

PR 2004/29 - Income tax: 2004 Timbercorp Table Grape Project

 This cover sheet is provided for information only. It does not form part of *PR 2004/29 - Income tax: 2004 Timbercorp Table Grape Project*

 This document has changed over time. This is a consolidated version of the ruling which was published on *7 December 2005*



Product Ruling

Income tax: 2004 Timbercorp Table Grape Project

Contents	Para
What this Product Ruling is about	1
Date of effect	11
Withdrawal	13
Arrangement	14
Ruling	56
Explanation	75
Example	115
Detailed contents list	116

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, 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.

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

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 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 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 law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the '2004 Timbercorp Table Grape Project' 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);
 - Section 25-25 (ITAA 1997);
 - Division 27 (ITAA 1997);
 - Division 35 (ITAA 1997);
 - Division 40 (ITAA 1997);
 - Division 328 (ITAA 1997);
 - Section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - Section 82KZL (ITAA 1936);
 - Sections 82KZME – 82KZMF (ITAA 1936); and
 - Part IVA (ITAA 1936).

Goods and services tax

3. All fees and expenditure referred to in this Ruling include the 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. Although this Ruling deals with the laws 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 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 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 intend to terminate their involvement in the Arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it;
- persons who are accepted to participate in the Project on or after 16 June 2004;
- persons who participate in the Project through offers made other than through the Product Disclosure Statement; and
- Timbercorp Securities Limited and its associates.

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.

10. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no Product Ruling may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration
Intellectual Property Branch
Department of Communications, Information Technology and
the Arts
GPO Box 2154
Canberra ACT 2601
or by email to: commonwealth.copyright@dcita.gov.au

Date of effect

11. This Ruling applies prospectively from 17 March 2004 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 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 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 2006. 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 persons' involvement in the arrangement.

Arrangement

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

- Application for Product Ruling dated 3 February 2004 as constituted by documents provided on 17 December 2003 and 22 December 2003 and additional correspondence dated 14 January 2004, 28 January 2004, 29 January 2004, 2 February 2004, 16 February 2004, 19 February 2004, 24 February 2004, 26 February 2004 and 5 March 2004;
- Draft Product Disclosure Statement ('PDS'), dated 5 March 2004, for the 2004 Timbercorp Table Grape Project prepared for Timbercorp Securities Limited A.C.N. 092 311 469 ('TSL');
- Draft **Constitution** of the 2004 Timbercorp Table Grape Project, dated 30 January 2004 and received on 19 February 2004;
- Draft **Licence Agreement**, between each Grower and TSL, dated 5 March 2004;
- Draft **Grapelot Management Agreement**, between each Grower and TSL, dated 5 March 2004;
- Draft Lease Agreement, between Orchard Investments Management Limited ACN 105 684 231 ('Land Owner'), Timbercorp Limited ACN 055 185 067 and TSL, dated 20 February 2004 and received on 5 March 2004;
- Draft Sub-lease Agreement, between Timbercorp Limited ACN 055 185 067 and TSL, dated 11 December 2003;

- Draft Management Agreement between TSL and Grapecorp Management Pty Ltd ACN 105 995 195, dated 11 December 2003;
- Draft Interim Table Grape Management Agreement, between TSL, Grape House Pty Ltd, Costa Management Group Pty Ltd ACN 105 341 900, the Covenantor, Grapecorp and TSL, undated;
- Table Grape Vineyard Preliminary Management Plan, dated October 2003;
- Compliance Plan for the 2004 Timbercorp Table Grape Project, undated;
- Draft Custody Agreement between TSL and the Custodian, dated 11 December 2003;
- 2003 Timbercorp Projects Finance Package; and
- Draft Plant Breeder's Rights Licence Agreement, dated 18 September 2003 and received on 14 January 2004.

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

15. The documents highlighted are those Growers enter into or become a party to. A Loan Agreement will be executed where a Grower successfully applies for finance from Timbercorp Finance Pty Ltd. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are part of the arrangements to which this Ruling applies. In this Ruling the term 'associate' has the meaning given by section 318 of the ITAA 1936. The effect of these agreements is summarised as follows.

16. It should be noted that the term Grower as used in this Ruling means each several person who becomes a party to these documents as a result of the allotment of 'Grapelots' pursuant to an Application in the PDS. In these documents, a Grower is referred to as 'Participant Grower'.

17. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

Overview

18. The salient features of the 2004 Timbercorp Table Grape Project are as follows:

Location	Euston in south west New South Wales, approximately 100 km southeast of Mildura
Type of business to be carried on by each participant	Commercial cultivation and growing of table grapes for the purpose of harvest and sale.
Number of acres offered for cultivation	417 acres (168 hectares) with no capacity for oversubscription.
Size of each 'Grapelot'	0.25 acres
Minimum allocation	Two (2) 'Grapelots' but TSL reserves the right to accept applications for less than two 'Grapelots'.
Minimum subscription	None
Number of vines per acre	450
Term of the Project	15 years commencing on acceptance of a Grower's application and ending on 30 June 2019.
Initial cost per Grapelot	\$5,000 comprising of \$4,885 initial management fee and \$115 initial licence fee.
Initial cost per acre	\$20,000
Other costs to Growers	On going costs will be payable (refer to paragraphs 46 to 49).

