participants
- Cash flow forecasts for Australian Premium Coffee Plantations Ltd over the life of the Project
- Budgeted Profit & Loss Statement for Australian Premium Coffee Plantations Ltd
- Budgeted Profit & Loss Statement for Australian Premium Coffee Processors Ltd
- After tax cash flow projection for an investor on the top marginal rate, over the life of the Project
- Working papers used in setting the fees payable by an investor
- Letter dated 7 March 2000 from Australian Premium Coffee Plantations Ltd
- Letter dated 13 April 2000 from Australian Premium Coffee Plantations Ltd
- Facsimile dated 15 June 2000 plus annexures and amendments to the Farm Management Agreement from Australian Premium Coffee Plantation Ltd
- Letter dated 19 June 2000 plus annexure from Australian Premium Coffee Plantation Limited
- Facsimile dated 20 June 2000 from Australian Premium Coffee Plantations Ltd

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

16. There are no other agreements, whether formal or informal and whether or not legally enforceable, which a Unit holder or a Grower, or any associate of the Unit holder or the Grower, will be party to. The effect of these agreements is summarised in paragraphs 17 to 68.

Overview

17. This arrangement is called the Australian Premium Coffee Project (APCP) and has been registered as a Managed Investment Scheme under the Corporations Law.

18. The principal objective of APCP is to establish substantial coffee plantations in Queensland and New South Wales. APCP

intends to establish an integrated business operation to cultivate, process and market the product from these coffee plantations on the international and Australian markets.

19. The Project Land, on which options to purchase are currently held, is at Mountain Top near Nimbin in the Northern Rivers region of New South Wales, and at Childers in Southeast Queensland. The options to purchase are held by Australian Premium Coffee Plantations Ltd (APCP) and these will be exercised in favour of Australian Coffee Landholdings Trust (the Landholding Trust or Trust). The monies raised from the issue of units in the Landowning Trust under the prospectus will be used by the Trust to purchase the Project Land. The Project Land will then be leased to the custodian, the Australian Rural Group Limited and then subleased back to the Trust for a period of 20 years, which is the term of the Project.

20. The Project land will comprise approximately 230 ha of useable land which will be divided into interests (allotments) of 0.2 ha. Coffee plants will be propagated by the Responsible Entity and also will be acquired from contracted nurseries ready for planting. The whole Project will be planted within 12 months of the commencement of the Project

21. APCP has entered into a profit sharing arrangement with Australian Premium Coffee Processors Ltd (APCProcessors). That company will further process the Project production into value added coffee products and market those products. APCProcessors will also process and market coffee bean accessed from external sources. An objective of the arrangement is to establish a unique brand identity that will take advantage of and promote the quality of Australian coffee. The arrangement will take effect on the date minimum subscription is achieved. The arrangement provides for a share of the net profits derived by APCProcessors from both sources to be returned to the Growers. The percentage share of net profit to which Growers are entitled from processing and sale of value added coffee products is as follows:

Years 1-9

From the sale of Project product	95%
From the sale of external product	80%

Years 10-20

From the sale of Project product	90%
From the sale of external product	0%

Offer to investors

25. The Prospectus offers the opportunity for investors to invest in the Project. Two offers are being made as follows:

- an issue of units in the Trust; and
- the right to become Growers in the Project by growing coffee on Allotments on the Project Land and processing and marketing Project product.

26. Investors must take up both of the offers available, although the investor may take up units in the Trust and a related party may apply to take up the Grower's interest. In this Ruling investors who take up Units will be described as Unit holders and investors who take up the Growers interest will be described as Growers, notwithstanding that a Grower may also be a Unit holder and vice versa. Interests in the Project and the Trust are transferable in accordance with the respective Constitution and Trust Deeds.

27. By applying to become Growers, investors agree to appoint APCP to carry out horticultural, processing and marketing activities in relation to their business of growing, harvesting, processing and selling coffee pursuant to a Farm Development Agreement and a Management Agreement. Growers entering into a Farm Development Agreement and Management Agreement with APCP agree to the terms of the Project Constitution dated 7 April 2000. The Project Constitution states that a register of Unit holders and Growers must be held at all times.

