

PR 2006/110 - Income tax: Primary Yield Cropping Project No. 2 - for entities accepted into the Project on or before 15 June 2006

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 This document has changed over time. This is a consolidated version of the ruling which was published on *14 June 2006*



Product Ruling

Income tax: Primary Yield Cropping Project No. 2 – for entities accepted into the Project on or before 15 June 2006

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📌 This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

No guarantee of commercial success

The Tax Office **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 and how the product fits an existing portfolio. 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 in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document.

If the scheme is not carried out as described, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the scheme will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office will be undertaking review activities to confirm the scheme has been implemented as described below and to ensure that the participants in the scheme 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 entity(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 Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - section 8-1 of the ITAA 1997;
 - section 17-5 of the ITAA 1997;
 - section 25-25 of the ITAA 1997;
 - Division 27 of the ITAA 1997;
 - Division 35 of the ITAA 1997;
 - Subdivision 61-J of the ITAA 1997;
 - Division 70 of the ITAA 1997;
 - Part 3-1 of the ITAA 1997;
 - Division 328 of the ITAA 1997;
 - Division 328 of the *Income Tax (Transitional Provisions) Act 1997*;
 - section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 82KZL of the ITAA 1936;
 - sections 82KZME and 82KZMF of the ITAA 1936; and
 - Part IVA of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

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 Farmer) 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. Entities who are considering participating in the scheme 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 entities in schemes 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 entities

7. The class of entities to whom this Ruling applies consists of the entities more specifically identified in the Ruling part of this Product Ruling who enter into the scheme specified below on or after the date this Ruling is made. They will have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant Agreements until their term expires) and deriving assessable income from this involvement. In this Ruling, these entities are referred to as Farmers.

8. The class of entities to whom this Ruling applies does not include:

- entities who intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- entities who participate in the Primary Yield Cropping Project No. 2 through offers made other than through the Product Disclosure Statement;
- entities who are accepted to participate in the Project after 15 June 2006 or before the date of this Ruling;
- entities who finance their participation in the Project with loans from Primary Yield Finance Pty Ltd, or an Instalment Agreement with Environinvest Ltd other than those described at paragraphs 68 to 73 of this Ruling; or
- entities who finance their participation in the Project with loans from Primary Yield Finance Pty Ltd, or an Instalment Agreement with Environinvest Ltd, that do not comply with the written undertakings given to the Tax Office by Environinvest Ltd, dated 24 April 2006 and 1 June 2006.

Qualifications

9. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 17 to 75 of this Ruling.

10. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

12. This Ruling applies prospectively from 14 June 2006, 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

13. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

16. This Product Ruling is withdrawn and ceases to have effect after 30 June 2008. The Ruling continues to apply, in respect of the relevant provisions ruled upon, to all entities within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, who entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entity's' involvement in the scheme.

Scheme

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

- Application for a Product Ruling received on 24 February 2006 as constituted by documents, received 16 and 29 November 2005, 9, 15 and 19 December 2005 and 10 and 24 February 2006 and additional correspondence and emails dated 2, 14, 27 and 28 March 2006, 7, 11, 20, 26, 27 and 29 April 2006, 3, 5, 8, 9, 11, 12, 15, 16, 17, 22, 23, 24, 26, 29, 30 and 31 May 2006, 1, 2 and 5 June 2006;
- Product Disclosure Statement for the Primary Yield Cropping Project No. 2 (PDS), issued by Environinvest Limited the Responsible Entity, received 16 November 2005, as amended by Supplementary Product Disclosure Document for an interest in the Project, received 5 June 2006;
- Draft **Constitution** establishing the Primary Yield Cropping Project No. 2, received on 5 May 2006;
- Draft Compliance Plan for Primary Yield Cropping Project No. 2 issued by Environinvest Limited (Environinvest), received 16 November 2005;
- Head Lease agreements between various Landowners and Environinvest, received 26 April 2006;
- **Lease** to be entered into by each Farmer and Environinvest, received 24 May 2006;

- Master Service Agreement between Environinvest and Agricultural and Forestry Managers, received 5 May 2006;
- Draft Operations Management Agreement between Agricultural and Forestry Managers and Aurora Agricultural Proprietary Limited, received 31 May 2006;
- Draft **Management Agreement**, to be entered into by each Farmer and Environinvest (the Manager), received 24 May 2006;
- Draft **Loan Agreement** and **Loan Application Form**, to be entered into by each Farmer seeking finance and Primary Yield Finance Pty Ltd, received 2 March 2006; and
- Draft Instalment **Agreement** between Environinvest Ltd (as Responsible Entity) and a Farmer for Primary Yield Cropping Project No. 2, received 16 November 2005.