19. The Project will be registered as a managed investment scheme under the *Corporations Act 2001*. Applications to participate in the Project must be made during the 'Offer Period' which is the period commencing on the date of issue of the PDS and expiring on 15 June 2004 or such earlier date to be determined by the directors of TSL. The offer to participate in the Project must be made through the Application Form attached to the PDS. There is no minimum amount that must be raised under the PDS and oversubscription will not be accepted. A Custodian will be appointed under the Custody Agreement to protect the interests of Growers in their dealings with TSL.

20. Under a Power of Attorney contained on the Application Form, Applicants irrevocably appoint TSL to enter into the Licence Agreement and Grapelot Management Agreement on their behalf. They will also be bound by the Constitution on acceptance into the Project.

Interest in land

21. The 'Land' on which the Project will be conducted is described in the agreements that Growers will enter into. The PDS provides that the 'Land Owner', as Responsible Entity of the Timbercorp Orchard Trust, has entered into a contract of sale for the purchase of the 'Land'. This 'Land' is comprised of:

- 94 acres (38 ha) of existing vineyard planted in 2002 ('2002 Costa Land');
- 23 acres (9.2 ha) of vacant land adjacent to the 2002 Costa Land ('2004 Costa Land') (together known as 'Lara farm'); and
- 300 acres (121 ha) of vacant land located approximately 7 kilometres west of the Lara farm ('2004 Bella Vista Land' or 'Arumpo farm').

22. Both the '2004 Costa Land' and '2004 Bella Vista Land' will be established and planted by 30 June 2004. The '2002 and 2004 Costa Lands' (Lara farm) are described in those agreements as those parts of the land in registered plan Lot 2 Plan 1046695 and known as Lot 2 Stuart Highway, New South Wales while the '2004 Bella Vista Land' or Arumpo farm is described as those parts of the land in an unregistered plan which is part of Lot 4378 Plan 767245 and Lot 1 in Deposit Plan 1046695.

23. The 'Land' described above will be leased by the 'Land Owner' to Timbercorp Ltd who in turn will sub-lease the 'Land' to TSL. Growers will enter into a Licence Agreement whereby TSL will grant each Grower a licence to use and occupy a minimum of two parcels of land for a period of 15 years. TSL may however accept an application for only one parcel of land. Each parcel of land, referred to in this Project as a 'Grapelot', is an allotment of 0.25 acres of land. Each 'Grapelot' will comprise of an area of approximately 0.056 acres of the '2002 Costa Land' ('Existing Grapelot') and approximately 0.194 acres of the '2004 Costa Land' or '2004 Bella Vista Land' ('New Grapelot').

Constitution

24. The Constitution establishes the Project and operates as a deed binding all Growers and TSL. The Constitution sets out the terms and conditions under which TSL agrees to act as 'Responsible Entity' and thereby manage the Project.

25. Under clause 4 of the Constitution TSL holds the 'Application Money' on bare trust. TSL accounts for the 'Application Money' in a special trust account and deposits the money into a bank account solely for 'Application Money' for this Project. Once TSL is satisfied that all documents have been executed and any finance has been approved for an applicant, the 'Application Money' is released and applied against the fees due to TSL (clause 9.3).

26. In summary, the Constitution also sets out provisions relating to:

- invitations and offers under the PDS (clause 2);
- the irrevocable appointment of TSL as the Grower's agent, representative and attorney (clause 3);
- procedures relating to 'Applications' (clause 6);
- the absolute discretion of TSL to refuse an 'Application' (clause 7);
- the effect of an 'Application' being accepted by TSL (clause 8);
- preparation and execution of the Licence Agreement and Grapelot Management Agreement by TSL and release of the 'Application Money' (clause 9);
- preparation and issuing of 'Grapelot Statements' to Growers and the setting up and maintenance of a 'Register' (clause 10);
- TSL's powers (clause 11);
- the keeping of a separate 'Agency Account' for the holding of 'Proceeds' and any other money, apart from 'Application Money' and interest thereon, that TSL may hold for the Grower (clause 12);
- the appointment of TSL as agent and attorney to deal with the processing and sale of the 'Table Grapes' and distributions from the 'Agency Account' of 'Proceeds' to Growers and insurance proceeds (clause 13);
- the right of TSL to be paid fees and other expenses (clause 14);
- the status, the retention by TSL, and termination by TSL or the Growers, of the Grapelot Management Agreement and Licence Agreement (clause 18). This includes the right of Growers to obtain a copy of the above agreements by written request to TSL (clause 18.2) and the consequences of termination of these agreements (clause 18.4);

- the right of Growers to inspect certain documents related to their participation in the Project and to offer and give opinions to TSL (clause 19.1);
- the assignment and transmission of ‘Grapelots’ (clause 20) and restrictions on such assignments and transmissions (clause 21);
- resolution of complaints made by the Grower in relation to the Project or TSL (clause 25); and
- termination of the Project (clause 26).

27. Although clause 6.4 provides that Growers may pay the ‘Application Money’ by instalments **this Product Ruling does not apply to any Grower who enters into an arrangement to pay their ‘Application Money’ by instalments.**

Joint Venture

28. The Constitution allows two persons to enter into a ‘Joint Venture’. Clause 29 of the Constitution deals with the rights and obligations of Growers who constitute themselves as joint venturers (‘Joint Venture Growers’).