Landholding trust

28. The corpus of the Trust is divided into 'A', 'B', 'C' and "D" class units.

29. One 'A' class unit of \$4,950 will be allotted to a unit holder for each interest subscribed for in the Project. Units have the rights and liabilities as set out in the Trust Deed and the issue of a unit will entitle the Grower, who may be a related party of the Unit holder, to:

- a right to use and occupy an Allotment (this is a licence only and does not give the Grower any title to the land or in the Allotment) on the land allocated to the Grower; and
- a right to own and operate the coffee growing, processing and marketing business of the Grower and to use the horticultural infrastructure of the Trust necessary for that business.

30. An investor who subscribes for a unit in the Trust is entitled to use a 0.2 hectare Allotment of Land for growing coffee. Each

Allotment will be planted with approximately 584 trees. Growers retain control over their own Allotments and are encouraged to visit that Allotment at any time.

31. The taxation consequences of any subsequent dealing or disposal of these 'A' class units do not form part of this Ruling.

32. One 'B' class unit has been issued to APCP. The unit will give APCP a beneficial interest in the capital and income in the Land not allocated to Growers.

33. 'C' and "D" class units will also be issued to APCP and are redeemable for a redemption price of \$940 and \$1,570 respectively. Redemptions will be funded by the 'A' class unit subscriptions. APCP may make a profit from the redemption of these units.

Custodian

34. The Australian Rural Group Limited (ARG) will act as custodian to hold all Project property (including application monies) as agent for APCP. APCP will review (on a continuing basis) ARG's compliance with the Custodial Standards.

Land preparation agreement

35. The Trustee of the Australian Premium Coffee Landholdings Trust, Coffee Landholdings Pty Ltd, (the Trustee) will enter into a Land Preparation Agreement with APCP. This Agreement is valid until all the duties set out in the Agreement are completed by APCP. The duties, to be provided by APCP within 12 months of payment, include:

- clearing debris and overgrowth from the Land designated for planting;
- demarcating the Land into areas that will comprise separate Grower's Allotments;
- ensuring that all utilities necessary to conduct coffee growing operations and on-site processing of harvested coffee cherry are connected to the Land and, if necessary, the proposed Growers' allotments;
- erecting fences as necessary to protect coffee trees and property generally;
- building roads, tracks and pathways to enable adequate access to and within the Land;
- building sheds, other buildings (except sheds for harvester storage and pulping and drying which are to

be erected prior to commencement of the first machine harvest) and all improvements required for storing machinery and other equipment to be used in the Project or for any other purpose which is necessary and incidental to the Project;

- embarking on such operations that may be required to prevent or combat Land degradation;
- take out appropriate public risk insurance (\$5,000,000).

36. APCP is entitled to delegate all or any of the functions to be performed by it pursuant to the Land Preparation Agreement.

37. The Trustee may terminate the Land Preparation Agreement in certain circumstances, including where APCP defaults in the performance of its duties.

Unit holders

38. Unit holders in the Trust will be entitled to a distribution from the Trust. The Trust will receive income annually from Allotment fees received from Growers. Unit holders are also required to pay Management Fees to the Landholding Trust. If the Unit holder defaults in any way in relation to payments due, APCP will send written notice to the Grower demanding payment. Information in the Prospectus indicates that Unit holders will receive a positive return on their investment.

Agreements entered into by Growers

39. Growers who utilize the services of APCP to carry out all the activities and duties on their farms will enter into the following agreements with APCP

- Farm Development Agreement
- Management Agreement

40. Growers who do not utilize the services of APCP will be outside the arrangement to which this Ruling applies.

Farm development agreement

41. The duties under this Agreement are to be carried out within 12 months of the date of acceptance of the Grower's application (cl 4.2 of agreement). The Farm Development services to be provided by APCP include:

- design the layout of trees to be planted on the Grower's Allotment in a way that ensures efficient management and maintenance and optimizes coffee production having regard to the nature of the land;
- prepare the Grower's Allotment so it is suitable for the planting and growing of approximately 584 trees per Allotment by the anniversary of the acceptance of their application for an interest;
- ensure the Grower's Allotment has adequate drainage;
- install an efficient and effective irrigation system to provide adequate water to the trees, in accordance with coffee industry standards;
- embark on operations required to prevent or combat Land degradation;
- fertilise and apply other soil nutrients to enhance the fertility of the Grower's allotment in preparation for planting;
- arrange for the supply of trees to the Grower;
- plant the trees and tend and maintain them in a proper and skilful manner;
- generally establish the trees and Grower's Allotment in a proper and skilful manner:

