



PR 2001/123 - Income tax: 2000 Timbercorp Olive Project (Private Offer)

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Product Ruling

Income tax: 2000 Timbercorp Olive Project (Private Offer)

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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 persons, who take part in the arrangements to which this Ruling relates. In this Ruling these arrangements are sometimes referred to as the 2000 Timbercorp Olive Project (Private Offer), or just simply as 'the Project'.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- Division 35 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Goods and Services Tax

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

Business Tax Reform

4. The Government is currently evaluating further changes to the tax system in response to the *Ralph Review of Business Taxation* and continuing business 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 affect 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.

5. 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

6. 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

7. The class of persons to whom this Ruling applies is those who entered into the arrangement described below between and including the dates of 8 March 2000 and 14 April 2000. They will have had 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 'Growers'.

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

Qualifications

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

10. If the arrangement described in this 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

12. This Ruling applies prospectively from 4 July 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

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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 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 between and including the dates of 8 March 2000 and 14 April 2000. 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. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Application for a product ruling for the 2000 Timbercorp Olive Project (Private Offer) dated 14 March 2001;
- Information Memorandum for the 2000 Timbercorp Olive Project (Private Offer) dated February 2000;
- Copy of signed Project and Management Agreement (the 'Management Agreement') between Olivecorp Management Limited ('the Project Manager') and each Grower, dated 30 April 2000;
- Copy of signed Licence and Joint Venture Agreement (the 'Licence and Joint Venture Agreement') dated 30 April 2000;

- Copy of signed put option agreement between Olivecorp Management Limited and Costa d'Oro srl regarding the sale of olive oil dated 23 March 2000;
- Copy of a finance package incorporating the Loan Agreement between Timbercorp Finance (Vic) Pty Ltd ('the Lender') and the person specified in item 1 of the Schedule ('the Borrower');
- Application and Documents Package; and
- E-mail from Applicant dated 13 June 2001.

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

16. The documents highlighted are those Growers entered into or became a party to. For the purposes of describing the arrangements to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, to which the Grower, or an associate of the Grower, will be a party to. The effect of the agreements may be summarised as follows.

17. The Applicant has informed the Tax Office that the offer to participate in the Project opened on 8 March 2000 and closed on 14 April 2000 when it was fully subscribed. Initially, the offer was an excluded offer under the provisions of the Corporations Law and required Growers to subscribe for a minimum of 50 grovelots. Following changes to the Corporations Law on 13 March 2000, the offer was extended to participants who met the criteria under section 708 of the Corporations Law.

18. This Ruling does not apply unless a Grower who participated in the arrangement before 13 March had subscribed for a minimum of 50 Grovelots. This Ruling does not apply to a Grower who participated in the arrangement on or after 13 March 2000 unless the Grower:

- has accepted a 'personal offer' under subsections 708(1)-(7) of the Corporations Law;
- is a 'sophisticated investor' for the purposes of subsections 708(8)-(9) of the Corporations Law;
- has accepted an offer made by a licensed dealer where the offer meets the requirements of subsection 708(10) of the Corporations Law; or

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- is a ‘professional investor’ for the purposes of paragraphs (a), (b) or (h) of subsection 708(11) of the Corporations Law.

Overview

19. This arrangement is called the 2000 Timbercorp Olive Project (Private Offer). The salient features of the Project are shown in the table below.

Location	Boort (northwest of Bendigo), Victoria
Type of business each participant is carrying on	Commercial growing and cultivation of olive trees for eventual harvesting and selling of olive oil
Number of hectares under cultivation	362
Number of olive trees per hectare	An average of 330 trees
Size of the olive groves (‘grovelot’)	0.25 hectares
Number of olive trees per grovelot	83 on average
The term of investment in years	Approximately 23 years commencing on acceptance of a Grower’s application and ending on 30 June 2023
Initial subscription cost per grovelot (see paragraphs 33 & 34 for details of Project fees)	\$5,825
Initial subscription on per hectare basis	\$23,300

20. The Project is to carry out a large-scale business of cultivating and managing olive groves for the production of olive oil.

21. Growers participating in the Project entered into a Licence and Joint Venture Agreement with Olivecorp Land Pty Ltd (‘Olivecorp Land’). Olivecorp Land has established an olive grove and all associated infrastructure on its land. Under this agreement each Grower was given a right to use and occupy parcels of land for a period of approximately 23 years for the purpose of cultivating the

grove for the production of olives for processing into olive oil for sale. Each parcel of land is an allotment of 0.25 hectares of land ('grovelot'). Under the agreement, each Grower also entered into a joint venture arrangement with Olivecorp Land (on a 90%:10% basis) in respect of the cultivation and management of their grovelots. As a result, each Grower will be responsible for 90% of all management costs associated with the cultivation and management of their grovelots and will be entitled to 90% of all produce.