29. Under this ‘Joint Venture’:

- the First Joint Venture Grower is responsible for management fees payable (other than any incentive fees) under the Grapelot Management Agreement and the initial licence fee payable on application as well as the ‘Royalty Fees’ (clause 29.5(a));
- the Second Joint Venture Grower is responsible for the annual licence fees associated with the licence of Grapelots under the Licence Agreement other than the initial licence fee payable on application and the ‘Royalty Fees’ (clause 29.5(b)); and
- both Joint Venture Growers will be responsible for any incentive fees payable to TSL in their respective ‘Prescribed Proportions’.

30. The ‘Prescribed Proportions’ of each Joint Venture Grower which represent their respective entitlements to the ‘Table Grapes’, ‘Proceeds’ and any other rights of the ‘Joint Venture’ are:

- the First Joint Venturer – 70%; and
- the Second Joint Venturer – 30% (clause 29.4).

31. For purposes of constructing and interpreting the Constitution, the Licence Agreement and Grapelot Management Agreement, each set of Joint Venture Growers comprises a particular Grower under these agreements (clause 1.2(1)).

Compliance Plan

32. As required by the *Corporations Act 2001*, TSL has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that TSL manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

Licence Agreement

33. Under the Licence Agreement, each Grower will be granted a licence by TSL to use and occupy 'Grapelots' allotted to the Grower for the sole purpose of growing, cultivating and harvesting of 'Table Grapes' for commercial gain (clause 3.1).

34. Under this Agreement, TSL warrants and represents to the Grower that in respect of 'Existing Grapelots', to its knowledge, all establishment and capital works have been carried out and in respect of 'New Grapelots', TSL covenants that it will procure the 'Land Owner' to complete these works in full by 30 June 2004 (clause 2.1). These establishment and capital works include as follows:

- preparation of that part of the 'Land' on which 'Grapelots' are located to ensure that the 'Table Grape Vines' can grow satisfactorily;
- installation of appropriate irrigation equipment and carrying out the necessary irrigation works to ensure proper reticulation of water to the 'Table Grape Vines' on each 'Grapelot';
- carrying out drainage work and other works to help prevent soil erosion on all 'Land';
- eradication as far as reasonably possible any pests and competitive weeds which may affect the growth or yield of 'Table Grape Vines';
- planting 'Table Grape Vines' on each 'Grapelot', and where applicable, construction of trellising in accordance with 'Best Viticultural Practice' so that the 'Table Grape Vines' can be harvested commercially; and

- providing or undertaking, as the case requires, such other capital works, services or things which, in the reasonable opinion of TSL, are incidental or ancillary to the effective establishment and provision of the works referred to above.

35. The Licence Agreement also sets out:

- the water requirements for which water licences will be purchased and maintained by the 'Land Owner' (clause 3.2);
- its Term (clause 4.1);
- the licence and royalty fees payable by Growers (clause 7);
- provisions dealing with damage to or reduction in the viability of the Grower's 'Grapelots' (clauses 10.3 and 10.4);
- the obligations and rights of the Grower (clauses 4.2 and 8), the obligations and rights of TSL (clauses 5 and 9.2) and rights of the 'Land Owner' (clause 9.1); and
- provisions relating to early termination of this Agreement by the Grower or TSL and the effects of such termination (clause 10).

36. This Agreement is conditional on the Grower entering into the Grapelot Management Agreement with TSL and the 'Sub-lease' being entered into by TSL and Timbercorp Ltd (clause 6.1).

Plant Breeders' Rights

37. Clause 23 of the Licence Agreement deals with the Grower's rights and obligations in respect of the 'Table Grapes Vines' planted on the 'Grapelots'. Under clause 23.1, the Grower is granted the right to grow the 'Licensed Vines' on the relevant 'Grapelots' and the non-exclusive right to process and sell the 'Licensed Fruit' in the 'Licensed Territory'.

38. Clause 23 also sets out the Grower's obligations regarding:

- the intellectual property rights (clause 23.4);
- marketing of the 'Licensed Vine' and 'Licensed Fruit' (clause 23.2);
- labelling and packaging (clause 23.5); and
- the use of names to market the 'Table Grapes' (clause 23.11).

39. The 'Licensed Products' are specified in clause 23.16 and these are White Seedless Grape Cultivar known as 'Stanley Seedless' Table Grape Vines and Red Seedless Grape Cultivar known as 'Red Robe' Table Grape Vines.

Grapelot Management Agreement

40. The Grapelot Management Agreement sets out the terms and conditions of TSL's appointment by the Grower as an independent contractor to manage the 'Grapelot'. This Agreement will commence on the date TSL accepts the Grower's 'Application' under the PDS for the Project and the Agreement is executed under the Power of Attorney. It will continue until the termination of the Project at 30 June 2019 (clause 2.1). Other grounds for termination by either the 'Responsible Entity' or the Grower and the procedures to be followed following such termination are set out in the Agreement. These grounds include default by one party in the performance of its duties (clause 15).

41. The 'Table Grapes' from the relevant 'Grapelots' will be pooled with 'Table Grapes' from other Grapelots and Growers will be entitled to their pro rata proportion of the 'Table Grapes' and the 'Table Grapes' sold (clause 7.3).