Management agreement

42. The duties under the Management Agreement relate to horticultural, processing and marketing activities and administration, accounting and compliance duties undertaken on the Grower's behalf in respect of the Grower's allotment and coffee growing and marketing business. The Management Agreement sets out the objectives to be achieved and duties to be undertaken to achieve those objectives as follows:

- maintain soil and Trees on the Grower's Allotment at optimum performance levels free from pests and diseases and, as far as achievable, free of the adverse affects of wind and frost;
- maintain the Trees on the Grower's Allotment to achieve optimum yields over the life of the Project;
- provide irrigation and water services in respect of the Trees on the Grower's Allotment and the coffee cherry harvested from the Allotment;

- provide site maintenance in respect of the Grower's Allotment and the Land on which the Grower's Allotment is located;
- harvest coffee cherry from the Trees on the Grower's Allotment to achieve optimum yields in each Production Period;
- pulp and dry coffee cherry harvested from the Trees on the Grower's Allotment to produce parchment;
- market and process coffee by – marketing and sale of the Coffee Attributable to the Grower's Allotment, processing of the Coffee Attributable to the Grower's Allotment into Value Added Coffee Products and marketing and sale of the Value Added Coffee Products for the return of a share of net profit from their sale.
- provide administration and accounting services;
- provide compliance services:

43. Growers have the right to carry out their own weeding on their allotment, provided at least 21 days written notice is given to APCP.

44. APCP may pool all produce of each Grower's business with that of each of the other Growers. The proceeds of the pooled sales from Growers' Allotments will be paid to ARG for crediting to the account of each Grower on a proportional basis without reference to coffee bean type, quality, volume, prices or any other factor in relation to the Grower's product or those of any other Grower. The income is to be distributed to Growers within two weeks of the payment by the Processor to ARG.

45. The produce obtained from any other source may be used in conjunction with produce from Growers' allotments to produce value added coffee products but each will be accounted for separately for the purposes of calculating the share of net profit of the Processor attributable to Growers. The Processor will market and sell all such produce.

46. The percentage shares of net profit of the Processor to which Growers are entitled will be paid to ARG for crediting to the account of each Grower on a proportional basis. The net profit of the Processor will be calculated for each quarter of each financial year and the percentage share to which Growers are entitled will be distributed to Growers within 14 days of the receipt of quarterly certified management accounts of the Processor.

47. The Grower may terminate the agreements referred to in paragraph 40 in certain circumstances, including where APCP makes default in the performance of its duties.

48. The Grower is not entitled to retrieve any part of the fee payable under the agreements that are referred to in paragraph 39 if the Grower terminates his/her investment in the Project. Nor is there any understanding, express or implied, between APCP or entities related to this entity and the Grower for the Grower's interest in the Project to be re-acquired after entry into the Project or for the Grower to be recouped in any way.

49. If the Grower defaults in any way in relation to payments due, APCP will send written notice to the Grower demanding payment. If payment is not received in three months, action will be taken to terminate the Agreement.

50. APCP may deduct any fees owing under the agreements that are referred to in paragraph 39 from a Grower's entitlements in respect of the proceeds of pooled sales of coffee from Growers' Allotments and the percentage shares of net profit of the Processor (clause 25.3 of the Project Constitution).

Fees pertaining to the application

51. In order to become a Unit holder in the Australian Premium Coffee Landholdings Trust (the Trust) and to have the right to become a Grower in the Project, amounts are payable both to the Trust and to APCP. The initial amount payable to the Trust to entitle the investor to become a Unit holder is \$5,038 while the amount payable to APCP in order to become a Grower is dependant on the date the application is made.

52. While initial payments to the Trust by Unit holders are required in full on application, payments to APCP depend on whether the applicant who is taking up the Grower's interest, applies on or before 31 October 2000 or on or before 28 February 2001.

Fees payable to the trust

53. The following amounts are payable to the Trust on application

(a) by the unit holder

	Fee	GST	Total
Units in the Trust	\$4,950		\$4,950
Management fee	<u>\$80</u>	<u>\$8</u>	<u>\$88</u>
	<u>\$5,030</u>	<u>\$8</u>	<u>\$5,038</u>

(b) by the Grower

Allotment fee	\$397	\$40	\$437
Land Preparation fee	<u>\$630</u>	<u>\$63</u>	<u>\$693</u>
	<u>\$1,027</u>	<u>\$103</u>	<u>\$1,130</u>

54. The management fee of \$88 is payable to the Trust by the Unit holder for the provision of administration and management services in respect of the Trust and the provision of an annual audit of the Trust's financial statements.