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

18. The documents highlighted are those that a Farmer may enter into. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Farmer, or any associate of a Farmer, will be a party to, which are a part of the scheme. The effect of these agreements is summarised as follows.

19. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of these agreements is summarised as follows.

Overview

20. The main features of the Primary Yield Cropping Project No. 2 are as follows:

Location	The Project land is expected to be spread across 3 geographically different regions, within the recognised grain growing regions of Queensland, New South Wales, and Victoria.
Type of business to be carried on by each participant	Commercial growing and cultivation of Crops for the purpose of harvesting and selling the produce. The Crops will consist principally of wheat, barley, canola, sorghum and chickpeas (Standard Crops). Other Crops, such as oats, faba beans, soy beans, lupins, triticale, maize and sunflower (Opportunity Crops) may also be grown in the Project.
Term of the Project	7 years
Number of hectares offered for cultivation	6,000
Size of each Farmer Lot	0.5 hectares
Minimum allocation per Farmer	100 × 0.5 hectare Lots
Minimum subscription	2 Farmers and 1,000 Lots
Initial cost	An Initial Crop Fee of \$77
Ongoing costs	Crop Fees, Opportunity Crop Fees and Rent
Other costs	Initial Payment Fee under the Lease (the Initial Payment Fee is payable once only on 1 July 2006); Crop Maintenance Expenses; Risk Management Expenses; Additional Spraying Expenses; Sales Management Fee; Harvest Expenses; Sales Expenses; Performance Bonus Fees; and Out of Pocket Expenses where incurred by the Manager.

21. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Environinvest Limited (Environinvest) has been issued with an Australian Financial Service Licence and will be the Responsible Entity for the Project.

22. The Project will involve the Farmer acquiring an interest in an existing sown area of Land in the Application Period where the Crops will be harvested for sale. In subsequent years the Farmer will be required to establish, sow, cultivate and harvest Crops for sale.

23. A Farmer that participates in the Project will do so by acquiring an interest in the Project which will consist of a minimum of 100 Lots at 0.5 hectare each Lot.

24. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS) as amended by the Supplementary PDS. The offer under the PDS is for 6,000 hectares which corresponds to 12,000 Farmer Lots in the Project.

25. Applicants execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints Environinvest to enter into, on behalf of the Farmer, a Lease, Management Agreement and any other documents required to hold an interest in the Project.

26. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Lease and the Management Agreement on or before 15 June 2006 will become 2006 Farmers. The 2006 Farmers are referred to in this Product Ruling as Farmers.

27. Under terms of the PDS the interests in Farmers Lots will be issued after a minimum subscription of 2 Farmers and 1,000 lots has been achieved.

28. The Responsible Entity is currently leasing Land and is making arrangements to lease additional Land if required for the Project within the recognised grain growing regions of Queensland, New South Wales, and Victoria.

29. This Land will be developed and sown and then be divided into 0.5 hectare lots and sub-leased to the Farmers accepted in the Project.

30. Each Farmer will use their Farmer Lots for the purpose of carrying on a business of cultivating and harvesting crops and the sale of harvested produce.

Constitution

31. The Constitution establishes the Project and operates as a deed binding all Farmers and Environinvest. The Constitution sets out the terms and conditions under which Environinvest agrees to act as Responsible Entity and thereby manage the Project. Upon acceptance into the Project, Farmers are bound by the Constitution by virtue of their participation in the Project.

32. In order to acquire an interest in the Project, the Farmer must make an application for Lots in accordance with clause 7 which requires among other things the application be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant, lodged at the registered office of the Responsible Entity and accompanied by payment of the Application Money in a form acceptable to the Responsible Entity.

33. Under clause 7.4 of the Constitution, Environinvest holds the Application Money on bare trust. Environinvest will deposit all Application Moneys received from applicants in a Project Account (clause 4).

34. Once Environinvest has accepted the application and all of the Project Documents have been executed and remain in force (clause 5.1) the Application Money may be transferred and applied against the fees due to Environinvest (clause 8).

