



PR 2007/49 - Income tax: Primary Yield Tomato Project - Pre 30 June 2007

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 This document has changed over time. This is a consolidated version of the ruling which was published on *30 May 2007*



Product Ruling

Income tax: Primary Yield Tomato Project – Pre 30 June 2007

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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. 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.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product 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 Product Ruling.

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the Primary Yield Tomato Project or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Growers.

3. The class of entities who can rely on those tax benefits consists of entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and which execute relevant Project Agreements mentioned in paragraph 34 of this Ruling on or before 15 June 2007. They must 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.

4. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling 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;
- are accepted into this Scheme before the date of this Ruling or after 15 June 2007;
- participate in the scheme through offers made other than through the Product Disclosure Statement and Supplementary Product Disclosure Statement;
- enter into finance arrangements with Primary Yield Finance Pty Ltd, or an Instalment Agreement with Environinvest Limited other than those described at paragraphs 62 to 71 of this Ruling; or
- Environinvest Limited or its associates.

Superannuation Industry (Supervision) Act 1993

5. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product ruling as to whether investment in this product may contravene the provisions of SISA 1993.

Qualifications

6. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 34 to 71 of this Ruling.

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

- this Product 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 Product Ruling may be withdrawn or modified.

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Date of effect

9. This Product Ruling applies prospectively from 30 May 2007, the date this Product Ruling is made. It therefore applies to the specified class of entities that enter into the scheme from 30 May 2007 until 15 June 2007, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities up to 30 June 2009.

10. However the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;

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

11. 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)).

12. 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.

13. 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).

Changes in the law

14. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

15. 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

16. 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 Product Ruling is issued.

Goods and Services Tax

17. All fees and expenditure referred to in this Product 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.

Ruling

Application of this Ruling

18. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters into the scheme described at paragraphs 34 to 71 of this Ruling.

19. The Grower's participation in the scheme must constitute the carrying on of business of primary production. Provided the scheme is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Management Agreement and Grower Lease, on or before 15 June 2007.

Minimum subscription

20. 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. Under the terms of the Supplementary PDS, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of two Growers and 240 Lots (in aggregate) is received.

The Simplified Tax System (STS)

Division 328

21. To be an 'STS taxpayer' a Grower 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 Grower participating in the Scheme, the recognition of income and the timing of tax deductions is different depending on whether the Grower was an 'STS taxpayer' prior to 1 July 2005 and 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*.

22. For such Growers, 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***

23. 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***Sections 6-5 and 17-5***

24. That part of the gross Harvest Proceeds from the Scheme 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.

Deductions for Tomato Plant Purchase Price, initial and ongoing Management Fees, Grower Rent, Interest and 'Loan Application Fee'***Sections 8-1 and 25-25***

25. A Grower may claim tax deductions for each Lot under section 8-1 and section 25-25 for the fees and expenses set out in the Table.

| Fee Type | Year ended 30 June 2007 | Year ended 30 June 2008 | Year ended 30 June 2009 |
|------------------------------------|------------------------------------|---|---|
| Tomato Plant Purchase Price | \$44.00 See Notes (i) & (ii) | | |
| Initial Management Fee | \$24.20 See Notes (i) & (ii) | Nil | Nil |
| Management Fees | Nil | Amount incurred See Notes (i), (ii) & (iii) | Amount incurred See Notes (i), (ii) & (iii) |
| Sales Management Fees | Nil | Amount incurred See Notes (i), (ii) & (iii) | Amount incurred See Notes (i), (ii) & (iii) |
| Packing Fees | Nil | Amount incurred See Notes (i), (ii) & (iii) | Amount incurred See Notes (i), (ii) & (iii) |

| | | | |
|--|------------------------------------|--|--|
| Out of Pocket Expenses | Nil | Amount incurred See Notes (i), (ii) & (iii) | Amount incurred See Notes (i), (ii) & (iii) |
| Grower Lease Fees (Rent) | Nil | \$24.20 See Notes (i), (ii) & (iii) | Amount incurred See Notes (i), (ii) & (iii) |
| Performance Bonus Fees | Nil | Amount incurred See Notes (i), (ii) & (iii) | Amount incurred See Notes (i), (ii) & (iii) |
| Interest on loans with Primary Yield Finance Pty Ltd | Nil | Amount incurred See Notes (iii) & (iv) | Amount incurred See Notes (iii) & (iv) |
| Loan Application Fee for loans with Primary Yield Finance Pty Ltd | Must be calculated See Note (v) | Must be calculated See Note (v) | Must be calculated See Note (v) |