42. Under the Agreement, the Grower engages TSL to manage and cultivate the 'Grapelots' on behalf of the Grower in accordance with the 'Management Plan' and 'Best Viticultural Practice', harvest the 'Table Grapes' and procure the processing of the 'Table Grapes' into saleable condition. Clause 5 sets out the services that TSL is required to perform under the Agreement. These include:

- operate the irrigation system and apply fertilisers and nutrients at the appropriate times;
- keep the relevant 'Grapelots' free from vermin, weeds and other noxious growth;
- keep the 'Table Grape Vines' free from insects and diseases;
- apply and keep accurate records of all fertilisers, nutrients and other chemicals applied to the relevant 'Grapelots' or 'Table Grape Vines';
- in its absolute discretion destroy any 'Table Grape Vines' on the relevant 'Grapelots' which a reasonable horticulturist would destroy;
- maintain firebreaks and any fencing, trellising, staking or netting on the relevant 'Grapelots';
- prune the 'Table Grape Vines';

- maintain the relevant ‘Grapelots’ in accordance with ‘Best Viticultural Practice’;
- replant any of the ‘Table Grape Vines’ in need of replacement in accordance with the terms of any agreement made with suppliers of the ‘Table Grape Vines’;
- if water in excess of that available under the ‘Required Water Licences’ is required from time to time procure such additional water and supply it to all Growers; and
- annually prepare, or arrange for the preparation of, the ‘Management Plan’ for the Project.

43. The Grapelot Management Agreement also sets out:

- the administrative services to be provided by TSL (clause 8);
- the rights and obligations of TSL and Growers in respect of access to the ‘Vineyard’ (clause 9);
- the requirement for TSL to provide regular reports and annual statements of income and expenses (clauses 13.5 & 13.6); and
- dispute resolution procedures (clause 18).

44. Under clause 1.5 of the Grapelot Management Agreement, TSL can delegate its obligations under this Agreement. Pursuant to this right to delegate, TSL will enter into a Management Agreement with Grapecorp Management Pty Ltd, an associate of TSL, who in turn will enter into an Interim Table Grape Management Agreement with a number of parties.

Pooling of amounts and distribution of ‘Proceeds’

45. Both the Constitution (clause 13) and the Grapelot Management Agreement (clause 7.3) set out provisions relating to the pooling of amounts held by TSL on behalf of Growers. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed ‘Table Grapes’, the ‘Product’ or insurance proceeds to the pool making up the ‘Proceeds’ are entitled to benefit from distributions from those ‘Proceeds’; and
- any pooled ‘Table Grapes’, the ‘Product’ or other ‘Proceeds’ must consist only of ‘Table Grapes’, the ‘Product’ or other ‘Proceeds’ contributed by Growers from this Project.

Project Fees

46. The fees payable by a Grower are specified in the Licence Agreement (clause 7) and Grapelot Management Agreement (clause 11). Fees payable per 'Grapelot' by a Grower who is not in 'Joint Venture' are as follows:

Management Fees

- for the period from 'Commencement Date' until 30 June 2004, **\$4,885**, payable on or before 'Commencement Date';
- for the period 1 July 2004 to 30 June 2005, **\$1,500**, payable on 31 October 2004 plus a further amount (called the deferred management fee). The deferred management fee represents part of the management fee for the 'Financial Year' ending 30 June 2005. It is payable in each 'Financial Year', from the 'Financial Year' ending 30 June 2005, at the rate of **5% of the 'Gross Proceeds'** of the sale of 'Table Grapes' payable at the time any 'Proceeds' are received by TSL;
- for the period 1 July 2005 to 30 June 2006, **\$1,506**, payable on 31 October 2005 **plus 2.5% of the 'Gross Proceeds'** of the sale of 'Table Grapes' in the 'Financial Year' ending 30 June 2006, payable at the time any 'Proceeds' are received by TSL (the 2.5% is in addition to the 5% deferred management fee referred to above);
- from and including the 'Financial Year' ending 30 June 2007, the management fee for services in each 'Financial Year' is the **estimated operating costs** payable on 31 October each year **plus 2.5% of the 'Gross Proceeds'** of the sale of 'Table Grapes' in each 'Financial Year', payable at the time any 'Proceeds' are received by TSL (the 2.5% is in addition to the 5% deferred management fee referred to above);
- a fee of 25% of so much of the annual 'Net Proceeds' in a 'Financial Year' as exceeds the 'Incentive Fee Threshold' ('Incentive Fees');

Licence Fees

- for the period from 'Commencement Date' until 30 June 2004, **\$115**, payable on or before 'Commencement Date';

- for the 'Financial Years' ending 30 June 2005 to 2009, **\$1,380**, payable on 31 October 2004, 2005, 2006, 2007 and 2008, respectively;
- for subsequent 'Financial Years', the annual Licence Fees will be the annual Licence Fee payable on the immediately preceding 31 October, 'Indexed', payable on 31 October each year;
- a fee equal to 8% of the 'Shed Door Proceeds' payable at the time any 'Proceeds' are received by TSL ('Royalty Fees').

