



PR 2003/47 - Income tax: Margaret River Watershed Premium Wine Project - Replacement Prospectus

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 This document has changed over time. This is a consolidated version of the ruling which was published on *25 June 2003*

Product Ruling

Income tax: Margaret River Watershed Premium Wine Project – Replacement Prospectus

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Potential participants 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.

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**, **Previous Ruling**, **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. 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 participants 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 this product fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out 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, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants 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 arrangement to which this Ruling refers. In this Ruling this arrangement is sometimes referred to as the 'Margaret River Watershed Premium Wine Project – Replacement Prospectus' or simply as 'the Project'.

Tax law(s)

2. The tax laws dealt with in this Ruling are:
- Section 6-5 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
 - Section 8-1 (ITAA 1997);
 - Section 17-5 (ITAA 1997);
 - Division 27 (ITAA 1997);
 - Division 35 (ITAA 1997);
 - Division 70 (ITAA 1997);
 - Division 328 (ITAA 1997);
 - Section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
 - Section 82KZL (ITAA 1936);
 - Section 82KZME (ITAA 1936);
 - Section 82KZMF (ITAA 1936); and
 - Part IVA (ITAA 1936).

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.

Changes in the law

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 taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering participating 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 participants in projects such as this. In keeping with that intention, the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

Class of persons

7. The class of persons to whom this Ruling applies is the persons who are more specifically identified in the Ruling part of this Product Ruling and who enter into the arrangement specified 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. 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 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. 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. The Ruling will be withdrawn or modified.

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Date of effect

11. This Ruling applies prospectively from 25 June 2003, 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).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on that private ruling if the income year to which it relates has ended or has commenced but not yet ended. However if the arrangement covered by the private ruling has not commenced, 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

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2005. 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 arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the person's involvement in the arrangement.

Previous Ruling

14. This Ruling replaces Product Ruling PR 2002/106 which is withdrawn on and from the date this Ruling is made. Product Ruling PR 2002/106 will continue to apply to participants who entered into the Project on or before 25 June 2003.

Arrangement

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

- Application for Product Ruling dated 3 October 2001;
- The Margaret River Watershed Premium Wine Project Prospectus, dated 19 January 2002;
- Replacement Prospectus for the Margaret River Watershed Premium Wine Project, dated 21 January 2002;
- **Amended Constitution for the Margaret River Watershed Premium Wine Project** between Primary Securities Ltd [the 'Responsible Entity'], Primary Securities Ltd ['the Bare Trustee'] and the Grower, dated January 2003;
- **Project Operations Agreement for 2002 Growers Margaret River Watershed Premium Wine Project** between Primary Securities Ltd [the 'Responsible Entity'] and the Grower, dated 8 April 2003;
- **Lease for 2002 Growers** between Watershed Land Ltd [the 'Owner'], Primary Securities Ltd [the 'Responsible Entity'], and the Grower, dated 8 April 2003;
- Marketing and Management Agreement Margaret River Watershed Premium Wine Project between Watershed Marketing and Management Pty Ltd [the 'Manager'] and Primary Securities Ltd [the 'Responsible Entity'], dated 8 April 2003;
- Rules Margaret River Watershed Premium Wine Project by Primary Securities Ltd [the 'Responsible Entity'], undated;
- Compliance Plan for the Margaret River Watershed Premium Wine Project, dated 5 July 2001;

- Wine Production Agreement between Watershed Marketing and Management Pty Ltd [the 'Manager'] and Watershed Wines Ltd [the 'Winery'] dated 20 April 2000;
- Lease Watershed Winery between Watershed Land Ltd [the 'Lessor'] and Watershed Wines Ltd [the 'Winery'] undated; and
- Additional correspondence dated 11 December 2001, 24 June 2002, 19 May 2003.

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

16. The documents highlighted are those that the Growers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or an associate of the Grower will be a party to that are part of the arrangement to which this Ruling applies.

17. All Australian Securities and Investments Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of the agreements may be summarised as follows.