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoings would need to be adjusted as relevant for GST (Division 27).
- (ii) The 'Tomato Plant Purchase Price' of \$44.00 per Lot, 'Initial Management Fee' of \$24.20 per Lot, the 'Management Fees' for 'Subsequent Years', the 'Sales Management Fees', the 'Packing Fees', 'Performance Bonus Fees', any share of 'Out of Pocket Expenses', and the 'Rent' are deductible in the income year that the relevant fee is incurred.
- (iii) 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 83 to 87 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 *Income Tax Assessment Act 1936* (ITAA 1936). Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.

- (iv) 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.
- (v) 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 are outside the scope of this Ruling.

Trading stock

Section 70-35

26. A Grower who is not an 'STS taxpayer' will, in some years, hold tomatoes that will constitute trading stock on hand. Where, in an income year, the value of trading stock on hand at the end of an income year exceeds the value of trading stock on hand at the start of an income year a Grower must include the amount of that excess in assessable income.

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

Section 328-285

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

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

Division 35 – deferral of losses from non-commercial business activities***Section 35-30 – assessable income test***

30. A Grower who is an individual accepted into the Project by 15 June 2007 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10.

31. Financial projections by the Responsible Entity indicate that in each year of the Scheme the assessable income test in section 35-30 will be met.

32. Where a Grower satisfies the assessable income test in an income year the Grower will not be required to defer any loss attributable to their business activity, to a later year. Instead, this loss can be offset against other assessable income of the Grower for the year in which the loss arises.

33. However, if a Grower either fails to pass the assessable income test in the income year ended 30 June 2007 or later, or fails to pass one of the other tests in Division 35, they should seek a private ruling on how Division 35 will apply to their business activity for that income year.

Prepayment provisions and anti-avoidance provisions***Sections 82KZME, 82KZMF and 82KL and Part IVA***

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

- expenditure by a Grower does not fall within the scope of sections 82KZME and 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.

Scheme

35. The scheme that is the subject of this Ruling is identified and described in the following documents:

- Application for a Product Ruling as constituted by documents received on 8 March 2007 and additional correspondence received from the applicant and the applicant's representative dated 3, 4, 5, 12, 20 and 23 April 2007 and 1, 2, 3, 4, 7, 9, 11, 13, 14 and 16 May 2007;
- **Product Disclosure Statement (PDS)** for the Project received 8 March 2007;
- **Draft Supplementary PDS** for the Project received 16 May 2007;
- **Draft Constitution** for the Project received 8 March 2007;
- Draft Compliance Plan for the Project received 8 March 2007;
- **Draft Management Agreement** between the Environinvest Ltd (as Manager) and a Grower for Primary Yield Tomato Project received 16 May 2007;
- Draft Head Lease between the Lessor and Environinvest Ltd (the Lessee) received 8 March 2007;
- **Draft Grower Lease** between Environinvest (the Lessor) and a Grower for Primary Yield Tomato Project received 3 May 2007;
- Draft Operations Management Agreement between Environinvest Ltd (as Manager) and the Services and Support Functions provider for Primary Yield Tomato Project received 8 March 2007;
- **Draft Instalment Agreement** between Environinvest Ltd (as Manager) and a Grower for Primary Yield Tomato Project received 8 March 2007; and
- **Draft Finance Application** between Primary Yield Finance Pty Ltd and a Grower for Primary Yield Tomato Project received 8 March 2007.