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

- the irrevocable appointment of Environinvest as the Farmer's agent, representative and attorney (clause 3);
- the issue of interests in the Project (clause 5);
- procedures relating to Applications (clause 7);
- the issue of interests in the Project and the transfer of Application Money paid by an applicant from the Project Account to the Responsible Entity (clause 8);
- the Responsible Entity's powers and duties relating to the management of the Project (clause 14);
- the keeping and maintenance of a register of Farmers who hold an interest in the Project (clause 15);
- the appointment of agents to perform tasks (clause 16);
- the right of the Responsible Entity to be paid fees and other expenses and the duty to make payments in respect of the Project from its own assets in relation to certain expenses (clause 17);
- the keeping of a Project Account for the holding of proceeds and any other amounts held by the Responsible Entity on behalf of the Farmers and the manner in which the proceeds are to be distributed (clause 18);
- the rights of the Responsible Entity in circumstance where the Farmer Defaults (clause 20);
- resolution of complaints made by the Farmer in relation to the Responsible Entity's management of the Project (clause 21);

- the liabilities and indemnities of the Responsible Entity (clause 22) and the Farmers (clause 23);
- the assignment of a Farmer's interest in the Project (clause 24);
- the retirement and removal of the Responsible Entity (clause 26); and
- termination of the Project (clause 32) and the winding up of the Project (clause 33).

Compliance Plan

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

Head Lease

37. The Responsible Entity will enter into a Head Lease Agreement(s) with the Lessor(s) in respect of Land required for the Project.

38. The Responsible Entity must use the Land only for agricultural farming of summer and winter crops as are normally grown in the district in which the land is located.

39. The Responsible Entity may also sub-lease the land or any part of the land for a term equivalent of the term of the Lease to participants in the Primary Yield Cropping Project No. 2.

Lease

40. A Farmer as a Lessee will execute a Lease with the Responsible Entity as the Lessor. The Responsible Entity will grant to the Farmer the right to exclusively possess, occupy, use and enjoy the Farmer Lots, for the conduct of the Farmer's Business and to harvest and sell the Crops for a commercial profit.

41. The Lessor warrants to the Farmer that on the Commencement Date, all of the Farmer's Lots will be sown with Crops, clause 2.1(b).

42. In subsequent years the Farmer shall have the right to use their Lots for the purposes referred to in the Management Agreement, including, without limitation, the clearing and cultivating of their Lots and the planting, tending, growing, caring for and the harvesting of their Crops for commercial profit.

43. The Lease sets out the rights and obligations of the parties to the Agreement. Under the terms of the Agreement a Farmer will lease from the Responsible Entity a minimum of 100 Lots, each of 0.5 hectares. The Lease shall operate on and from the Commencement Date until terminated in accordance with the terms under clause 3.

44. Under the Lease, the Farmer must pay an Initial Payment, to compensate the Lessor for the preparation of the land and sowing of the seed on their Lots prior to entering into the scheme. The Farmer is liable for and will pay the Lessor the Initial Payment on 1 July 2006, clause 5.1.

45. Under clause 5.1(b) and (c) the Initial Payment can be offset against the Farmer's Entitlement to Harvest Proceeds in the first Subsequent Year. Where the Harvest Proceeds in the first Subsequent Year are insufficient to cover the Initial Payment and any other costs payable, Primary Yield may issue a Notice to the Farmer requiring the Farmer to pay any outstanding Initial Payment within 15 Business Days of the Notice being provided to the Farmer. **For this Ruling to apply any outstanding Initial Payment must be fully paid by 30 June 2007.**

46. The Lessor acknowledges that the Farmer's Crops (including Farmer's Crops sown before the Commencement Date) will remain the property of the Farmer during the term of the Lease, provided that the Lease and Management Agreement have not been terminated for the non-payment of any Rent, fees, costs or expenses payable under the agreements, clause 4.1.

47. The Farmer's obligations are set out in detail in clause 6.1 under which the Farmer agrees to use the Farmer Lots for the purpose of establishing, maintaining, harvesting the Crops in accordance with best practices of the cropping industry.

48. Under clause 7 the Responsible Entity agrees that the Farmer may enjoy the Farmer Lots without any interruption or disturbance. This is subject to the Farmer paying the Rent and performing and observing all its covenants.