55. The Land Preparation Fee is payable to the Trust by the Grower in consideration of the Trust entering into a Land Preparation Agreement with APCP

56. The allotment fee of \$437 is payable to the Trust by the Grower in consideration for the provision of a licence for the use of an allotment for the purpose of conducting a business of growing, processing and marketing coffee.

Fees payable to APCP

57. The following amount is payable to APCP on application by the applicant who is taking up the Growers interest:

Management fee - pro rata per month (GST inclusive) \$493.16

58. In addition a Farm Development Fee of \$6,600, which includes \$3,200 for dams and irrigation, \$2,800 for crop establishment and \$600 for GST, is payable to APCP by the Grower as follows:

For applications before 31/10/2000

\$2,200 on application

\$2,200 on 31/10/2000

\$2,200 on 28/2/2001

For applications between 31/10/2000 and 28/2/2001

\$4,400 on application

\$2,200 on 28/2/2001

For applications on or after 28/2/2001

\$6,600 on application

Fees payable in subsequent years

Fees due to the trust

59. Allotment fees are payable by Growers to the Landowning Trust in subsequent years as follows –

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Year after acceptance	Fee	GST	Total
	\$	\$	\$
2	409	41	450
3	421	42	463
4	434	43	477
5	447	45	492
6	460	46	506

Thereafter the fee is at the rate for the sixth year after acceptance indexed for inflation at 3% p.a. or at the rate of increase in the CPI, whichever is the greater. Allotment fees are payable in subsequent years on the anniversary of the first payment.

60. Management fees are payable by unit holders to the Landowning Trust in subsequent years as follows

Year after acceptance	Fee	GST	Total
	\$	\$	\$
2	82	8	90
3	85	9	94
4	87	9	96
5	90	9	99
6	93	9	102

Thereafter the fee is at the rate for the sixth year after acceptance indexed for inflation at 3% p.a. or at rate of increase in the CPI, whichever is the greater. Management fees are payable in subsequent years on 1 July of the relevant year.

Fees payable to ACP

61. Further fees are payable by Growers under the Management Agreement in later years as follows. These amounts are for the relevant financial year (1 July to 30 June) and are payable on 1 July of that year.

Year after acceptance	Fee	GST	Total
	\$	\$	\$
2	5,460	546	6,006
3	5,530	553	6,083
4	6,290	629	6,919
5	6,750	675	7,425
6	6,980	698	7,678

Thereafter the fee is at the rate for the sixth year after acceptance indexed for inflation at 3% p.a. or at the rate of increase in the CPI, whichever is the greater.

Processing fee

62. The Grower must pay the Processor a Processing fee for processing the coffee bean harvested on the Grower's Allotment. This is calculated as a percentage of the net profit derived from processing operations by the Processor as defined in the Constitution and the Processing Agreement. The fee payable is as follows:

- In each of the years 2 to 9 5%
- In each of the remaining years 10%.

63. No processing fee is payable by Growers in respect of the 80% share of net profit of the Processor to be paid to them from the sale of value added coffee products produced from coffee bean purchased from external sources by the Processor in years 1 to 9 of the Project.

Goods and Services Tax

64. The Goods and Services Tax will be applicable to services provided by the Manager after 1 July 2000.

Projected return

65. Projected returns for Growers are based on 325 interests being accepted in the Project and depend upon a range of assumptions made by APCP. There is no assurance or guarantee whatsoever in respect of the future success of, or financial returns associated with the Project. Based on certain assumptions, APCP forecasts that a Grower could expect to achieve an internal rate of return of 24.7%.

Finance

66. Growers may fund the investment with their own resources or borrow from an unassociated lending institution. No entity or related entity involved in the Project is involved in the provision of financing for the Project. Independent finance consultants may be introduced to Growers by the Project, or its related entities on an arm's length commercial basis.