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

36. The documents highlighted are those that a Grower 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 Grower, or any associate of a Grower, will be a party to, which are a part of the scheme. The effect of these agreements is summarised as follows.

37. 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

38. The main features of the Project are as follows:

| | |
|---|---|
| Location | Guyra, New South Wales |
| Type of business to be carried on by each participant | Commercial growing and cultivation of tomato plants as annual crops for the purpose of harvesting and selling the tomatoes. |
| Number of hectares offered for cultivation | 5 hectares |
| Size of each interest | 1 square metre |
| Minimum allocation | 120 Lots |
| Minimum subscription | 50,000 Lots |
| Number of plants per hectare | 30,000 |
| Term of the Project | 7 years |
| Initial cost | \$68.20 per Lot |
| Initial cost per minimum allocation | \$8184.00 |
| Ongoing costs | Management Fees; and Rent. |
| Other costs | Tomato Plant Purchase Price; Packing Fees; Sales Management Fees; Performance Bonus Fees; and Out of Pocket Expenses. |

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

40. An offer to participate in the Project will be made through the PDS and Supplementary PDS. The offer will invite participants to subscribe for a minimum of 120 'Lots' in the Project.

41. To participate in the Project a participant must complete the 'Application and Power of Attorney Form' in the Supplementary PDS and pay the 'Initial Management Fee' and 'Tomato Plant Purchase Price'. The 'Initial Management Fee' and 'Tomato Plant Purchase Price' will be held by the Responsible Entity initially in the 'Project Account' as bare trustee for the 'Applicant' and will be released to the Responsible Entity in accordance with clause 8 of the Constitution when certain specified criteria have been met.

42. Growers will enter into a Grower Lease with Environinvest. The Grower Lease will comprise contractual rights in relation to parcels of land of one square metre called a 'Lot'. Each Grower will lease a minimum of 120 'Lots'.

43. The Grower Lease gives Growers the right to use their 'Lots' during the term of the Project to carry on their 'Business' of annual planting and tending, growing and caring for their 'Tomato Plants' and the harvesting of their 'Tomatoes'.

44. Under the Management Agreement each Grower will engage Environinvest to manage their 'Business' during the term of the Project.

Constitution

45. The Constitution for the Project sets out the general functions, powers and duties under which the Responsible Entity agrees to act for the Growers and to manage the Project. The Grower Lease and the Management Agreement are Schedules to the Constitution. These Agreements will be executed on behalf of each Grower who has signed the 'Application and Power of Attorney Form' attached to the Supplementary PDS and who is accepted into the Project. After acceptance and execution of the Agreements, Growers are bound by the Constitution, the Management Agreement and the Grower Lease. The Responsible Entity will keep a register of all Growers that are accepted to participate in the Project.

46. Among the other things, the Constitution sets out details summarised as follows:

- appointment of the Responsible Entity as the Grower's irrevocable agent, representative and attorney (clause 3);
- procedures relating to applications for interests in the Project and the 'Application Moneys' (clause 7);
- procedures relating to the issue of interests and the transfer of 'Application Moneys' (clause 8);

- execution of the 'Project Documents' by the Responsible Entity (clause 9) and the issue to each Grower of a 'Certificate' setting out details of the Grower, their interest in the Project, and the number of 'Grower's Lots' subscribed for by the Grower (clause 10);
- the Responsible Entity's powers and duties (clause 14);
- the setting up and maintenance of a Register of Growers (clause 15);
- procedures relating to the collection of all proceeds, deductions from the proceeds, and distribution of the proceeds (clause 19);
- resolution of complaints made by the Growers in relation to the Project or the Responsible Entity (clauses 20 and 21);
- assignment of a Grower's interest (clause 24);
- retirement and removal of the Responsible Entity (clause 26);
- procedures for calling a meeting of Growers (clause 29); and
- events and procedures for winding up the Project (clause 33).