Management Agreement

49. Under the Management Agreement the Farmer appoints the Responsible Entity (as Manager) to manage the Farmer Lots and to carry out the management services subject to the terms and conditions of the Agreement. This Agreement shall commence on the date the Responsible Entity accepts the Farmer application under the PDS and shall continue until its termination under clause 4.

50. The Responsible Entity will commence the provision of the Initial Services on or after the Commencement Date and shall use all reasonable endeavours to complete the Initial Services before the end of the Application Year.

51. The Initial Services include, amongst other things:
- undertaking a comprehensive internal quality assurance audit in respect of the Farmer's Lots;
 - if required, any services required to be performed to rectify any deficiencies identified as a result of the internal quality assurance;
 - maintain and repair fire breaks, access roads and fences; and
 - prepare detailed market and operational reports for Farmers.
52. The Responsible Entity will commence the provision of the Services after the completion of the Initial Services and shall continue to provide the Services until the termination of this Agreement.
53. The Services include Cultivation and Preparation Services, Sowing Services, Maintenance Services, Harvesting Services and Sales Management Services, and Risk Management Services.
54. The Responsible Entity may provide Additional Spraying Services in respect of Crops, where the spraying activities conducted as part of the Cultivation and Preparation Services are insufficient. This may include the spraying of herbicides, pesticides, and insecticides taking into account the type of soil and climatic conditions.

Master Services Agreement

55. Environinvest intends to enter into an agreement with Agriculture and Forestry Manager Pty Ltd (AFM), for the carrying out of the Services as submitted in a complete Project Schedule signed by the Authorised Signatories.
56. Under the Project Schedule AFM is to provide the day-to-day management services for the Land and Crops used in the Project. Environinvest acknowledges that AFM may engage sub-contractors or other persons to perform some or all of the required management services including Aurora Agriculture Pty Ltd (Aurora).

Operations Agreement

57. AFM intends to enter into an agreement with Aurora for the purposes of carrying out of the cropping operations. Under this Agreement the AFM will appoint Aurora as the Operations Manager of the Project.

Pooling of Crops and Farmer's Entitlement to Net Harvest Proceeds

58. The Management Agreement sets out provisions relating to the Farmer's Entitlement to Harvest Proceeds. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Farmers who have contributed Crops or Insurance Proceeds or Net Risk Management Profit/Loss to the sales pool in a Subsequent Year are entitled to benefit from distributions of Harvest Proceeds from the pool;
- Farmers that do not contribute to a pool of a specific crop will not have any interest in the net harvest proceeds from that pool; and
- any pooled Crops must consist only of Crops or Insurance Proceeds contributed by Farmers of the same Project Class.

59. A Farmer's Interest is determined in accordance with the formula detailed in clause 1 of the Management Agreement. A Farmer's Interest in the Project will be classed based on the Application Year that Farmers are accepted into the Project. The Class to which a Farmer belongs determines which group of Farmers will collectively pool their Crops for sale, and the amount of fees charged to each Farmer. Under clause 6.3 of the Management Agreement the Farmers Entitlement will be paid to the Farmer but may be reduced by the deductions of fees and expenses set out in clause 5.2.

Fees

60. Under the terms of the Management Agreement and the Lease, a Farmer will make payments as described below on a per Lot basis.

Management Agreement

61. The Application Money is to be paid by each Farmer on application for the provision of the Initial Services in the Application Period. The Application Moneys comprise of the **Initial Crop Fee of \$77 per Lot**.

62. Following the Application Year, ongoing **Crop Fees** and **Opportunity Crop Fees** are payable to the Responsible Entity for providing the Cultivation and Preparation Services and the Sowing Services. Crop Fees and Opportunity Crop Fees are payable in respect of Crops if they are actually planted for each individual Farmer. These fees are payable in advance in respect of the sowing of Winter Crops and in arrears in respect of Summer Crops. In addition, each Farmer shall be liable to pay the Farmer's share of **Harvest Expenses, Sales Expenses, Risk Management Expenses, Crop Maintenance Expenses, and Additional Spraying Expenses** in respect of each Harvest.

63. **Out of Pocket Expenses**, if any, are payable by the Farmer to the Responsible Entity. The Responsible Entity shall notify the Farmer of any Out of Pocket Expenses incurred or to be incurred by the Responsible Entity. Out of Pocket Expenses will be due and payable within 15 Business Days of the date of a Notice outlining the Farmer's share of any Out of Pocket Expenses.

