



PR 2001/122 - Income tax: CMCL Produce Pool

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Product Ruling

Income tax: CMCL Produce Pool

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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

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.

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.

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 person who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the "CMCL Produce Pool", or just simply as the "the pool".

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 17-5 (ITAA 1997)
 - section 70-35 (ITAA 1997);
 - section 70-90 (ITAA 1997) and;
 - Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936);

This Ruling also comments on the operation of:

- Subdivision 153-B of the *A New Tax System (Goods and Services Tax) Act 1999* ('GST Act').

Class of persons

3. The class of persons to whom this Ruling applies is Sellers of Produce 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 and deriving assessable income from the sale of Produce into a CMCL Produce Pool. They will be registered under the GST Act at all times during the course of the arrangement. In this Ruling these persons are referred to as "Sellers" or "the Seller".

4. The class of persons is only those who become members of the co-operative company, Commodity Marketing Co-operative Limited ('CMCL'), as only they can become Sellers.

Qualifications

5. The Ruling provides this specified class of persons with a binding ruling as to the tax consequences of this product. The Commissioner accepts no responsibility in relation to the commercial viability of this product, and gives no assurance the returns from the

product are reasonable, appropriate, or represent industry norms. A financial (or other) adviser should be consulted for such information.

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

7. The class of persons defined in the Ruling may rely on its contents, provided the arrangement (described below at paragraphs 12 to 23) 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.

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Date of effect

9. This Ruling applies prospectively from 29 June 2001, 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).

10. 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

11. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. 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

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

- a draft copy of the **Produce Pool Contract** dated 14 April 2000 to be entered into by each Seller with Commodity Marketing Co-operative Limited ('CMCL'), which will act as Exclusive Agent for the Seller, and Manager of a Produce Pool;
- a draft copy of the Master Agreement Governing Grain Sales Contracts dated 14 April 2000 that will be entered into between CMCL and Buyers of Produce from pools operated under this arrangement;
- a draft copy of the Agreement Between the Bank and CMCL;
- Constitution of CMCL Pty Ltd; and
- additional correspondence from the applicant's adviser dated 14 April 2000, 2 August 2000, 3 October 2000 and 6 November 2000.

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

13. The documents highlighted are those the Sellers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Seller, or any associate of the Seller, will be party to, with the exception of finance agreements to which paragraph 22 may apply.

14. CMCL is a co-operative governed by *The Companies (Co-Operative) Act 1943*, Western Australia. Only members of CMCL are able to be Sellers within the CMCL Produce Pool.

15. CMCL is inviting Sellers of Produce to participate in a CMCL Produce Pool ("The Pool" or simply the "Pool") CMCL will open one Pool in each quarter of the year. The Produce they supply to a Pool managed by CMCL will be delivered to various storage facilities in

Australia, and those supplies will occur in the ordinary course of a Seller carrying on their business. The pool will be available for the following Produce;

- grain: including wheat, barley, oats, triticale and sorghum;
- pulse: including pea, chick pea, faba bean, vetch, lupins and mung beans;
- oilseed: including canola, safflower and sunflower;
- cottonseed;
- hay: either in bales or pellets;
- pasture seeds: including clovers, medics, serradellas, lucerne, annual and perennial grasses.

CMCL will include within each pool sub-pools for different types of Produce. Pools will close 90 days after opening and mature 365 days after the close date of the pool. Sellers will be in a commercial business of growing Produce and the anticipated minimum delivery value per Seller is \$10,000. They will be registered for GST at all times during the course of the arrangement. The Produce they supply to CMCL will be supplied to CMCL in Australia.

Delivery of the produce by the Seller

16. The Seller will agree to irrevocably appoint under a Produce Pool Contract ('PPC') CMCL as their exclusive agent with authority to sell the Produce specified in Schedule A of the PPC in a CMCL Produce Pool as specified in Schedule B of the PPC and on terms and conditions contained in Schedule C of the PPC. Typically, the PPC will be entered into some months before delivery of the Produce is expected to take place. There will be an anticipated minimum delivery value of \$10,000 worth of Produce. The Seller will deliver the Produce specified in Schedule A by the latest delivery date to the delivery location nominated in Schedule A of the PPC. The Produce will be delivered by the Seller to the delivery location at the expense of the Seller. The PPC will provide that:

- (i) CMCL can issue tax invoices under section 153-50 of the GST Act in respect of the deemed supply of the Produce by CMCL to Produce Buyers and the deemed supply of the Produce by the Seller to CMCL under section 153-50 of the GST Act;
- (ii) the Seller will not issue tax invoices in respect of the supply of the Produce;

- (iii) the Seller acknowledges that it is registered under the GST Act when it enters into the agreement and that it will notify CMCL if it ceases to be registered;
- (iv) CMCL acknowledges that it is registered for GST when it enters into the agreement and will notify the Seller if it ceases to be registered under the GST Act (cl 4.4.1, Produce Pool Contract).