47. As noted above, from the 2007 'Financial Year', the annual fee will consist of an amount for the estimated costs of operating the 'Grapelot' plus a management fee equal to 2.5% of the Grower's 'Gross Proceeds'. The estimated costs of operating the 'Grapelot' for a 'Financial Year' will include an adjustment for the difference between the actual costs and the estimated costs of managing the 'Grapelot' during the preceding 'Financial Year'.

48. Fees payable per 'Grapelot' by a Grower who is in 'Joint Venture' are as follows:

First Joint Venture Grower -

- with the exception of the Incentive Fees, all of the Management Fees outlined in paragraph 46 above; and
- the Licence Fee for the year ended 30 June 2004 and the 'Royalty Fees' outlined in paragraph 46 above.

Second Joint Venture Grower -

- annual Licence Fees from the year ended 30 June 2005 as per paragraph 46 above.

49. Joint Venturer Growers will be responsible for any Incentive Fees payable to TSL in their respective 'Prescribed Proportions'.

Finance

50. Growers can fund their involvement in the Project by borrowing from independent sources or from Timbercorp Finance Pty Ltd ('the Financier'), a lender associated with TSL.

51. The Financier will provide Growers with loans on a full recourse basis and will pursue legal action against any defaulting borrowers. Details of the loans that will be offered to Growers by the Financier are set out in the Loan Application Form and Loan Explanation and Loan Terms. These documents are summarised as follows:

- the Financier will, generally, lend up to 80% of the Grower's application amount;
- the Grower will pay a 'Loan Application Fee' of \$250 which will be added to the amount borrowed;
- the Grower may choose from a 3, 4, or 5 year 'Loan Term' with an interest rate, which is fixed for the 'Loan Term';
- the fixed rate of interest will depend on whether the Grower chooses a 3, 4, or 5 year loan;
- the loan is repayable over the 'Loan Term' by equal monthly instalments of principal and interest and to be deducted from the borrower's bank account under a direct debit authority;
- in the event that any amount is overdue, the Financier may charge interest at the 'Higher Interest Rate';
- the Grower is entitled to repay the whole or any part of the 'Total Amount Owing' without penalty for early repayment; and
- during the 'Loan Term' the Grower will assign and transfer over to the Financier by way of fixed charge all its rights, title and interest at any time in the Project including 'Grapelots' and the 'Project Agreements'.

52. It should be noted that TSL has stated in its application for this Product Ruling that the Financier, at its discretion may lend up to 100% of the of the 'Application Money' and up to 90% of the second and third year licence fees (other than the royalty fee) on terms up to 7 years.

53. Growers cannot rely on this Product Ruling if they enter into a finance agreement with the Financier that materially differs from that set out in the Loan Application Form and Loan Explanation and Loan Terms provided to the Tax Office by TSL with the application for this Product Ruling.

54. Growers also cannot rely on this Product Ruling if Application Money otherwise remains unpaid by 15 June 2004. Where an application is accepted subject to finance approval by any lending institution, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by 15 June 2004.

55. This Ruling does not apply if the finance arrangement entered into by the Grower with the Financier or any other lender 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, other than Timbercorp Finance Pty Ltd, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

56. This Ruling applies only to Growers who are accepted to participate in the Project and who have executed a Grapelot Management Agreement and a Licence Agreement on or before 15 June 2004.

57. 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***

58. To be an 'STS taxpayer' a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer'. Changes to the STS rules apply from 1 July 2005. From that date, STS taxpayers may use the accruals accounting method or can continue to use the cash accounting method (called the 'STS accounting method' – see section 328-125).

Qualification

59. 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 an '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.

Assessable Income***Section 6-5 and section 328-105***

60. 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.

61. Other than Growers referred to in paragraph 62, a Grower recognises ordinary income from carrying on their business of viticulture in the year in which the income is derived.

62. A Grower who is an 'STS taxpayer' (for the 2003-04 and 2004-05 income years) or an 'STS taxpayer' continuing to use the cash accounting method (for the 2005-06 and later income years) recognises ordinary income from carrying on their business of viticulture in the year in which the income is received.

Deductions for Management Fees, Licence Fees, interest and borrowing cost***Section 8-1, section 328-105 and section 25-25***

63. A Grower (who is not a Joint Venture Grower) accepted into the Project on or before 15 June 2004 may claim, on a per 'Grapelot' basis, for the following expenditure.

PR 2004/29

Fee Type	Year ended 30 June 2004	Year ended 30 June 2005	Year ended 30 June 2006
Management Fee	\$4,885 See Notes (i), (ii), (iii) & (iv)	\$1,500 plus 5% of any 'Gross Proceeds' See Notes (i), (ii), (iii) & (iv)	\$1,506 plus 7.5% of any 'Gross Proceeds' See Notes (i), (ii), (iii) & (iv)
Licence Fee	\$115 See Notes (i), (ii), (iii) & (iv)	\$1,380 See Notes (i), (ii), (iii) & (iv)	\$1,380 See Notes (i), (ii), (iii) & (iv)
Royalty Fees	n/a	8% of any 'Shed Door Proceeds' See Notes (i), (ii) & (iii)	8% of any 'Shed Door Proceeds' See Notes (i), (ii) & (iii)
Interest on loans with Timbercorp Finance Pty Ltd	As incurred (Non-STs taxpayers) Or as paid (STs taxpayers) See Note (iv) & (v)	As incurred (Non-STs taxpayers) Or as paid (STs taxpayers) See Note (iv) & (v)	As incurred (Non-STs taxpayers & STs taxpayers using accruals accounting method) Or as paid (STs taxpayers continuing to use cash accounting method) See Notes (iv) & (v)
Borrowing costs for loans with Timbercorp Finance Pty Ltd	Must be calculated - See Note (vi)	Must be calculated - See Note (vi)	Must be calculated - See Note (vi)