Lease

64. Under the Lease, each Farmer must make an **Initial Payment of \$104.50 per Lot** to compensate the Lessor for the preparation of the land and sowing of the seed on their Lots on the Farmer's Lots before the Application Period. This amount is payable on 1 July 2006. The Initial Payment can be offset against the Farmer's Entitlement to Harvest Proceeds in the first Subsequent Year. Where the Harvest Proceeds in the first Subsequent Year are insufficient to cover the Initial Payment, Primary Yield may issue a Notice to the Farmer requiring the Farmer to pay any outstanding Initial Payment within 15 Business Days of the Notice being provided to the Farmer.

65. Following the Application Period, **Rent of \$55 per Lot per annum** is payable on 1 July in respect of the first Subsequent Year. Rent is indexed thereafter for future Subsequent Years and is payable on every 1 July of the Term.

Finance

66. A Farmer who does not pay the Initial Crop Fee in full upon application and who does not receive an approval to pay its fees under the Instalment Agreement (see below), can borrow from Primary Yield Finance Pty Ltd, or from an independent lender external to the Project. **A Farmer who funds its participation in the Project through loans with Environinvest Ltd is not covered by this Product Ruling and is not entitled to the tax benefits set out in this Product Ruling.**

67. Only the Instalment Agreement Arrangement set out in paragraphs 72 to 73 and finance arrangements with Primary Yield Finance Pty Ltd that do not differ from the arrangement described in paragraphs 68 to 71 are covered by this Product Ruling. No other finance arrangements are covered by this Product Ruling. A Farmer who enters into a finance arrangement with an independent lender external to the Project may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

Finance offered by Primary Yield Finance Pty Ltd

68. Subject to the terms and conditions of the Loan Agreement a Farmer (called the Borrower in the Primary Yield Finance Pty Ltd Loan Application Form and Loan Agreement) can finance the cost of their Initial Crop Fee that is payable on Application by borrowing that amount from Primary Yield Finance Pty Ltd (as the Lender).

69. Subject to Primary Yield Finance Pty Ltd accepting the Borrower's application, the Borrower will be bound by the terms and conditions of the Loan Agreement upon signing the Loan Application Form and Loan Agreement and after the Loan Application Form and Loan Agreement are executed.

70. Although details of Loan Agreements with Primary Yield Finance Pty Ltd may vary at the discretion of the Lender, Farmers are not covered by this Product Ruling where they enter into a Loan Agreement with Primary Yield Finance Pty Ltd which includes any of the following features:

- the Term of the loan exceeds 5.6 years;
- the Loan is a Revolving Cropping Loan, or contains similar features;
- repayments of the Loan are not made by equal repayments of principal and interest made monthly in arrears; or
- the Loan includes any interest only period.

71. Common features of the Loan Application Form and Loan Agreement offered by Primary Yield Finance Pty Ltd require that:

- the Farmer's application to participate in the Project has been accepted by Environinvest;
- the Farmer pays a Loan Establishment Fee of \$250;
- Primary Yield Finance will take security over the Farmers Lots and Crops;
- additional interest will be charged at the Commonwealth Bank 55 Day Interest Free Standard VISA Credit Card Rate on overdue amounts due and payable; and
- Farmers agree to make equal repayments monthly in arrears of the Instalment Amount, which is stipulated in Item 10 of the Schedule, on each Date of Payment over the Term of the Loan as detailed in the Schedule.

Instalment Agreements with Environinvest Ltd

72. Farmers may submit an application to pay their Initial Crop Fee under an Instalment Agreement. Environinvest reserves the right to either accept or reject the application.

73. If the Instalment Agreement is accepted by Environinvest, the Farmer will be required to pay their Application Money on the dates and for the amounts specified in Item 7 of the Schedule in the Instalment Agreement, or as otherwise agreed by the Farmer and Environinvest from time to time provided that the Application Money must be paid in full within 12 months of the Commencement Date by the Final Repayment Date.

Other qualifications relating to finance arrangements

74. Other than where the Initial Crop Fee is paid under an Instalment Agreement, Farmers cannot rely on any part of this Ruling if the Initial Crop Fee is not paid in full on or before 15 June 2006 by the Farmer or, on the Farmer's behalf, by a lending institution. Where an application is accepted by Environinvest, and that application is subject to finance approval by any lending institution, Farmers cannot rely on this Ruling if written evidence of that approval has not been given to Environinvest by the relevant lending institution on or before 15 June 2006. Where an application has been accepted on the basis of written evidence of finance approval the lending institution must provide the full amount of the loan monies to Environinvest no later than 30 June 2006.