67. This Ruling does not apply if a Grower enters into a finance agreement that includes any of the following features:

- Split loan features of the type described in Taxation Ruling TR 98/22;
- Entities associated with the Project are or become involved in the provision of the finance;
- Indemnity arrangements, or equivalent collateral arrangements limiting the borrower's risk;
- Non-arm's length terms and conditions;
- Additional benefits, for the purposes of section 82KL, are granted to borrowers, or the funding arrangements transform the Project into a 'scheme' to which Part IVA may be applied;
- Repayments of principal and payment of interest are linked to derivation of income from the Project;
- Funds borrowed, in whole or in part, are not available for the conduct of the Project, but are transferred (by any means, and directly, or indirectly), back to the lender, or any associate; or
- Lenders do not have the capacity under the loan agreement, or do not have a genuine intention to take legal action against defaulting borrowers.

68. Growers who enter into financing arrangements which do not satisfy these conditions will be outside the arrangement to which this Ruling applies.

Ruling

Goods and Services Tax

69. For a Grower who invests in the Project, section 27-5 of the ITAA 1997 will apply to reduce the amount of any deduction allowable by any GST input tax credit to which the Grower is entitled.

Allowable deductions

70. In this Ruling investors who take up units are described as Unit holders and investors who take up the Growers interest are described as Growers, notwithstanding that a Grower may also be a Unit holder and vice versa. A unit holder who does not take up a Grower's interest will not incur fees in respect of the Farm Development, Management and Allotment Agreements and will therefore not be entitled to a deduction for those fees incurred by Growers.

71. For a Grower who enters the arrangement on or before 30 June 2001, the deductions listed below are currently available for the years ended 30 June 2001 to 30 June 2003.

Fee type	ITAA 1997 section	Deductions for Growers only		
		30 June 2001 \$	30 June 2002 \$	30 June 2003 \$
Management Fee	8-1	\$493.16 pro rata per month see note (i) below	6,006	6,083
Land preparation Fee Mains electricity installation	387-355	21 see note (ii) below	21	21
Farm development fee – dams & irrigation	387-125	\$1,067 see note (iii) below	1,067	1,066
Farm development fee – crop establishment	387-165 see note (iv) below			
Allotment fee (paid to trust)	8-1	437	450	463
TOTAL		Depends on date of application	7,544	7,634

All amounts are GST inclusive

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- (i) The farm management fee for the full year to 30 June 2001 is \$5,918 (including \$538 GST). The amount payable on application will be determined by the date of the application and is pro rated for the year at \$493.16 (including \$44.83 GST) per month.
- (ii) The part of the land preparation fee allowable as a deduction is in respect of mains electricity installation. The Grower's capital expenses on mains electricity installation are deductible under section 387-355. The deduction can be claimed on the basis of one tenth of the total expenditure in the year the expenditure is incurred, and one tenth in each of the following nine years of income.
- (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 for each of the next 2 years of income.
- (iv) A deduction under section 387-165 for expenditure on acquiring and planting the coffee plants is calculated on the basis of the plants, as horticultural plants, entering their first commercial season in the year ended 30 June 2004 and a Grower 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% on a prime cost basis. The Manager will advise the Growers of the years in which a deduction will be allowable.

72. For a Unit holder who enters the arrangement on or before 30 June 2001 and acquires one unit, the following deductions will be available for the years ended 30 June 2001 to 30 June 2003.

Expenses	Legislation ITAA 1997	Year 1	Year 2	Year 3
		30/6/2001	30/6/2002	30/6/2003
Management fee	8-1	90	94	96

All fees are GST inclusive

Income

73. Growers who invest in the Project will be assessable under section 6-5 in respect of any income received by them from the sale of coffee beans from their Allotment, from the sale of value added coffee products derived from coffee beans from their Allotment and from coffee beans from external sources.

74. Distributions received by the Unit holders presently entitled to income from the Trust, who are not under a legal disability, will be assessable in the hands of the recipients pursuant to Section 97 of the ITAA 1936.

Sections 82KZM, 82KL and Part IVA

75. For Unit holders and Grower who invest in the Project, the following provisions have application as indicated

- The expenditure incurred does not fall within the scope of section 82KZM.
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions of Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Proposed new laws

Losses from non-commercial business activities

76. 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 the taxpayer's non primary production assessable income for the income year (excluding any net capital gain) is less than \$40,000 (proposed subsection 35-10(4)).

77. 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.

78. The Project's agreements, its draft prospectus, and its cash flow projections, show that Growers 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 Grower'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).

79. Provided the provisions are enacted as introduced, subject only to the above condition relating to the Arrangement (discussed below at paragraphs 119-120), Growers can deduct losses arising from their interests they hold in the Project in the years that such losses arise.