Acceptance of applications

47. In order to acquire an interest in the Project, the Grower must make an application in a form approved by the Responsible Entity accompanied by payment of the 'Application Money'. Payment of the 'Application Money' must be made by cheque or money order, credit or debit card, under an 'Instalment Agreement', or an approved finance arrangement, or a combination of these payment methods.

Compliance Plan

48. 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 Growers are protected.

Head Lease

49. The Responsible Entity will enter into a Head Lease Agreement with the Lessor in respect of the 'Land', including the 'Glasshouse', required for the Project.

50. The Responsible Entity will not issue any interests to Growers in the Project unless a Head Lease has been executed in respect of the Project.

Grower Lease

51. Each Grower will execute a Grower Lease with the Responsible Entity. The Responsible Entity will grant to the Grower the right to exclusively possess, occupy, use and enjoy the 'Grower's Lots', together with all improvements (including the 'Grower's Tomato Plants'), for cultivating, planting, tending, growing, caring for the Grower's Tomato Plants, and the harvesting of the Grower's Tomatoes (clauses 2 and 3).

52. The Grower Lease sets out the rights and obligations of the parties to the Agreement. The Grower Lease operates on and from the 'Commencement Date' until terminated in accordance with the terms of clause 2.3.

53. The Grower Lease requires that the Lessor, at its own cost, establishes or procures the establishment of the Grower's Tomato Plants on the Lots and the Grower must pay to the Lessor the Tomato Plant Purchase Price by the Commencement Date for the acquisition of the Grower's Tomato Plants.

54. The Grower Lease also:

- provides that each Grower owns the 'Tomatoes' and the 'Tomato Plants' on their 'Lots' during the term of the Grower Lease (clause 4);
- requires that the Grower pays Rent and other fees during the term of the Grower Lease (clause 5);
- sets out the Grower's and the Lessor's covenants (clauses 6 and 7); and
- provides for termination in the case of default (clause 13) and sets out dispute resolution procedures (clause 15).

Operations Management Agreement

55. The Responsible Entity will enter into an Operations Management Agreement with the Services and Support Functions provider whereby the Responsible Entity appoints the provider to provide the Services and Support Functions as defined by the agreement during the term of the Agreement (clause 3.1).

Management Agreement

56. Under the Management Agreement the Grower appoints the 'Manager' as an independent contractor to manage the Grower's 'Business' and to carry out the management services and, as the Grower's sole agent, to procure the sale of the 'Grower's Tomatoes' (clause 2). This Agreement commences on the date the Responsible Entity accepts the Grower application under the Supplementary PDS and executes the Management Agreement and continues until termination under clause 3.

57. On or after the 'Commencement Date' the Manager will commence the provision of the 'Initial Tomato Management Services', including a comprehensive internal quality assurance audit in respect of the Grower's Lots and any other service reasonably required for the successful establishment of the Business and shall use all reasonable endeavours to complete the Initial Tomato Management Services by 30 June 2007 (clause 4).

58. After the completion of the 'Initial Tomato Management Services' the Manager will commence the provision of the 'Services' and will provide the 'Services' until the termination of the Project (clause 4(b)).

59. The 'Services' include 'Planting Services', 'Maintenance Services', 'Harvesting Services', 'Packing Services' and 'Sales Management Services' (clause 1).

Pooling of 'Tomatoes' and 'Grower's Entitlement' to 'Net Harvest Proceeds'

60. Each 'Grower's Tomatoes' will be pooled with the 'Tomatoes' of other Growers in the Project and the Grower will be entitled to a proportionate share of the net proceeds of sale of the total tomatoes produced by all Growers in the 2007 Project. The Management Agreement sets out provisions relating to the 'Grower's Entitlement' to 'Harvest Proceeds' (clause 6).

61. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed tomatoes to the sales pool in the 'Application Period' and each 'Subsequent Year' are entitled to benefit from distributions of 'Harvest Proceeds' from the pool; and
- any pooled 'Tomatoes' must consist only of 'Tomatoes' or insurance proceeds contributed by Growers of the same Project 'Class'.