Overview

18. This arrangement is called the Margaret River Watershed Premium Wine Project – Replacement Prospectus.

Location	South West Region of Western Australia, South of Margaret River
Type of business each participant is carrying on	A commercial viticulture and wine production business
Number of hectares under cultivation	79.9 hectares
Size of each Vinelot	0.025 hectares
Number of vines per hectare	1,660
Expected production	720 cases of wine / hectare
The term of the investment	18 years
Initial cost	\$4,488
Initial cost per hectare	\$179,520

Ongoing costs	Annual Management Fees and Lease fees (Rent).
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19. Growers who applied under the Prospectus entered into a Marketing and Management Agreement and a Lease. As a result of a restructure to the Project, the Marketing and Management Agreement has been replaced by a Project Operations Agreement between the Grower and the Responsible Entity. Watershed Land Ltd agreed to lease to the Grower an identifiable area of land called a 'Vinelot' for the purpose of cultivating vines and harvesting grapes until the Project is terminated on 30 June 2019. Each Vinelot is 0.025 hectares in size.

20. The Project Land is situated in the South West Region of Western Australia, approximately 5kms south of Margaret River. Watershed Land Ltd is the owner of the land.

21. There was no minimum subscription for the Project. Each investor may subscribe for a minimum of one Vinelot. The Manager has planted approximately 41 vines per Vinelot (1,660 per hectare).

Amended Constitution

22. The Amended Constitution for the Project sets out the terms and conditions under which the Responsible Entity agrees to act for the Growers and to operate the Project. The Responsible Entity will keep a register of Growers. The Project Operations Agreement for 2002 Growers came into effect on 8 April 2003 and the Lease for 2002 Growers came into effect on acceptance of a Grower's Application by the Responsible Entity. Growers are also bound by the Amended Constitution by virtue of their participation in the Project.

Compliance plan

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

Interest in land

24. A lease of the Vinelot has been granted by the Lessor, Watershed Land Ltd, to the Growers under the terms of the Lease (clause 2.1). The Lease is granted for the purpose of cultivating vines and harvesting grapes for commercial grape production (Recital C). Growers must pay rent to the Lessor of \$176 per Vinelot on application and \$176 (indexed) on 1 March 2003. For each year thereafter rent is payable on 1 March and will be indexed annually. The term of a Grower's Lease is from the Lease Commencement Date until 30 June 2019 (Schedule to the Lease for 2002 Growers).

Project Operations Agreement

25. Each Grower enters into a Project Operations Agreement with the Responsible Entity. The termination of the Project is the date on which all wine has been sold, proceeds from the sale of wine have been paid, and all accounts and reports have been given in relation thereto (clause 3). Growers contract with the Responsible Entity to purchase grapes and juice, manage, maintain and harvest grapes from the vines, arrange for grapes to be processed into wine and to market and sell wine. Growers pay a management fee of \$4,312 on application plus \$2,420 on or before 1 March 2003 for services to be provided from the date of allotment to 30 June 2003. A management fee of \$2,288 is payable on or before 1 March 2004 for services to be provided during the period commencing 1 July 2003 to 30 June 2004. Management fees are payable annually thereafter equal to the Growers' proportion of the Responsible Entity's actual costs for performing the services under the agreement plus the Grower's proportion of corporate overhead costs and relevant insurance premiums.

26. The Responsible Entity engages the Manager to carry out the following services under this agreement:

- cultivate and maintain the vines on the Vinelots in a proper and skilful manner pursuant to the Project Operations Agreement;
- take any necessary steps to prevent or combat land degradation in relation to the Vinelots;
- tend to the vines according to the principles of sound viticulture practice, including the application of fertiliser;
- maintain and/or upgrade fences to prevent the entry of kangaroos and vermin, soil degradation and protect the placement of vines;

- keep the vines in good and substantial repair and condition and conduct activities on them in a commercial manner in keeping with accepted viticulture industry standards;
- do such things as may reasonably be required to eradicate, exterminate and keep the Vinelots and the land free from disease, vermin, noxious weeds, rabbits, kangaroos, insect pests and all other pests.
- purchase wine and grapes to supplement grapes grown on the relevant Vinelot;
- arrange for the delivery of harvested grapes and any other wine or grapes purchased on behalf of the Grower to the winery for the production of Wine from those grapes;
- arrange for the Wine to be bottled, corked, packaged and stored; and
- carry out the brand marketing strategy referred to in the Prospectus/PDS and carry out the distribution and sale of the Wine.