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 115;

- (ii) Where the Grower is not an 'STS taxpayer' or is an 'STS taxpayer' using the accruals accounting method (for the 2005-06 income year), the Management Fees and the Licence Fees including 'Royalty Fees' shown in the Grapelot Management Agreement and the Licence Agreement, respectively, are deductible under section 8-1 in full in the year that they are incurred. Where the Grower is an 'STS taxpayer' (for the 2003-04 and 2004-05 income years) or an 'STS taxpayer' continuing to use the cash accounting method (for the 2005-06 income year), these fees are deductible in full in the year in which they are paid;
- (iii) In any year where 'Table Grapes' are not harvested and sold 'Gross Proceeds' and 'Shed Door Proceeds' will be zero and, therefore, no amount based on the percentages shown above, will be payable. 'Gross Proceeds' and 'Shed Door Proceeds' are defined terms in the Project Agreements;
- (iv) This Ruling does not apply to Growers who choose to prepay fees or who choose, or who are required to prepay interest under a loan agreement (see paragraph 96). Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME to 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project;
- (v) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling. Growers who borrow from lenders other than Timbercorp Finance Pty Ltd may request a private ruling on the deductibility of the interest incurred; and
- (vi) The 'Loan Application Fee' payable to Timbercorp Finance Pty Ltd is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling.

Joint Venture Growers

64. A Joint Venture Grower (as explained in paragraphs 28 to 31) in the Project who is **not** an 'STS taxpayer' may claim deductions for the following amounts set out in the table and Notes above:

- the **First Joint Venture Grower** referred to in paragraph 29 may claim deductions under section 8-1 for amounts incurred for Management Fees, Licence Fee for the year ended 30 June 2004, 'Royalty Fees', any interest on funds borrowed from Timbercorp Finance Pty Ltd, and under section 25-25 for borrowing costs payable to Timbercorp Finance Pty Ltd; and
- the **Second Joint Venture Grower** referred to in paragraph 29 may claim deductions under section 8-1 for amounts incurred for annual Licence Fees from the year ended 30 June 2005, any interest on funds borrowed from Timbercorp Finance Pty Ltd, and under section 25-25 for borrowing costs payable to Timbercorp Finance Pty Ltd.

65. For a Joint Venture Grower who **is** an 'STS taxpayer', the deductions referred to in paragraphs 63, other than the borrowing expenses, are deductible as follows:

- for the 2003-04 and 2004-05 income years, in the income year in which they are paid; and
- for the 2005-06 income year, in the income year in which they are incurred where the Joint Venture Grower is an 'STS taxpayer' using the accruals accounting method or in the income year in which they are paid where the Joint Venture Grower is an 'STS taxpayer' continuing to use the cash accounting method.

65A. Borrowing costs for a Joint Venture Grower who is an 'STS taxpayer' remain deductible under section 25-25 in the years shown in the Table above. Each Joint Venture Grower may also claim deductions for its proportional share of the Incentive Fees and the horticultural plant write-off explained below.

Deductions for horticultural plant***Division 40***

66. Each Grower will also be entitled to tax deductions relating to the 'Table Grape Vines' planted on the 'Grapelot'. 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 at paragraph 115.

67. A table grape vine is considered to be a 'horticultural plant' as defined in subsection 40-520(2). A Grower holds a licence to cultivate the 'Table Grape Vines' on a designated area of land called a 'Grapelot' for the growing of 'Table Grapes' for commercial gain. As a Grower holds the 'Grapelot' under a licence, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value.

68. The deduction is determined using the formula in section 40-545. Table grape vines have an 'effective life' of greater than 13 but fewer than 30 years and, for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the 'Table Grape Vines' enter their first commercial season (section 40-530, item 2). TSL will notify Growers when their 'Table Grape Vines' enter their first commercial season and the amount that may be claimed.

Division 35 - Deferral of losses from non-commercial business activities

Section 35-55 – Commissioner's discretion

69. For a Grower who is an individual and who enters the Project by 15 June 2004, the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project.

70. Under paragraph 35-55(1)(b) the Commissioner will decide for these Growers that the rule in section 35-10 does not apply to this activity for the income years ending **30 June 2004 to 30 June 2006** provided that the Project is carried out in the manner described in this Ruling.

71. 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 103 in the Explanation part of this ruling); or
- a Grower's business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45; or
- a 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)).

72. 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.

73. 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

74. For a Grower who participates in the Arrangement described above and incurs expenditure as required by the Grapelot Management Agreement, the Licence Agreement and any loan agreement with the Financier, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower who participates in the Project does not fall within the scope of sections 82KZME to 82KZMF;
- 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?