22. Growers (comprising applicants in joint venture with Olivecorp Land) entered into a Project and Management Agreement with the project manager, to perform services in relation to the cultivation and management of their olive grovelots. Under this agreement, the project manager will also harvest the olives, procure the processing of olives into olive oil and sell the oil on behalf of the joint venture growers (at market prices) who will be entitled to the proceeds in their respective proportions. The project manager has entered into a put option agreement with Costa d'Oro srl, a major Italian olive oil distributor, under which it is entitled to require Costa d'Oro to purchase up to 4,500 metric tonnes of olive oil per annum during the first 19 years of the Project.

Licence and Joint Venture Agreement

23. Under the Licence and Joint Venture Agreement, Olivecorp Land agreed to establish olive groves at its own cost (clause 2.1) including construction of necessary infrastructure and carrying out capital works. This was done on grovelots which are separate identifiable areas of land comprising allotments of 0.25 hectares of land. A grove was established by 30 April 2000.

24. Each applicant Grower obtained a non-exclusive licence to use and occupy grovelots (in joint venture with Olivecorp Land). Under the terms of the agreement a Grower may only use the land for the purpose of cultivating and harvesting olives and producing olive oil.

25. At the expiration of the term, each Grower must return the grovelots to Olivecorp Land in good condition but is not required to remove the olive trees or restore the grovelots to their original condition.

26. The agreement provides that Olivecorp Land and each Grower will enter into the Project Management Agreement as joint venturers. It provides that the Grower will be entitled to 90% of the joint venture assets and will be entitled to 90% of the olives and of the proceeds of sale. The Grower will also be responsible for 90% of the management fees.

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27. The Licence and Joint Venture Agreement was subject to and conditional on the Growers entering into the Project and Management Agreement prior to or on the commencement date.

Project and Management Agreement

28. Under the Project and Management Agreement, each Grower (in joint venture with Olivecorp Land) engages the project manager to manage and cultivate the grove on behalf of the Grower in accordance with the management plan, harvest the olives, procure the processing of the olives into olive oil and market the oil for sale for the duration of the term.

29. The project manager is required to perform these services in a proper and efficient manner in accordance with good horticultural and environmental practices.

30. The olives from the grove will be pooled with olives from other Growers' grovelots and Growers will be entitled to their pro rata proportion of the olives and the olive oil produced.

31. Although the services described commenced once the grove was established by Olivecorp Land, there were also services provided before this time. The project manager was required to oversee the establishment of the grove by Olivecorp Land to ensure that the work was carried out in accordance with good horticultural and environmental practices.

32. The project manager will endeavour to arrange insurance on the Growers' behalf. Where this is available, Growers are required to insure their grovelots against damage or destruction by fire and other insurable risks. The project manager will arrange payment of insurance premiums to the appropriate insurers.

Fees

33. Under the terms of the Licence and Joint Venture Agreement and the Project and Management Agreement, a Grower has made and will make (as required) the following payments per grovelot.

Fee type	30 June 2000	30 June 2001	30 June 2002
Licence fee (see Note (I) below)	\$200	\$481.25	\$481.25
Management fee (see Note (ii) below)	\$5,625	\$1,856.25	\$1,856.25
Total	\$5,825	\$2,337.50	\$2,337.50

Notes:

- (i) The licence fee for the period ending 30 June 2000 was paid on commencement. Subsequently, licence fees are payable on 31 January of each financial year. After 30 June 2002, the licence fee will be indexed each year to CPI.
- (ii) The management fee for the period ending 30 June 2000 was paid on commencement. Subsequently, management fees are payable on 31 January of each financial year. After 30 June 2002, the management fee for each financial year will be an amount calculated by the Manager as the reasonable costs of managing the grovelot.

34. From year 4 of the Project, Growers will be liable to pay annual management cost comprising operating costs and a management fee (clauses 12.1 and 12.2).

Finance

35. Growers can either fund their investment in the Project themselves, borrow from an independent lender, or may elect to use proposed financing packages through Timbercorp Finance (Vic) Pty Ltd. All interest payments will be made in arrears.

36. The provision of finance involves full recourse loans and the finance provider will pursue legal action against defaulting borrowers.