27. The Responsible Entity will arrange for the Manager to harvest (clause 7) each season (except for the initial growing seasons) as and when deemed appropriate in keeping with sound viticultural practice, to produce the best results for the Grower. The Responsible Entity will be responsible for paying for the cost of annual insurance of Growers' wine (clause 12).

Fees

28. The total management fee payable per Vinelot for services to be performed in the year ended 30 June 2003 is \$6,732. The management services in respect of this fee will be performed during the period from the date of allotment to 30 June 2003.

29. A management fee of \$2,288 is payable for services to be carried out in the period commencing 1 July 2003 until 30 June 2004 and is payable on or before 1 March 2004.

30. For the years from 1 July 2004 to 30 June 2019, management fees are payable by the Grower each year equal to the Grower's proportion of the actual cost to the Responsible Entity in performing the services under the Project Operations Agreement or the relevant financial year plus the Grower's proportion of the corporate overhead costs, profits and any relevant insurance premiums.

31. Rent per Vinelot for the year ended 30 June 2003 comprises of \$176 being payable on allotment and \$176 (indexed) payable on 1 March 2003. For each year thereafter, rent of \$176, indexed annually, is payable by the Grower on 1 March of the relevant year.

32. The Subscription Money will be held in the Trust Account by the Bare Trustee formed under the Project's Amended Constitution (clause 6(a)).

Cultivation and Harvesting

33. The Responsible Entity will contract with the Manager to tend to and cultivate the vines according to the principles of sound viticulture practice. The services to be provided by the Responsible Entity over the term of the Project are outlined in the Project Operations Agreement (clause 5).

34. The Responsible Entity will contract with the Manager to arrange for the harvesting of the grapes, and/or purchase of grapes and juice, delivery of these grapes and juice to the Winery, for production of wine from those grapes, storage of the wine and arranging for the marketing and sale of wine. The harvest will take place each season (except for the initial growing seasons) as and when deemed appropriate by the Manager in keeping with sound viticulture practice, to produce the best results for the Grower.

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

- to the Responsible Entity for any outstanding fees and expenses payable by the Grower to the Responsible Entity under the Amended Constitution;
- to the Responsible Entity for any outstanding fees, costs or interest owing by the Grower to the Responsible Entity under the Project Operations Agreement;
- to the Owner for any outstanding Lease fee or other fees, costs, interest or expenses owing by the Grower to the Owner under the Lease; and then
- to the Grower provided that if the aggregate sum to be distributed is less than \$1,000, then at the discretion of the Responsible Entity, distribution to Growers may be postponed (clause 12 of the Amended Constitution).

Finance

36. Growers can fund their investment in the Project themselves or borrow from an independent lender.

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

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL or the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

38. This Ruling applies only to Growers who were accepted to participate in the Project on or before 19 January 2003, being the date of expiry of the prospectus, and who executed a Marketing and Management Agreement and a Lease for 2002 Growers before that date. The Marketing and Management Agreement will now be replaced by the Project Operations Agreement for 2002 Growers. The Grower's participation in the Project must constitute the carrying on of a business of primary production. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced.

The Simplified Tax System ('STS')

Division 328

39. For a Grower participating in the Project, the recognition of income and the timing of tax deductions, including those related to capital allowances, is different depending on whether the Grower is an 'STS taxpayer'. To be an 'STS taxpayer' a Grower:

- must be eligible to be an 'STS taxpayer'; and
- must have elected to be an 'STS taxpayer'.

Qualification

40. This Product Ruling assumes that a Grower who is an 'STS taxpayer' is so for the income year in which their participation in the Project commences. A Grower may become an 'STS taxpayer' at a later point in time. Also, a Grower who is 'STS taxpayer' may choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer', during the term of the Project. These are contingencies relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

Tax outcomes for Growers who are not 'STS taxpayers'

Assessable Income

Section 6-5

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

42. The Grower recognises ordinary income from carrying on the business of viticulture at the time that income is derived.