75. This Ruling does not apply if the finance arrangement entered into by the Farmer 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 of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 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 Primary Yield Finance Pty Ltd, are involved or become involved in the provision of finance to Farmers for the Project.

Ruling

Application of this Ruling

76. Subject to paragraph 8, this Ruling applies only to Farmers who are accepted to participate in the Project on or after the date of this Ruling and on or before 15 June 2006 and who have executed a Management Agreement and a Lease by that date. The Farmer's participation in the Project must constitute the carrying on of a business of primary production. Provided the Project is carried out as described above, the Farmer's business of primary production will commence at the time of execution of their Management Agreement and Lease.

Minimum subscription

77. A Farmer is not eligible to claim any tax deductions until the Farmer's application to enter the Project is accepted and the Project has commenced. Under the terms of the PDS, a Farmer's application will not be accepted and the Project will not proceed until the minimum subscription of 2 Farmers and 1,000 Farmer's Lots is achieved.

The Simplified Tax System (STS)

Division 328

78. To be an 'STS taxpayer' a Farmer must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328 of the ITAA 1997). For a Farmer participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Farmer who was an 'STS taxpayer' prior to 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method') – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

79. For such Farmers, a reference in this Ruling to an amount being deductible when 'incurred' will mean that amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

25% entrepreneurs tax offset

Subdivision 61-J

80. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides for a tax offset of up to 25% of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

Assessable income

Section 6-5

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

Deductions for management fees, Rent, Interest and Loan Application Fee

Sections 8-1 and 25-25

82. For the year ending 30 June 2006, Farmers can claim a deduction for the **Initial Crop Fee of \$77** per Lot.

83. For the years ending 30 June 2007 and 30 June 2008, Farmers can also claim deductions under section 8-1 for expenditure incurred on:

- Rent (Note: the Initial Payment is not a deductible, however, see paragraphs 89 to 90 of this Ruling);
- Crop Fees;
- Opportunity Crop Fees;
- Sales Management Fees;
- Performance Bonus Fees;
- the Farmer's share of Out of Pocket Expenses;
- the Farmer's share of Additional Spraying Expenses;
- the Farmer's share of Crop Maintenance Expenses;
- the Farmer's share of Harvest Expenses;
- the Farmer's share of Risk Management Expenses;
- the Farmer's share of Sales Expenses; and
- interest on loans with Primary Yield Finance Pty Ltd on terms as described in paragraphs 68 to 71 of this Ruling.

84. If the Farmer is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (Division 27).

85. This Ruling does not apply to Farmers who choose to prepay fees or who choose, or who are required to prepay interest under a loan agreement (see paragraphs 117 to 119 of this Ruling). Subject to certain exclusions, 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 and 82KZMF of the ITAA 1936. Any Farmer who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.

86. The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Primary Yield Finance Pty Ltd, the internal financier, is outside the scope of this Ruling.

87. This Ruling does not rule on the deductibility of any portion of the Out of Pocket Expenses that relate to the cost of bringing or defending any third party legal proceedings for and on behalf of Farmers. If such expenditure is incurred Farmers may request a private ruling on the taxation consequences of their participation in the Project.

88. The Loan Application Fee payable to Primary Yield 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 Primary Yield Finance Pty Ltd is outside the scope of this Ruling.

Initial Payment under the Lease

89. The Initial Payment made under the Lease of \$104.50 incurred on 1 July 2006 is capital in nature and therefore not deductible under section 8-1 as it represents a lease premium.

90. The Initial Payment will be included in the first element of the cost base and reduced cost base of the Farmer Lease under paragraph 110-25(2)(a).

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

Section 35-55 – exercise of Commissioner’s discretion

91. A Farmer who is an individual accepted into the Project by 15 June 2006 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for these Farmers for the income year ending **30 June 2006**. This conditional exercise of the discretion will allow those losses to be offset against the Farmer’s other assessable income in the income year in which the loss arises. This exercise of the Commissioner’s discretion only applies to Farmers with at least 100 Lots in the Project.