Testing and acceptance by CMCL

17. At or after delivery, the Produce will be tested, and provided the test is satisfactory, it will be mixed at the delivery location with other Produce of that type and grade (if any). This will occur usually at the railway siding or Produce storage facility, such as a silo. CMCL may reject the delivery of the Produce if on the delivery date it does not meet the minimum receival standards as defined by the relevant marketing authorities prior to each harvest season. Subject to the authority of CMCL to mix the Produce supplied by other persons when the Produce is delivered at the delivery date, the Seller will continue to have an interest in the Produce while it remains uncontracted for sale to a Buyer. On confirmation of delivery and after the Produce has been allocated to a specific Produce Pool, CMCL will issue the Seller with a Pool Equity Points ('PEP') Certificate. Points will be issued with a face value of \$1 per point calculated on a mark to market valuation of the Produce as classified by the test results. CMCL will notify the Seller of the name and maturity date of the pool or pools to which their Produce is allocated, the number of PEPs they have been issued in the pool or pools, and an initial estimate of the value of those PEPs. On maturity, the value of each point may be higher or lower than the \$1 face value depending on the outcome of the pool. There will be no guarantee from CMCL to Sellers regarding the value of the final PEPs. CMCL may only allocate the Produce to a pool before the closing date for the pool. Should the closing date for the pool have passed before the Produce is allocated to a pool, CMCL may allocate the Produce to the next available pool.

Sale of Produce by CMCL

18. CMCL will negotiate agreements with Buyers for the sale of the Produce. These agreements will be covered by the Master Agreement Governing Produce Sales Contracts. When Produce is sold it will usually have been mixed with Produce of other Sellers and will not have retained its identity as Produce of a particular Seller. CMCL will determine the price and the terms and conditions for the sale of the Produce. CMCL as exclusive agent, will have authority to determine when the Produce is to be released to a Buyer. Normally

this is expected to occur within a reasonably short time of that Produce having been delivered by the Seller. The agreements with Buyers will specify that part of the purchase price (equal to the GST payable in respect of the supply of the Produce to them) shall be payable by the Buyer within 14 days of the release of the Produce to the Buyer, except where the sale to the Buyer is GST-free. These initial payments will assist CMCL in meeting its own GST obligations arising from its arrangements with Sellers (under Subdivision 153-B of the GST Act) for CMCL to make a deemed supply of Produce to Buyers. The remaining portion of the price for the Produce payable by the Buyers to CMCL (or the whole of the price in the case of Buyers for whom the purchase is GST-free) shall be deferred until pool maturity date, being at the latest 365 days after the close of the pool.

19. As consideration for this deferral of payment, Buyers will pay a Produce Access Fee ('PAF'). The rate of the PAF may vary between Buyers, but in all instances will be a floating rate which will not be able to be calculated precisely in advance. The exact PAF to be used in respect of any sale agreement will not be known until five days before the maturity date of the pool when the Final Invoice is issued to Buyers by CMCL in accordance with clause 4.5 of the Master Agreement Governing Produce Sales Contracts that will be entered into between CMCL and Buyers. The rate for the PAF will be the Bank Bill Swap Rate (BBSW) bid plus an agreed margin prevailing at 11:00am on that date. Buyers will be required to procure a Stand-by Letter of Credit in favour of CMCL as security for payment of the contract price and the PAF on the pool maturity date before taking delivery. The amount of the Stand-by Letter of Credit will approximate the likely amount of liability owing by the Buyer to the pool.

Payment to Sellers on pool maturity

20. CMCL will deduct from payments received from each Buyer variable expenses including tolls, statutory levies and charges, fobbing, receival and storage expenses, any adjustments made in respect of the applicable receival standards, selling costs, any costs associated with settling claims against the sellers' Produce, GST in respect of the supply to the Buyers, and any relevant and reasonable expenses in operating the pool (cl 4.3, Produce Pool Contract).