75. For the amounts set out in the table above to constitute allowable deductions the Growers' activities of cultivating 'Table Grape Vines' and harvesting the 'Table Grapes' for eventual sale as a participant in the 2004 Timbercorp Table Grape Project must amount to the carrying on of a business of primary production.

76. Where there is a business, or a future business, the gross proceeds from the sale of the 'Table Grapes' will constitute gross assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question

have the requisite connection with the operations that more directly gain or produce this income.

77. For schemes such as the 2004 Timbercorp Table Grape Project, 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 *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

78. Generally, a Grower will be carrying on a business of growing 'Table Grapes', and hence primary production, if:

- the Grower has an identifiable interest in the land (by lease) or rights over the land (by licence) on which the Grower's 'Table Grape Vines' are established;
- the Grower has a right to harvest and sell the 'Product';
- the cultivation of the 'Table Grape Vines' and harvesting of the 'Table Grapes' are carried out on the Growers' behalf;
- the activities of the Grower are typical of those associated with a business of cultivating table grape vines and harvesting the table grapes for commercial gain; and
- the weight and influence of general indicators point to the carrying on of a business.

79. In this Project, each Grower enters into a Grapelot Management Agreement and a Licence Agreement.

80. Under the Licence Agreement each individual Grower will have rights over one or more specific and identifiable areas of land, each known as a 'Grapelot'. The Licence Agreement provides the Grower with an ongoing interest in the specific 'Table Grape Vines' on the licenced area for the term of the Project from the commencement of the Licence Agreement. Under the Licence Agreement the Grower must use the land in question for the purpose of cultivating 'Table Grape Vines' and harvesting the 'Table Grapes', and for no other purpose. The Licence Agreement allows TSL to come onto the land to carry out its obligations under the Grapelot Management Agreement.

81. Under the Grapelot Management Agreement, TSL is engaged by the Grower to provide management services on the Grower's identifiable area of land during the term of the Project. Under the Management Agreement and Interim Table Grape Management

Agreement, the management services are sub-contracted to Grape House Pty Ltd and Costa Management Group Pty Ltd.

82. TSL is also engaged to harvest and sell, on the Grower's behalf, the 'Table Grapes'.

83. 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.

84. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of the 'Table Grapes' that will 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.

85. The pooling of the 'Table Grapes' grown on the Grower's Grapelot with the 'Table Grapes' of other Growers in the 2004 Timbercorp Table Grape Project is consistent with general horticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled 'Table Grapes' will reflect the proportion of the 'Table Grapes' contributed from their 'Grapelot'.

86. TSL's services are also consistent with general horticultural practices. They are of the type ordinarily found in grape growing ventures that would commonly be said to be businesses. While the size of an individual 'Grapelot' is relatively small, it is of a size and scale to allow it to be commercially viable.

87. The Grower's degree of control over TSL as evidenced by the Constitution and Grapelot Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, TSL is required to provide the Grower with regular progress reports on the Grower's 'Grapelot' and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with TSL in certain instances, such as cases of default or neglect.

88. The activities of the Grower are typical of those associated with a business of cultivating table grape vines and harvesting the table grapes for commercial gain, 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 Grower's activities of cultivating 'Table Grape Vines' and harvesting the 'Table Grapes' for eventual sale in the 2004 Timbercorp Table Grape Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

89. 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.

90. 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 Licence Fees

Section 8-1

91. Consideration of whether the Management and Licence Fees 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.

92. The Management and Licence Fees will relate to the gaining of income from the Grower's business of growing 'Table Grapes' (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of 'Table Grapes') 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 this fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Interest deductibility***Section 8-1******(i) Growers who use Timbercorp Finance Pty Ltd as the finance provider***

93. Some Growers may finance their participation in the Project through a loan facility with Timbercorp Finance Pty Ltd. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of Management and Licence Fees.

94. The interest incurred will be in respect of a loan to finance the Grower's business operations - the cultivation and growing of 'Table Grapes' and the licence to occupy and use the land on which the 'Table Grape Vines' will have been planted - that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

(ii) Growers who DO NOT use Timbercorp Finance Pty Ltd as the finance provider

95. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

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

96. 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.

Application of the prepayment provisions to this Project

97. Under the Arrangement to which this Product Ruling applies Management and Licence Fees are incurred annually and interest payable to Timbercorp Finance is incurred monthly. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF have no application to this Arrangement. A Grower who is an 'STS taxpayer' (for the 2003-04 and 2004-05 income years) or an 'STS taxpayer' continuing to use the cash accounting method (for the 2005-06 income year) can, therefore, claim a deduction for each of the relevant amounts in the income year in which the amount is paid. A Grower who is not an 'STS taxpayer' or who is an 'STS taxpayer' using the accruals accounting method (for the 2005-06 income year) can claim a deduction for each of the relevant amounts in the income year in which the fee is incurred.

98. However, sections 82KZME and 82KZMF may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Grapelot Management Agreement and/or the Licence Agreement or prepays interest under a loan agreement (including loan agreements with lenders other than Timbercorp Finance Pty Ltd). Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

99. As noted in the Ruling section above, Growers who prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

Deferral of losses from non-commercial business activities***Division 35***

100. 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 satisfied; or
- if one of the tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

101. 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.
102. 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 satisfied, the discretion is exercised, or the exception applies.
103. For the purposes of applying Division 35, 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.
104. 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, or an interest in real property, (excluding any private dwelling) 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).
105. 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 participation of two 'Grapelots' (although TSL reserves the right to accept applications for one 'Grapelots') in the Project is unlikely to pass one of the objective tests until the income year ended 30 June 2009. Growers who acquire more than the minimum allocation of one 'Grapelot' in the Project may however, find that their activity meets one of the tests in an earlier income year.