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

92. For a Farmer who participates in the Project and incurs expenditure as required by the Management Agreement and the Lease the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Farmer does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 117 to 119 of this Ruling);
- 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.

Commissioner of Taxation

14 June 2006

Appendix 1 – Explanation

❶ ***This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.***

Is the Farmer carrying on a business?

93. For the amounts set out in the Ruling section above to constitute allowable deductions the Farmer's cropping activities as a participant in the Primary Yield Cropping Project No. 2 must amount to the carrying on of a business of primary production.

94. Where there is a business, or a future business, the gross proceeds from the sale of the harvested Crops 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.

95. For schemes such as that of the Primary Yield Cropping Project, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Farmer's activities can constitute the carrying on of a business. As 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.

96. Generally, a Farmer will be carrying on a business of cropping, and hence primary production, if:

- the Farmer has an identifiable interest (by lease) or rights over land (by licence) on which the Crops are established;
- the Farmer has a right to harvest and sell the harvested Crops from the leased Farmer's Lots;
- the cropping activities are carried out on the Farmer's behalf;
- the cropping activities of the Farmer are typical of those associated with a cropping business; and
- the weight and influence of general indicators point to the carrying on of a business.

97. In this Project, each Farmer enters into a Management Agreement and a Lease.

98. Under the Lease each individual Farmer will have rights over a specific and identifiable area of 50 hectares of land or more. The Lease provides the Farmer with an ongoing interest in the specific Crops grown and harvested on the leased area for the term of the Project. Under the Lease the Farmer must use the land in question for the purpose of carrying out cropping activities, and for no other purpose. The Lease allows the Responsible Entity to come onto to the land to carry out its obligations under the Management Agreement.

99. Under the Management Agreement the Responsible Entity is engaged by the Farmer to establish and maintain the Farmer's Lots on the Farmer's identifiable area of land 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 establish and maintain the Farmer's Lots on the Farmer's behalf.

100. The Responsible Entity is also engaged to harvest and sell, on the Farmer's behalf, the harvested Crops grown on the Farmer's Lots.

101. 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.

102. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Farmer in the Project will derive assessable income from the sale of the harvested Crops that will return a before-tax profit, that is, a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

103. The pooling of harvested Crops grown on the Farmer's Lots with the harvested Crops of other Farmers is consistent with general cropping practices. Each Farmer's proportionate share of the sale proceeds of the pooled harvested Crops will reflect the proportion of the harvested Crops contributed from their Farmer Lots.

104. The Responsible Entity's services are also consistent with general cropping practices. They are of the type ordinarily found in cropping ventures that would commonly be said to be businesses. While the size of a Farmer's Lot is relatively small, it is of a size and scale to allow it to be commercially viable.

105. The Farmer's degree of control over the Responsible Entity as evidenced by the Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, Environinvest will provide the Farmer with regular progress reports on the Farmer's Lots and the activities carried out on the Farmer's behalf. Farmers are able to terminate arrangements with Environinvest in certain instances, such as cases of default or neglect.

106. The cropping 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 Farmers' cropping activities in the Primary Yield Cropping Project No. 2 will constitute the carrying on of a business.

The Simplified Tax System

Division 328

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

108. Changes to the STS rules apply from 1 July 2005. The question of whether a Farmer is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). Therefore, any Farmer 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

109. Consideration of whether the management fees and lease 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.

110. Any part of the expenditure of a Farmer entering into the cropping business attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, a portion of the Out of Pocket Expenses may be paid in relation to the cost of the Manager bringing or defending any third party legal proceedings for and on behalf of Farmers. In some instances the bringing and defending of third party legal proceedings may be properly characterised as capital expenditure and cannot be deducted under section 8-1.

111. Also in this Project an amount called the Initial Payment is paid on 1 July 2006 under the Lease. It is to compensate the Lessor for the preparation of the land and sowing of the seed on their Lots prior to the Farmer entering into the scheme. Therefore, it represents a lease premium which is capital or capital in nature and will not be an allowed as a deduction under section 8-1.

112. The fees payable under the Management Agreement and the Lease Agreement (other than any possible cost of bringing and defending a third party legal proceeding and the payment of the Initial Payment that is properly characterised as capital expenditure), are associated with the Farmer's leasing and cropping activities and the sale of the harvested Crops and will relate to the gaining of income from the Farmer's business (see above), and hence have a sufficient connection to the operations by which income (from the sale of harvested Crops) 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 fees is identifiable from the arrangement. These fees appear to be reasonable and have no capital component. The tests of deductibility under the first limb of section 8-1 are met and the exclusions do not apply.