Trading stock

Section 70-35

43. A Grower who is not an 'STS taxpayer' may, in some years, hold grapes, grape juice and/or bottles of wine that will constitute trading stock on hand. Where, in an income year, the value of trading stock on hand at the end of an income year exceeds the value of trading stock on hand at the start of an income year a Grower must include the amount of that excess in assessable income.

44. Alternatively, where the value of trading stock on hand at the *start* of an income year exceeds the value of trading stock on hand at the *end* of an income year, a Grower may claim the amount of that excess as an allowable deduction.

Deductions for Management Fees and Rent

Section 8-1

45. A Grower who is not an 'STS taxpayer' may claim tax deductions for the following revenue expenses:

Fee Type	ITAA 1997 Section	Year ended 30/6/2003	Year ended 30/6/2004	Year ended 30/6/2005
Management Fee	8-1	\$6,732 – See Notes (i) & (ii) (below)	\$2,288 – See Notes (i) & (ii) (below)	Amount must be calculated – See Notes (i),(ii) & (iii) (below)
Rent	8-1	\$176 + \$176 (indexed) – See Notes (i) & (ii) (below)	\$176 (indexed) – See Notes (i) & (ii) (below)	\$176 (indexed) – See Notes (i) & (ii) (below)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (e.g. input tax credits): Division 27. See Example 1 at paragraph 109.
- (ii) The management fees and the rent shown in the Project Operations Agreement and the Lease for 2002 Growers are deductible in full in the year that they are incurred. However, if a Grower **chooses** to prepay fees for the doing of a thing (e.g. the provision of management services or the leasing of land) that will not be wholly done in the income year the fees are incurred, the prepayment rules of the ITAA 1936 may apply to apportion those fees (see paragraphs 79 to 86). In such cases, the tax deduction for the prepaid fee must be

determined using the formula shown in paragraph 85 unless the expenditure is 'excluded expenditure'. 'Excluded expenditure' is an 'exception' to the prepayment rules and is deductible in full in the year in which it is incurred. For the purpose of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000.

- (iii) For the years from 1 July 2004 to 30 June 2019, management fees are payable by the Grower each year equal to the Grower's proportion of the actual cost to the Responsible Entity in performing the services under the Project Operations Agreement for the relevant financial year plus the Grower's proportion of the corporate overhead costs and any relevant insurance premiums.

Tax outcomes for Growers who are 'STS taxpayers'

Assessable Income

Section 6-5

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

47. The Grower recognises ordinary income from carrying on the business of viticulture at the time the income is received (paragraph 328-105(1)(a)).

Treatment of Trading Stock

Section 328-285

48. A Grower who is an 'STS taxpayer' may, in some years, hold bottles of wine that will constitute trading stock on hand. Where, for such a Grower, for an income year, the difference between the value of all their trading stock at the start and a reasonable estimate of it at the end, is less than \$5,000, they do not have to account for that difference under the ordinary trading stock rules in Division 70 (subsection 328-285(1)).

49. Alternatively, a Grower who is an 'STS taxpayer' may instead choose to account for trading stock in an income year under the provisions of Division 70 (subsection 328-285(2)).

Deductions for Management Fees and Rent***Section 8-1 and section 328-105***

50. A Grower who is an 'STS taxpayer' may claim tax deductions for the following revenue expenses:

Fee Type	ITAA 1997 Sections	Year ended 30/6/2003	Year ended 30/6/2004	Year ended 30/6/2005
Management Fee	8-1 & 328-105	\$6,732 – See Notes (iv), (v) & (vi) (below)	\$2,288 – See Notes (iv), (v) & (vi) (below)	Amount must be calculated – See Notes (iv), (v), (vi) & (vii) (below)
Rent	8-1 & 328-105	\$176 + \$176 (indexed) – See Notes (iv), (v) & (vi) (below)	\$176 (indexed) – See Notes (iv), (v) & (vi) (below)	\$176 (indexed) – See Notes (iv), (v) & (vi) (below)

Notes:

- (iv) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (e.g. input tax credits): Division 27. See Example 1 at paragraph 109.
- (v) If, for any reason, an amount shown in the Table above is not fully paid in the year in which it is incurred by a Grower who is an 'STS taxpayer' then the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower. Any amount or part of an amount shown in the Table above which is not paid in the year in which it is incurred will be deductible in the year in which it is actually paid.
- (vi) Where a Member who is an 'STS taxpayer', pays the management fees and the rent in the relevant income years shown in the Project Operations Agreement and Lease for 2002 Growers, those fees are deductible in full in the year that they are paid. However, if a Grower **chooses** to prepay fees for the doing of a thing (e.g. the provision of management services or the leasing of

land) that will not be wholly done in the income year the fees are incurred, the prepayment rules of the ITAA 1936 may apply to apportion those fees (see paragraphs 79 to 86). In such cases, the tax deduction for the prepaid fee must be determined using the formula shown in paragraph 85, unless the expenditure is 'excluded expenditure'. 'Excluded expenditure' is an 'exception' to the prepayment rules, and is deductible in full in the year in which it is incurred. For the purpose of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000.

- (vii) For the years from 1 July 2004 to 30 June 2019, management fees are payable by the Grower each year equal to the Grower's proportion of the actual cost to the Responsible Entity in performing the services under the Project Operations Agreement for the relevant financial year plus the Grower's proportion of the corporate overhead costs and any relevant insurance premiums.

Tax outcomes that apply to all Growers

Interest

51. The deductibility or otherwise incurred by Growers who finance their participation in the Project through a loan facility with a bank or other financier is outside the scope of this Ruling. However, all Growers who borrow funds in order to participate in the Project should read the discussion of the prepayment rules in paragraphs 79 to 86 as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.

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

Section 35-55 – Commissioner's discretion

52. For a Grower who is an individual and who enters the Project during the year ended 30 June 2003 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 will decide for the income years ending 30 June 2003 to 30 June 2004 that the rule in section 35-10 does not apply to this activity provided that the Project is carried out in the manner described in this Ruling.

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

- the ‘exception’ in subsection 35-10(4) applies (see paragraph 97 in the Explanations part of this ruling, below);
- a Grower’s business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the Grower’s business activity produces assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsection 35-10(2)).

54. Where, the exception in subsection 35-10(4) applies, the Grower’s business activity satisfies one of the tests, or the discretion in subsection 35-55(1) is exercised, 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.

55. 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 commercially viable. An assessment of the Project or the product from this perspective has not been made.

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

56. For a Grower who participates in the Project and incurs expenditure as required by the Project Operations Agreement and the Lease for 2002 Growers the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME-82KZMF (but see paragraphs 79 to 86);
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Explanation

Is the Grower carrying on a business?

57. For the amounts set out in the Tables above to constitute allowable deductions the Grower's viticulture activities as a participant in the Margaret River Watershed Premium Wine Project - Replacement Prospectus must amount to the carrying on of a business of primary production. These viticulture activities will fall within the definitions of 'horticulture' and 'commercial horticulture' in section 40-535 of the ITAA 1997.

58. For schemes such as that of the Margaret River Watershed Premium Wine Project – Replacement Prospectus, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As Taxation Ruling TR 2000/8 sets out, these circumstances have been established in court decisions such as *FCT v. Lau* 84 ATC 4929, (1984) 15 ATR 932.

59. Generally, a Grower will be carrying on a business of viticulture, and hence primary production, if:

- the Grower has an identifiable interest (by lease or by licence) in the land on which the Grower's vines are established;
- the Grower has a right to harvest and sell the grapes each year from those vines;
- the viticulture activities are carried out on the Grower's behalf;
- the viticulture activities of the Grower are typical of those associated with a viticulture business; and
- the weight and influence of general indicators point to the carrying on of a business.

60. In this Project, each Grower enters into a Project Operations Agreement and a Lease for 2002 Growers.

61. Under the Lease, each individual Grower will have rights over a specific and identifiable area of land (Vinelots). The Lease provides the Grower with an ongoing interest in the specific vines on the Vinelots for the term of the Project. Under the Lease the Grower must use the Vinelots in question for the purpose of carrying out viticultural activities and for no other purpose. The Lease allows the Responsible Entity to come onto the land to carry out its obligations under the Project Operations Agreement.