Explanations

Sections 27-5 - Good and Services Tax

80. 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 Grower is entitled.

Section 8-1

81. Consideration of whether the Management and Allotment fees are deductible under section 8-1 begins with paragraph (a) of that section. This view proceeds on the following basis:

- the outgoings in question must have a sufficient connection with the operation or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under paragraph (b) of section 8-1 if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer contractually commits himself/herself 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 (b) applies. However, that does not preclude the application of paragraph (a) and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

Is the Grower carrying on a business?

82. The growing of coffee can constitute the carrying on of a business. A business includes a 'primary production business', which is defined under subsection 995-1(1) to include a business of propagating and cultivating plants. Where there is a business, or a future business, the gross sale proceeds from the sale of coffee bean or coffee products from the Project will constitute gross assessable income in their own right. 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 and maintaining of the coffee trees and the harvesting, processing, marketing and sale of the coffee bean and value added coffee products.

83. Generally, a Grower will be carrying on a business of horticulture where:

- the Grower has an identifiable interest in specific growing coffee trees coupled with a right to harvest and sell the coffee bean resulting from those bushes;
- the growing, harvesting, processing and marketing activities are carried out on the Grower's behalf; and
- the weight and influence of the general indicators of a business, as developed by the Courts, point to the carrying on of a business.

An identifiable interest and a right to harvest and sell coffee beans/products.

84. For this Project, Growers have, under the Allotment Agreement, rights in the form of occupancy over an identifiable area of land consistent with the intention to carry on a business of growing coffee plants. An Allotment fee of \$437 (year 1) is charged. This fee is charged annually and indexed by the greater of the increase in the CPI or 3%. Under the Farm Development Agreement, Growers appoint APCP to provide the services of pre-planting and planting of coffee trees and the installation of irrigation. Under the Management Agreement growers appoint APCP to carry out all cultural operations necessary to develop a mature fruit bearing tree and the operations of gathering in, processing and marketing the crop from the trees.

Coffee bean growing activities carried out on the Grower's behalf

85. Growers have the right to use the Land in question for horticultural purposes and to have APCP come onto the Land to carry out its obligations under the Agreements referred to. In other words, Growers control their investment. The Growers' degree of control over APCP, as evidenced by the Agreements supplemented by Corporations Law, is sufficient.

86. Under the Project, Growers are entitled to receive regular progress reports on APCP's activities. Growers are able to terminate arrangements with APCP in certain instances, such as cases of default or neglect. The activities in the Agreements are carried out on the Growers' behalf.

General indicators of business

87. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the arrangement's description for all the indicators discussed in that Ruling. Growers 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 Growers, i.e., a 'profit' in cash terms that does not depend on its calculation on the fees in question being allowed as a deduction.

88. Growers will engage the professional services of a Manager with appropriate credentials. There is a means to identify which plants Growers have an interest in. These services are based on accepted practices and are of the type ordinarily found in ventures that would commonly be said to be businesses.

89. Growers have a continuing interest in the plants from the time they are acquired until the termination of the Project. The horticultural 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 Growers' horticultural activities will constitute the carrying on of a business.

90. The Management and Allotment fees associated with the horticultural 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 coffee products) is to be gained from this business. They will be deductible under section 8-1. Further, no "non-income producing" purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. No capital component is identifiable. The tests of deductibility under section 8-1 are met. Subsection 8-1(2) does not apply.

Expenditure of a capital nature

91. Any part of the expenditure of a Grower entering into the horticulture 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. It is apparent from the Project's agreements that certain payments made are attributable to the acquisition of capital assets. This includes pre-planting costs and the establishment of such items as dams and irrigation. However, expenditures of this nature can fall for consideration under specific deduction provisions relevant to the carrying on of a business of primary production, and under the general depreciation provisions of the ITAA 1997. No deduction under section 8-1 has been allowed for these capital items.

Subdivision 387-E – expenditure on mains electricity connection

92. Capital expenditure incurred by a person carrying on a primary production business on the connection of mains electricity to land on which that business is being carried on, qualifies for a write off over a ten year period (i.e., 10% with no pro rating required) under Subdivision 387-E. A taxpayer incurring this expenditure need not be the owner of the land to claim the deduction but must have an interest in the land e.g., as owner or tenant. In this case there will generally be no delay between the signing of the agreements and the commencement of 'business operations'. Accordingly, a Grower's business of primary production will generally have commenced at the time the expenditure is incurred. The requirements of Subdivision 387-E will have been met in this respect.