106. 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.

107. 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 satisfied one of the objective tests; and
- (iii) 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.

108. For a Grower who is an individual and who enters the Project during the year ended 30 June 2004, information provided with the application for this Product Ruling indicates that they are expected to be carrying on a business activity that will either pass one of the objective tests, or produce a taxation profit, for the year ended 30 June 2007. 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 2006.

109. 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 70), in the manner described in the Arrangement (see paragraphs 14 to 55). If so, this Ruling, and specifically the decision in relation to paragraph 35-55(1), 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). Growers may need to apply for private rulings on how paragraph 35-55(1) will apply in such changed circumstances.

110. 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:

- the report of the independent expert and additional expert and scientific evidence provided by the 'Responsible Entity' with the application; and
- independent, objective, and generally available information relating to the table grape industry which

substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the 'Responsible Entity'.

Section 82KL – recouped expenditure

111. The operation of section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefits(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 – general tax avoidance provisions

112. 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).

113. The 2004 Timbercorp Table Grape Project will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 63 and 66-68, 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.

114. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the 'Table Grapes'. 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 is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing 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

Entitlement to GST input tax credits

115. 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 2003, 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 1/1/2004 to 30/6/2004	\$4,400*
Carrying out of upgrade of power for your vineyard as quoted	<u>\$2,200*</u>
Total due and payable by 1 January 2004 (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 2004, 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

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

	Paragraph
What this Product Ruling is about	1
Tax law(s)	2
Goods and Services Tax	3
Changes in the Law	4
Note to promoters and advisers	6
Class of persons	7
Qualifications	9
Date of effect	11
Withdrawal	13
Arrangement	14
Overview	18
Interest in land	21
Constitution	24
<i>Joint Venture</i>	28
Compliance Plan	32
Licence Agreement	33
<i>Plant Breeders' Rights</i>	37
Grapelot Management Agreement	40
Pooling of amounts and distribution of Proceeds	45
Project Fees	46
Finance	50
Ruling	56
Application of this Ruling	56
The Simplified Tax System ('STS')	58
<i>Division 328</i>	58
Qualification	59
Assessable Income	60
<i>Section 6-5 and section 328-105</i>	60
Deductions for management fees, licence fees, royalty fee, interest and borrowing cost	63

<i>Section 8-1, section 328-105 and section 25-25</i>	63
Joint Venture Growers	64
Deductions for horticultural plant	66
<i>Division 40</i>	66
Deferral of losses from non-commercial business activities	69
<i>Section 35-55 – Commissioner’s discretion</i>	69
Sections 82KZME – 82KZMF, 82KL, and Part IVA	74
Explanation	75
Is the Grower carrying on a business?	75
The Simplified Tax System	89
<i>Division 328</i>	89
Deductibility of management and licence fees	91
<i>Section 8-1</i>	91
Interest deductibility	93
<i>Section 8-1</i>	93
<i>(i) Growers who use Timbercorp Finance Pty Ltd as the finance provider</i>	93
<i>(ii) Growers who DO NOT use Timbercorp Finance Pty Ltd as the finance provider</i>	95
Prepayment provisions	96
<i>Sections 82KZL – 82KZMF</i>	96
<i>Application of the prepayment provisions to this Project</i>	97
Deferral of losses from non-commercial business activities	100
<i>Division 35</i>	100
Section 82KL - recouped expenditure	111
Part IVA - general anti-avoidance provisions	112
Example	115
Example – Entitlement to GST input tax credits	115
Detailed contents list	116

PR 2004/29FOI status: **may be released**

Page 36 of 36

Previous draft:

Not previously released in draft form

*Related Rulings/Determinations:*PR 1999/95; TR 92/1; TR 97/16;
TR 92/20; TD 93/34; TR 98/22;
TR 2000/8; TR 97/11*Other Rulings/Determinations:*

TR 2001/14

Subject references:

- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees
- non commercial losses
- producing assessable income
- product rulings
- public rulings
- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

Legislative references:

- ITAA 1936 Div 3 Subdiv H Pt 3
- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)

- ITAA 1936 318
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 25-25
- 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 Div 40
- ITAA 1997 40-515(1)(b)
- ITAA 1997 40-520(2)
- ITAA 1997 40-525(2)
- ITAA 1997 40-530 item 2
- ITAA 1997 40-545
- ITAA 1997 Div 328
- ITAA 1997 328-105
- ITAA 1997 328-105(1)(a)
- ITAA 1997 328-105(1)(b)
- ITAA 1997 Subdiv 328-F
- ITAA 1997 Subdiv 328-G
- TAA 1953 Pt IVAAA
- Copyright Act 1968
- Corporations Act 2001

Case references:

- Commissioner of Taxation v. Lau
(1984) 6 FCR 202; 84 ATC 4929;
(1984) 16 ATR 55

ATO references

NO: 2003/16037
ISSN: 1441-1172