62. Under the Project Operations Agreement the Responsible Entity is engaged by the Grower to maintain the vines on the Grower's Vinelots during the term of the Project. The Responsible Entity has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to maintain the Vinelot on the Grower's behalf.

63. The Grower engages the Responsible Entity to maintain the vines on the Vinelots according to the principles of sound viticulture practice which includes irrigation, fertilisation, weed control and pruning. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the grapes grown on the Grower's Vinelot.

64. 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 Project's description for all the indicators.

65. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable forecasts, a Grower in the Project may derive assessable income from the sale of its wine that may return a before-tax profit, i.e. a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

66. The pooling of wine and grapes from grapes grown on the Grower's Vinelot with the wine and grapes of other Growers is consistent with general viticulture practices. Each Grower's proportionate share of the sale proceeds of the pooled wine and grapes will reflect the proportion of the grapes contributed from their Vinelot.

67. The Responsible Entity's services are consistent with general viticulture practices. While the size of a Vinelot is relatively small, it is of a size and scale to allow it to be commercially viable (see Taxation Ruling IT 360).

68. The Grower's degree of control over the Responsible Entity as evidenced by the Project Operations Agreement, and supplemented by the Corporations Act, is sufficient. During the term of the Project, the Responsible Entity will provide the Grower with regular progress reports on the Grower's Vinelot and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Responsible Entity in certain instances, such as cases of default or neglect.

69. The viticulture 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. For the purposes of this Ruling, the Growers' viticulture activities in the Margaret River Watershed Premium Wine Project – Replacement Prospectus will constitute the carrying on of a business.

The Simplified Tax System

Division 328

70. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

71. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductibility of Management Fees and Rent

Section 8-1

72. Consideration of whether the initial Management Fees and rent are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer is contractually committed 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 the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

73. The management fees and rent associated with the viticulture activities will relate to the gaining of income from the Grower's business of viticulture (see above), and hence have a sufficient connection to the operations by which income (from the regular sale of wine) is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. There is no capital component of the management fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Possible application of prepayment provisions

74. Under the Project Operations Agreement and the Lease, neither the management fees nor the rent are for things to be done beyond 30 June in the year in which the relevant amounts are incurred. In these circumstances, the prepayment provisions in sections 82KZME and 82KZMF have no application to these fees.

75. However, where a Grower chooses to prepay these fees for a period beyond the income year in which the expenditure is incurred, the prepayment provisions (see paragraphs 79 to 86) will apply to determine the amount and timing of the deductions regardless of whether the Grower is an 'STS taxpayer' or not. These provisions apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF. This is subject to the 'excluded expenditure' exception. For the purpose of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000.

Timing of deductions

76. In the absence of any application of the prepayment provisions, the timing of deductions for the management fees or the rent will depend upon whether a Grower is an 'STS taxpayer' or is not an 'STS taxpayer'.

77. If the Grower is not an 'STS taxpayer', the management fees and the rent are deductible in the year in which they are incurred.

78. If the Grower is an 'STS taxpayer' the management fees and the rent are deductible in the income year in which they are paid, or are paid for the Grower (paragraph 328-105(1)(b)). If any amount that is properly incurred in an income year remains unpaid at the end of that income year, the unpaid amount is deductible in the income year in which it is actually paid or is paid for the Grower.

Prepayment provisions***Sections 82KZL to 82KZMF***

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

provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

80. For this Project only section 82KZL (an interpretative provision) and sections 82KZME and 82KZMF are relevant. Where the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for prepaid expenditure under section 82KZMF using the formula in subsection 82KZMF(1). These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF.

Sections 82KZME and 82KZMF

81. Where the requirements of subsections 82KZME(2) and (3) are met, the formula in subsection 82KZMF(1) (see below) will apply to apportion expenditure that is otherwise deductible under section 8-1 of the ITAA 1997. The requirements of subsection 82KZME(2) will be met if expenditure is incurred by a taxpayer in return for the doing of a thing that is not to be wholly done within the year the expenditure is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1)).