93. An amount of \$212 payable on application has been identified for this purpose. Therefore, a Grower entering into the Project by 30 June 2001 and commencing to carry on a primary production business by that date would be allowed a deduction under section 387-355.

The amounts are as follows:

- year ending 30 June 2001 \$21
- year ending 30 June 2002 \$21
- year ending 30 June 2003 \$21.

Subdivision 387-B - expenditure on conserving or conveying water

94. Capital expenditure incurred by a person carrying on a primary production business on the construction, acquisition and installation of plant, equipment and structural improvements to be used primarily and principally for the purpose of conserving or conveying water for use in such a business, qualifies for a write off over a three year period (i.e., one third with no pro rating required) under section 387-125. A

taxpayer incurring this expenditure need not be the owner of the land to claim the deduction, so long as he/she is carrying on a business of primary production. In this case there will generally be no delay between the signing of the agreements and the commencement of 'business operations'. Accordingly, a Grower's business of primary production will generally have commenced at the time the expenditure is incurred. The requirements of Subdivision 387-B will have been met in this respect.

95. An amount of \$3,200 payable on application has been identified for this purpose. Therefore, a Grower entering into the Project by 30 June 2000 and commencing to carry on a primary production business by that date would be allowed a deduction under section 387-125. The amounts are as follows:

- year ended 30 June 2001 \$1067
- year ended 30 June 2002 \$1067
- year ended 30 June 2003 \$1066

Subdivision 387-C - horticultural provisions

96. Subdivision 387-165 allows capital expenditure on establishing horticultural plants owned and used, or held ready for use, in Australia in a business of horticulture to be written off for tax purposes. A lessee or licensee of land, carrying on a business of horticulture, is taken to own the plants growing on that land rather than the actual owner of the land.

97. Under this Subdivision, if the effective life of the plant is less than three years the expenditure can be written off in full. If the effective life of the plant is more than three years, an annual deduction is allowable on a prime cost basis during the plant's maximum write-off period. The period starts from the time the plant enters its first commercial season. For a plant which has an effective life of greater than 13 years but less than 30 years the write off rate is 13% (see section 387-185).

98. Horticulture is defined in subsection 387-170(3) and the cultivation of coffee plants falls within the subsection. The effective life of a coffee plant falls within 'the greater than 13 years but less than 30 years' bandwidth and the plants are expected to produce in the fourth year of the Project. Therefore, a deduction of \$364 is likely to be available in the year ended 30 June 2004, this being the first commercial season for a Grower who enters into the Project in the year ended 30 June 2000. Growers should confirm with APCP sometime during the year ended 30 June 2004 that the plants have in fact entered their first commercial season.

Section 82KZM

99. 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. The section applies if certain expenditure incurred under an agreement is in return for the doing of a thing under the agreement that is not wholly to be done after the day on which the expenditure is incurred.

100. Under the Management Agreement, the management fees set out in paragraph 57 will be incurred by Growers on execution of the Agreement. The fees are payable by a Grower for services and access to facilities that are provided within 12 months from the execution of the Agreement. Further amounts are required to be paid in the second and subsequent years of the Agreement.

101. For this Ruling's purposes, no explicit conclusion can be drawn from the arrangement's description, that the fees have been inflated to result in reduced fees being payable for subsequent years. Fees vary from year to year reflecting the amount of work and resources required to be allocated to the activities undertaken on behalf of Growers. The fees are expressly stated to be for a number of specified services. There is no evidence that might suggest the services covered by the fees could not be provided within 12 months of incurring the expenditure in question.

102. Thus, for the purposes of this Ruling, it can be accepted that no part of the fees is for the Manager to do things that are not to be wholly done within 12 months of the fee being incurred. On this basis, the basic precondition for the operation of section 82KZM operation is not satisfied and it will not apply to the expenditures for fees by Growers.

Section 82KL

103. Section 82KL is a specific anti-avoidance provision that operates to deny an otherwise allowable deduction for certain expenditure incurred, but effectively recouped, by the taxpayer. Under subsection 82KL(1), a deduction for certain expenditure is disallowed where the sum of the 'additional benefit' plus the 'expected tax saving' in relation to that expenditure equals or exceeds the 'eligible relevant expenditure'.