21. The final value of a Seller's Pool Equity Points is determined under clause 6 of the Produce Pool Contract. This final value in turn will determine the amount of the Seller's Pool Proceeds. The final amount of a Seller's Pool Proceeds cannot be determined until the relevant Pool Maturity Date occurs, and will be net of expenses that CMCL may deduct under clause 4.2. CMCL will agree with Sellers

that CMCL will issue a recipient-created tax invoice for Goods and Services Tax ('GST') purposes. The recipient-created tax invoice will be issued to the Seller at the Produce pool maturity date. CMCL will deposit the Seller's pool proceeds into the bank account specified in the Produce Pool Contract on the pool maturity date less an amount equal to the GST shown on the recipient-created tax invoice ('RCTI') provided by CMCL to the Seller. CMCL will deposit into Seller's specified bank account an amount equal to the GST shown on the RCTI within 7 days of CMCL receiving an amount under section 35-5 of the GST Act for CMCL's tax period during which the pool maturity date occurs, or if no amount is payable under section 35-5 to CMCL for that tax period, within 28 days of the end of that tax period.

Finance for Sellers

22. Although it will not be a condition of the PPC, CMCL proposes to arrange for an independent financial institution to provide financial accommodation to Sellers who want finance. The financial accommodation will be by way of a discounted acquisition of not more than 90 per cent of the Seller's estimated entitlement to payment from the pool excluding the PAF. The maximum amount of financial accommodation received by a Seller will be less than 90 per cent of this entitlement after allowing for the discount. Sellers will be given a choice of the amount of the financial accommodation they receive, subject to this maximum limit. The financial accommodation will be full recourse to the Seller as CMCL will indemnify the financial institution in respect of the financial accommodation and the Seller will indemnify CMCL in respect of its indemnity to the financial institution. There will be no advance payment by CMCL to Sellers prior to the maturity of the pool.

Ruling

Section 70-35 of the ITAA 1997

23. When the Seller's Produce is released to the Buyer, the Produce will no longer be trading stock "on hand" of the Seller for the purposes of section 70-35 of the ITAA 1997. Accordingly, Sellers will only have to account for the value of such stock under subsection 70-35(1) where such Produce has been delivered but not released to a Buyer by the end of the income year in question.

Section 70-90 of the ITAA 1997

24. The sale by the Seller of Produce under a Produce Pool Contract through a CMCL Produce Pool is not a disposal of trading

stock by the Seller outside the ordinary course of business and section 70-90 of the ITAA 1997 has no application.

Section 6-5 of the ITAA 1997

25. Assessable income will be derived by the Seller for the purposes of section 6-5 of the ITAA 1997 from the sale of Produce through the pool when the final value of PEP's are determined on the pool maturity date by CMCL and a contractual right to receive the income arises for the Seller under the terms of the pooling arrangement. This is subject to all the variables required for the calculation of the amount due to the Seller only becoming known at that time.

26. No income is derived by the Seller simply from financial accommodation being made to the Seller on normal commercial terms by a financial institution by the full recourse arrangements set out at paragraph 22.

Section 17-5 of the ITAA 1997

27. Assessable income of the Seller will not include any amount relating to GST for which the Seller is liable in relation to a supply of produce. Note that this amount of GST should appear on the recipient created tax invoice issued by CMCL under the GST Act Subdivision 153-B arrangements.

Part IVA

28. Whether or not Part IVA of *the Income Tax Assessment Act 1936* will apply will depend in part upon the individual circumstances of each individual Seller. The deliberate deferral of creation and quantification of the debt for the Seller's Pool Proceeds will normally be driven predominantly by commercial reasons, to derive greater sale proceeds than otherwise would be the case.

Explanations

Section 70-35 of the ITAA 1997

29. Our views on when trading stock will no longer be 'on hand' are set out in Taxation Ruling IT 2670. In the arrangements covered by this Ruling CMCL acts only as an exclusive agent of the Seller, and never takes physical possession of the Produce. The key principle from IT 2670 is that of 'dispositive power'. We consider CMCL never acquires dispositive power over the goods in question.

30. A Seller, either alone, or in conjunction with others, is considered to retain dispositive power over the Produce until it has been released to a Buyer. In practice this will often occur quite soon after delivery of the Produce into a Pool storage facility. Accordingly, a Seller will only need to account under section 70-35 for the difference between the opening and closing value of Produce on hand if their Produce has not been released to a Buyer by the end of the income year in question.