Interest deductibility

Section 8-1

(i) A Farmer who uses Primary Yield Finance Pty Ltd as the finance provider

113. A Farmer may finance their participation in the Project through a loan facility with Primary Yield 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 the Management Fees, Rent and other fees.

114. The interest incurred for the year ended 30 June 2006 and in subsequent years of income will be in respect of a loan to finance the Farmer's business operations – the cultivation and growing of the Crops and the lease of the land on which the Crops 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) A Farmer who DOES NOT use Primary Yield Finance Pty Ltd as the finance provider

115. The deductibility of interest incurred by Farmers who finance their participation in the Project through a loan facility with a bank or financier other than Primary Yield 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

116. 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 (for example, 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

117. Under the Scheme to which this Product Ruling applies Management Fees, Rent and other fees are incurred annually and the interest payable to Primary Yield Finance Pty Ltd is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this Scheme.

118. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Farmer in this Project prepays all or some of the expenditure payable under the Management Agreement and/or the Lease, or prepays interest under a loan agreement (including loan agreements with lenders other than Primary Yield 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.

119. As noted in the Ruling section above, Farmers 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.

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

Section 35-55 – exercise of Commissioner’s discretion

120. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income year **30 June 2006** the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for the income year ended 30 June 2006:

- it is because of its nature the business activity of a Farmer will not satisfy one of the four tests in Division 35;
- there is an objective expectation that within a period that is commercially viable for the cropping industry, a Farmer’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit; and
- a Farmer who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

121. The exercise of the Commissioner’s discretion under paragraph 35-55(1)(b) is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Farmer will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Section 82KL – recouped expenditure

122. The operation of section 82KL of the ITAA 1936 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 of the ITAA 1997.

Capital Gains Tax consequences

123. On entering into the Lease, the Farmer acquires a CGT asset under section 108-5. The relevant CGT asset is the Lease.

124. The Lease is acquired by the Farmer, as lessee, when the contract is entered into, or if there is no contract, when the lease starts (Event Number F1 of the table in subsection 109-5(2)).

125. The cost base of the Lease is determined in accordance with Subdivision 110-A. The first element of the cost base of the Lease includes the money paid or required to be paid in respect of the acquisition of the Lease (paragraph 110-25(2)(a)).

126. The Initial Payment represents a lease premium (see paragraph 111 of this Ruling) and for the purposes of subsection 110-25(2) is money paid or required to be paid in respect of the acquisition of the Lease.

127. Accordingly, the first element of the cost base and reduced cost base of the Lease includes the Initial Payment.

128. Under section 104-25, CGT event C2 happens when the Lease expires. If the Lessor extends or renews the Lease, the Lease is taken to have expired when it is extended or renewed (subsection 104-25(4)).

129. A Farmer makes a capital gain if the capital proceeds from the expiry of the Lease are more than the Lease's cost base. The Farmer makes a capital loss if those capital proceeds are less than the Lease's reduced cost base.

130. Usually there will be no capital proceeds from the Lease expiring and therefore no capital gain can arise. A capital loss may arise to the extent of the Farmer's reduced cost base of the Lease (Subdivision 110-B; sections 104-25 and 102-22).

131. The reduced cost base of the Lease cannot include any amounts which the Farmer has deducted or can deduct (subsection 110-55(4); sections 110-45 to 110-53). The market value substitution rule in subsection 116-30(1) does not apply where the Lease simply expires (subsection 116-30(3)).

Part IVA – general tax avoidance provisions

132. For Part IVA of the ITAA 1936 to apply there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

133. The Primary Yield Cropping Project No. 2 will be a 'scheme'. A Farmer will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 82 to 83 of this Ruling 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.

134. Farmers 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 Crops. There are no facts that would suggest that Farmers 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) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/11; TR 98/22; TR 2000/8;
TR 2001/14; TR 2002/6;
TR 2002/11

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

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
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- ITAA 1936 Pt IVA
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- ITAA 1936 177C
- ITAA 1936 177D
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- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
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- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
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- ITAA 1997 109-5(2)
- ITAA 1997 Subdiv 110-A
- ITAA 1997 110-25(2)
- ITAA 1997 110-25(2)(a)
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