104. 'Additional benefit' (see the definition of 'additional benefit' at subsection 82KH(1) and paragraph 82KH(1F)(b)) is, broadly speaking, a benefit received that is additional to the benefit for which the expenditure is ostensibly incurred. The 'expected tax saving' is essentially the tax that is saved if a deduction is allowed for the relevant expenditure.

105. Section 82KL's operation depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. For the purposes of the section, there are no additional benefits that will apply to deny the deductions otherwise allowable under section 8-1.

Part IVA

106. For Part IVA to apply there must be a 'scheme' (section 177A of the ITAA 1936); a 'tax benefit' (section 177C); and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D). The Australian Premium Coffee Project is a 'scheme' commencing when the Prospectus is issued. Growers will obtain a 'tax benefit' from entering into the scheme, in the form of deductions which would not be obtained but for the scheme. However, it is not possible to conclude that Unit holders and/or Growers will enter into the scheme with the dominant purpose of obtaining a tax benefit.

107. Unit holders and Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from dividends or from the eventual harvesting, processing and sale of the produce from the coffee beans. Further, there are no features of the Project, for example, where fees are considered to be 'excessive' and uncommercial, and predominantly financed by a non-recourse loan, and resulting in insufficient 'real money' coming into the Manager's hands that might suggest the Project was so 'tax driven' and so designed to produce a tax deduction of a certain magnitude that the Project would attract the operation of Part IVA.

Assessable income

108. Gross sale proceeds derived from the sale of coffee harvested from the Project and from external sources will be assessable income of the Growers, under section 6-5.

109. Distributions received by the Unit holders presently entitled to income from the Trust, who are not under a legal disability, will be assessable in the hands of the recipients pursuant to Section 97 of the ITAA 1936.

Trading stock

110. Taxation Ruling TR 94/13 considers trading stock in relation to various marketing arrangements as they apply to cotton growers. One of the marketing arrangements discussed in that ruling is similar to the arrangement that exists between APCP and Growers.

111. Under the Marketing and Processing Agreement, coffee beans are "pooled" prior to sale and processing. When this pooling occurs,

APCP takes possession of the beans. Given that the arrangement is in effect the same as the “pooled” arrangements described in TR 94/13, the tax consequences will be the same.

112. Growers who have agreed with APCP to have their beans “pooled” no longer have dispositive power over the beans and will not be in possession of trading stock.

113. Growers who harvest and/or process their own beans will not take part in the “pooled” arrangement with APCP. If they retain dispositive power over their produce, they will have to account for trading stock as is the case in TR 94/13.

Proposed changes to losses from non-commercial business activities

114. 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.

115. 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).

116. 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.

117. 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 2004 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.

118. 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).

119. 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.

120. This Product Ruling is issued on a prospective basis (i.e., before an individual Grower’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 be exercised in respect of the actual arrangement carried out as one of the key conditions in paragraph 35-55(1)(b) will not have been met.

121. In deciding to exercise his discretion, should the proposed new law be introduced into Parliament, the Commissioner relies upon any and all information provided in respect of the Arrangement, including:

- the report of the independent expert or scientific evidence provided with the application by the Responsible Entity;
- the binding agreement between the Responsible Entity and Australian Premium Coffee Processors Ltd (APCProcessors) for the sale of the Project production into value added coffee products and for the marketing of those products. APCProcessors will also process and market coffee bean from external sources. The arrangement provides for a share of the net profits derived by APCProcessors from both sources to be returned to the Growers;

- supporting cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity in relation to both Unit holders and Growers which project a commercial rate of return over the life of the project.

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Previous draft:

Not previously issued in draft form

- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

Related Rulings/Determinations:

TR 1999/95; TR 92/1; TR 97/16;
 TR 92/20; TD 93/34; TR 98/22;
 TR 97/11; TR 94/13

Subject references:

- capital expenses
- carrying on a business
- commencement of business
- fee expenses
- horticulture
- insurance expenses
- interest expenses
- management fees expenses
- primary production
- primary production expenses
- producing assessable income
- product rulings
- public rulings
- schemes and shams

Legislative references:

- ITAA 1997 6-5
- ITAA 1997 6-10
- ITAA 1997 8-1
- ITAA 1997 27-5
- ITAA 1997 387-125
- ITAA 1997 387-165
- ITAA 1997 387-355
- ITAA 1997 995-1
- ITAA 1936 82KZM
- ITAA 1936 82KL
- ITAA 1936 Part IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D

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