Section 70-90 of the ITAA 1997

31. Provided the arrangements carried out are as outlined in this Ruling the sales of Produce by the Sellers under these arrangements will be in the ordinary course of carrying on their businesses, and section 70-90 will have no application.

Section 6-5 of the ITAA 1997

32. If payments were made to the Seller from the pool in advance of final payment, by the pool manager, these payments would be income derived when the pool manager declared them. That is not contemplated in the case of the CMCL Produce Pool. Sellers will be paid not on the basis of the price paid for their Produce, but on the basis of the total proceeds received by the particular sub-pool, less expenses, and after taking into account the quantity and quality of Produce delivered by the Seller and the points allocated to the Seller and additional points for notional interest to reflect delivery date into the pool. There is no debt owing to the Seller at the time when the Produce is delivered into the pool or when the pool manager sells the Produce from the pool or sub-pool. Where financial accommodation is provided to a Seller, as described in paragraph 22, receipt of the amount provided under this accommodation will not constitute the derivation of assessable income. This accommodation is full recourse, involves the charging of a commercial discount rate, and appropriate documentation, evidencing that there is a loan on a genuine commercial basis. Where these elements are not present funds received by a Seller in respect of their entitlements and rights in relation to a Produce and rights in relation to a Produce Pool may be treated as assessable income.

Section 17-5 of the ITAA 1997

33. The income derived by the Seller when making a taxable supply of Produce will include an amount the Seller is liable to remit to the Commissioner of Taxation as GST. Section 17-5 excludes this amount of GST from the assessable income of the Seller.

Part IVA of the ITAA 1936

34. For Part IVA of the ITAA 1936 to apply, there must be a “scheme” (section 177A), a “tax benefit” (section 177C), and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D). The CMCL Produce Pool will be a “scheme”. The Sellers will obtain a “tax benefit” from entering into the scheme in the form of a deferral of the derivation of income assessable under section 6-5 in general until the maturity date, that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

35. Sellers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the sale of Produce. Further, there are no features of the CMCL Produce Pool which are uncommercial. In particular, the deferral of income arises from the fact that Buyers will not be making payment until or shortly before the pool maturity date. The deferral of payment arrangements, including the PAF, have been entered into in order to facilitate the sale of the Produce and to obtain a better price. The financial accommodation provided to Sellers in accordance with paragraph 22 of this Ruling will be full recourse to the Sellers. Bearing in mind these facts, there are no features that might suggest that the CMCL Produce Pool is so “tax driven” and so designed to produce a deferral of assessable income that it would attract the operation of Part IVA.

Description of Sub-division 153-B of the GST Act

36. Subdivision 153-B of the GST Act enables a principal and agent who are both registered for GST to enter into a voluntary arrangement in writing to treat certain supplies the agent makes on behalf of the principal as supplies by the agent rather than the principal. As a consequence of such an arrangement, there arises for GST purposes only a deemed supply from the principal to the agent, and a further deemed supply from the agent to the ultimate Buyer. As for ordinary supplies, these deemed supplies will require tax invoices to be issued, in order for input tax credits to be claimed.

37. The class of persons to whom this Ruling applies may therefore be in a position that their supply of produce to a Buyer at a particular price becomes instead **for GST purposes only** a supply of Produce to CMCL at a lower price, and the supply by CMCL to the ultimate Buyer as an agent becomes a supply by CMCL in its own right to that Buyer. These consequences will only arise if a relevant GST Subdivision 153-B agreement is entered into and applies to the transaction.

Detailed contents list

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Commissioner of Taxation29 June 2001

Previous draft:

Not previously released in draft form

- tax benefits

*Related Rulings/Determinations:*TR 92/1; TR 92/20; TR 97/16;
PR 1999/95; IT 2670; TD 93/34*Legislative references:**Subject references:*

- primary production
- producing assessable income
- product rulings
- public rulings
- schemes
- tax avoidance

- ITAA 1997 6-5
- ITAA 1997 17-5
- ITAA 1997 70-35
- ITAA 1997 70-35(1)
- ITAA 1997 70-90
- ITAA 1936 Part IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ANTS(GST)A99 Subdiv 153-B
- ANTS(GST)A99 153-50

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