37. This Ruling does not apply if a Grower enters into a finance agreement that includes 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 other than Timbercorp Finance (Vic) Pty Ltd 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 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 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) back to the lender or any associate; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

Ruling

Division 35 – deferral of losses from non-commercial business activities

Section 35-55 – Commissioner’s discretion

38. For a Grower who is an individual and who entered the Project on or after 8 March 2000 and up until and including 14 April 2000 the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner has decided that the rule in section 35-10 does not apply to this business activity for the income years specified below:

- for a Grower who entered the Project before 13 March 2000 and subscribed for a minimum of 50 grovelots, the income years ended 30 June 2001 to 30 June 2002; and
- for a Grower who entered the Project on or after 13 March 2000 and subscribed for one or more grovelots, the income years ended 30 June 2001 to 30 June 2003,

provided that the Project has been, and continues to be carried on in a manner that is not materially different to the arrangement described in this Ruling.

39. This exercise of the discretion in subsection 35-55(1) will not be required where, for any year in question:

- a Grower’s business activity satisfies one of the objective tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the ‘Exception’ in subsection 35-10(4) applies (see paragraph 45 in the Explanations part of this ruling, below).

40. Where, either the Grower's business activity satisfies one of the objective tests, the discretion in subsection 35-55(1) is exercised, or the Exception in subsection 35-10(4) applies, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of deductions attributable to their business activity in excess of any assessable income from that activity, i.e., any 'loss' from that activity, to a later year. Instead, this 'loss' can be offset against other assessable income for the year in which it arises.

41. Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner's decision to exercise the discretion in paragraph 35-55(1)(b) as an indication that the Tax Office sanctions or guarantees the Project or the product to be a commercially viable investment. An assessment of the Project or the product from this perspective has not been made.

Explanations

Division 35 – deferral of losses from non-commercial business activities

42. Under the rule in subsection 35-10(2) a deduction for a loss incurred by an individual (including an individual in a general law partnership) from certain business activities will not be allowable in an income year unless:

- the 'Exception' in subsection 35-10(4) applies;
- one of four objective tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or
- if one of the objective tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

43. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

44. Under the loss deferral rule in subsection 35-10(2) the relevant loss is not able to be taken into account in the calculation of taxable income in the year that loss arose. Instead, in a later year it may be offset against any income from the same or similar business activity, or, if one of the objective tests is passed, or the Commissioner's discretion exercised, against other income.

45. For the purposes of applying the objective tests, subsection 35-10(3) allows taxpayers to group business activities 'of a similar kind'. Under subsection 35-10(4), there is an 'Exception' to the

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general rule in subsection 35-10(2) where the loss is from a primary production business and the individual taxpayer has other assessable income for the income year from sources not related to that activity, of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

46. In broad terms, the objective 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 is used on a continuing basis in carrying on the business activity in that year (section 35-45).

47. A Grower who was accepted into, and who has participated in the Project since 8 March 2000 is carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling and additional information provided since, indicates that:

- a Grower who entered the Project before 13 March 2000 and acquired the minimum investment of 50 grovelots in the Project was unlikely to pass one of the objective tests until the income year ended 30 June 2003. Growers who acquired more than 50 grovelots in the Project may however, pass one of the tests in an earlier income year; and
- a Grower who entered the Project on or after 13 March 2000 and acquired one grovelot was unlikely to pass one of the objective tests or produce a taxation profit until the income year ended 30 June 2004. Growers who acquired more than one grovelot in the Project may however, pass one of the tests in an earlier income year.

48. Therefore, prior to these times, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

49. The first arm of 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 an individual Grower who acquired an interest(s) in the Project on or after 8 March 2000 and up until and including 14 April 2000, the Commissioner has decided that it would be unreasonable not to exercise the second arm of the discretion in paragraph 35-55(1)(b) for the period specified in paragraph 38 above.

50. The discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner 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 will either pass one of the objective tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

51. Information provided by the applicant states that the business activity comprised by a Grower’s involvement in this Project has started to be carried on, and will continue to be carried on in a manner that is not materially different to that described in the Arrangement in this Product Ruling.

52. In deciding to exercise the discretion in paragraph 35-55(1)(b) the Commissioner has relied upon:

- the Put Option Agreement with Costa d’Oro srl for the sale of the olive oil setting out prices that realistically reflect the existing market at the time of sale; and
- independent, objective, and generally available information relating to the olive 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

53. Below is a detailed contents list for this Product Ruling:

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Commissioner of Taxation

4 July 2001

Previous draft:

Not previously issued in draft form	- tax benefits
	- viticultural expenses

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

Subject references:

- carrying on a business
- commencement of a business
- management fees
- primary production
- producing assessable income
- product rulings
- public rulings
- schemes
- tax avoidance

Legislative references:

- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(3)
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(a)
- ITAA 1997 35-55(1)(b)

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FOI status: **may be released**

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 - Corporations Law 708(11)(a)
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ATO references:

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