82. The requirements of subsection 82KZME(3) will be met where the agreement (or arrangement) has the following characteristics:

- the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year; and
- the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the arrangement are managed by someone other than the taxpayer; and
- either :
 - (a) there is more than one participant in the agreement in the same capacity as the taxpayer; or
 - (b) the person who promotes, arranges or manages the agreement (or an associate of that person) promotes similar agreements for other taxpayers.

83. For the purpose of these provisions, the agreement includes all activities that relate to the agreement (subsection 82KZME(4)). This has particular relevance for a Grower in this Project who, in order to participate in the Project may borrow funds from a financier. Although undertaken with an unrelated party, that financing would be an element of the arrangement. The funds borrowed and the interest deduction are directly related to the activities under the arrangement. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF.

84. There are a number of exceptions to these rules, but for Growers participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1). However, for the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the arrangement that is less than \$1,000. Such expenditure is immediately deductible.

85. Where the requirements of section 82KZME are met, section 82KZMF applies to apportion relevant prepaid expenditure. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

86. In the formula 'eligible service period' (defined in subsection 82KZL(1)) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

Application of the prepayment provisions to this Project

87. In this Project, an initial management fee of \$4,312 per Vinelot will be incurred on the execution of the Project Operations Agreement and \$2,420 on or before 1 March 2003. The management fee and rent are charged for providing management services or leasing of land to a Grower by 30 June of the year of the Project Operations Agreement and lease Agreement coming into effect. Under the Project Operations Agreement and lease Agreement, further annual expenditure is required each year during the term of the Project for the provision of management services until 30 June in those years.

88. In particular, the management fee is expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the description of the arrangement that the initial management fee has been inflated to result in reduced fees being payable for management fees in subsequent years.

89. There is also no evidence that might suggest the management services covered by the fee could not be provided within the relevant expenditure year. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial management fee, and the fees for subsequent years, is for the Project Manager doing 'things' that are not to be wholly done within the expenditure year. Under the Lease, rent is payable annually for the lease of the land during the expenditure year.

90. On this basis, provided a Grower incurs expenditure as required under the Project agreements, as set out in paragraphs 28 to 31, then the basic precondition in subsection 82KZME(2) is not satisfied and, in these circumstances, section 82KZMF will have no application.

Growers who choose to pay fees for a period in excess of that required by the Project's agreements

91. Although not required under either the Project Operations Agreement or the Lease, a Grower participating in the Project may **choose** to prepay fees for a period beyond the 'expenditure year'. Similarly, Growers who use financiers may either choose, or be required to prepay interest. Where this occurs, contrary to the conclusion reached in paragraph 90 above, section 82KZMF will apply to apportion the expenditure and allow a deduction over the period in which the prepaid benefits are provided.

92. For these Growers, the amount and timing of deductions for any relevant prepaid management fees, prepaid rent, or prepaid interest will depend upon when the respective amounts are incurred and what the 'eligible service period' is in relation to these amounts.

93. However, as noted above, prepaid fees of less than \$1,000 incurred in an expenditure year will be 'excluded expenditure' and will be not subject to apportionment under section 82KZMF.

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

94. Division 35 applies to losses from certain business activities for the income year ended 30 June 2001 and subsequent years. Under the rule in subsection 35-10(2), a deduction for a loss made by an individual (including an individual in a general law partnership) from

certain business activities will not be taken into account in an income year unless:

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

95. 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.

96. Losses that cannot be taken into account in a particular year of income, because of subsection 35-10(2), can be applied to the extent of future profits from the business activity, or are deferred until one of the tests is passed, the discretion is exercised, or the exception applies.

97. For the purposes of applying the 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 general rule in subsection 35-10(2) where the loss is from a primary production business activity 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.

98. In broad terms, the 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 (excluding cars, motor cycles and similar vehicles) are used on a continuing basis in carrying on the business activity in that year (section 35-45).

99. A Grower who participates in the Project will be carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling indicates that a Grower who acquires the minimum investment in the Project of one Vinelot during the year ended 30 June 2003 is unlikely to pass one of the tests until the year ended 30 June 2007. Growers who acquire more than one Vinelot may however, find that their activity meets one of the tests in an earlier income year.

100. Therefore, prior to this time, 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.

101. 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, the second arm of 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;
- (ii) because of its nature, it has not yet met one of the tests set out in Division 35; and
- (iii) there is an expectation that the business activity of an individual taxpayer will either pass one of the tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

102. Information provided with this Product Ruling indicates that a Grower who acquires the minimum investment of one Vinelot in the Project is expected to be carrying on a business activity that will either pass one of the tests, or produce a taxation profit, for the year ended 30 June 2005. The Commissioner will decide for such a Grower that it would be reasonable to exercise the second arm of the discretion until the year ended 30 June 2004.

103. This Product Ruling is issued on a prospective basis (i.e. before an individual Grower's business activity starts to be carried on). The Project, however, may fail to be carried on during the income years specified above (see paragraph 52) in the manner described in the Arrangement (see paragraphs 15 to 37). If so, this Ruling, and specifically the decision in relation to paragraph 35-55(1)(b), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) not apply, may be affected, because the Ruling no longer applies (see paragraph 9) the Commissioner's discretion will not have been exercised because one of the key conditions in paragraph 35-55(1)(b) will not have been satisfied.

104. In deciding that the second arm of the discretion in paragraph 35-55(1)(b) will be exercised on this conditional basis, the Commissioner has relied upon:

- additional evidence provided with the application by the Responsible Entity; and independent, objective and generally available information relating to the viticulture industry which substantially supports cash flow forecasts and other claims, including prices and costs, as described by the independent experts in the Prospectus, and in the Product Ruling application submitted by the Responsible Entity.

Section 82KL

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

Part IVA

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

107. The Margaret River Watershed Premium Wine Project - Replacement Prospectus will be a ‘scheme’ commencing with the issue of the Prospectus. A Grower will obtain a ‘tax benefit’ from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 45 and 50 that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

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

information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Example

Example 1 – entitlement to GST input tax credits

109. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her viticulture business. Her manager is registered for GST and charges her a management fee payable every six months in advance. On 1 December 2001 Susan receives a valid tax invoice from her manager requesting payment of a management fee in advance, and also requesting payment for an improvement in the connection of electricity for her vineyard that she contracted him to carry out. The tax invoice includes the following details:

Management fee for period 1/1/2002 to 30/6/2002	\$4,400*
Carrying out of upgrade of power for your vineyard as quoted	<u>\$2,200*</u>
Total due and payable by 1 January 2002 (includes GST of \$600)	<u>\$6,600</u>

*Taxable supply

Susan pays the invoice by the due date and calculates her input tax credit on the management fee (to be claimed through her Business Activity Statement) as:

$$\frac{1}{11} \times \$4,400 = \$400.$$

Hence her outgoing for the management fee is effectively \$4,400 *less* \$400, or \$4,000.

Similarly, Susan calculates her input tax credit on the connection of electricity as:

$$\frac{1}{11} \times \$2,200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2,200 *less* \$200, or \$2,000.

In preparing her income tax return for the year ended 30 June 2002, Susan is aware that the management fee is deductible in the year incurred. She calculates her management fee deduction as \$4,000 (not \$4,400).

Susan is aware that the electricity upgrade is deductible 10% per year over a 10 year period. She calculates her deduction for the power upgrade as \$200 (one tenth of \$2,000 only, not one tenth of \$2,200).

Detailed contents list

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Commissioner of Taxation

25 June 2003

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Related Rulings/Determinations:

TR 92/1; TR 92/20; TD 93/34;
TR 97/11; TR 97/16; TR 98/22;
PR 1999/95; TR 2000/8; TR 2001/14;
PR 2002/106; IT 360

Subject references:

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

Legislative references:

- TAA 1953 Pt IVA
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 Div 27
- 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)
- ITAA 1997 40-535
- ITAA 1997 Div 70
- ITAA 1997 70-35
- ITAA 1997 Div 328
- ITAA 1997 Subdiv 328-F
- ITAA 1997 Subdiv 328-G
- ITAA 1997 328-105
- ITAA 1997 328-105(1)(a)
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