Fees

62. Under the terms of the Management Agreement (clause 5) and the Grower Lease (clause 5) a Grower will make payments as described below.

Initial Management Fee

- for the period from Commencement Date until 30 June 2007, \$24.20 per 'Lot', payable on or before the Commencement Date (Item 4 of the Schedule to the Management Agreement);

Management Fees

- for each 'Subsequent Year', a fixed management fee of \$27.50 per 'Lot' (indexed for CPI beginning from the year ended 30 June 2009), plus an amount equal to 34.1% of the 'Grower's Entitlement' to 'Harvest Proceeds', payable each 30 June (Item 5 of the Schedule to the Management Agreement);

Sales Management Fees

- for each 'Subsequent Year', an amount equal to 11% of the 'Grower's Entitlement' to 'Harvest Proceeds', payable upon receipt of Harvest Proceeds by the Manager (Item 6 of the Schedule to the Management Agreement);

Packing Fees

- for each 'Subsequent Year', a fixed packing fee of \$3.85 per 5kg box used to pack the 'Grower's Interest' in the harvest, payable upon receipt of Harvest Proceeds by the Manager (Item 7 of the Schedule to the Management Agreement);

Performance Bonus Fees

- for each 'Subsequent Year', an amount equal to 38.5% of the 'Grower's Entitlement' to 'Harvest Proceeds' which exceed \$162 (indexed for CPI beginning in each 'Subsequent Year') less 'Performance Bonus Fee Deficits' upon receipt of all Harvest Proceeds by the Manager (Item 9 of the Schedule to the Management Agreement);

Out of Pocket Expenses

- for each 'Subsequent Year', an amount equal to the Grower's share of the total Out of Pocket Expenses (if any) incurred or estimated to be incurred by the Manager, payable within 15 Business Days of the date of a 'Notice' (Item 8 of the Schedule to the Management Agreement);

Grower Lease (Rent)

- for each 'Subsequent Year', a fixed rent of \$24.20 (indexed for CPI in each 'Subsequent Year'), payable each 1 July (Item 4 of the Schedule to the Grower Lease); and

Tomato Plant Purchase Price

- by the Commencement Date, a Tomato Plant Purchase Price of \$44.00 (clause 5.3) (Item 5 of the Schedule to the Grower Lease).

Finance

63. A Grower who does not pay the 'Initial Management Fee' and 'Tomato Plant Purchase Price' 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.

64. Only the Instalment Agreement arrangement set out in paragraphs 68 to 69 of this Ruling and finance arrangements with Primary Yield Finance Pty Ltd that do not differ from the arrangement described in paragraphs 64 to 67 are covered by this Product Ruling. No other finance arrangements are covered by this Product Ruling. A Grower 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

65. Subject to the terms and conditions of the 'Loan Agreement' a Grower (called 'the Borrower' in the Primary Yield Finance Pty Ltd Loan Application Form and Loan Agreement) can borrow from Primary Yield Finance (as the 'Lender').

66. Subject to Primary Yield Finance 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.

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

- the 'Term' of the loan exceeds 5 years;
- 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.

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

- the Grower's application to participate in the Project has been accepted by Environinvest;
- the Grower pays a 'Loan Establishment Fee' of \$250;
- Primary Yield Finance will take security over the Growers 'Allotments' and 'Tomato Plants';
- 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
- Growers 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

69. Where Environinvest accepts that the 'Initial Management Fee' and 'Tomato Plant Purchase Price' can be paid under the Instalment Agreement, the Grower must complete an Instalment Agreement. Environinvest reserves the right to either accept or reject the application.

70. If the Instalment Agreement is accepted by Environinvest, the Grower will be required to pay their 'Application Money' on the date and the amount specified in Item 7 of the Schedule in the Instalment Agreement, or as otherwise agreed by the Grower and the Manager 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

71. Other than where the 'Application Money' is paid under an Instalment Agreement, Growers cannot rely on any part of this Ruling if the 'Application Money', is not paid in full on or before 15 June 2007 by the Grower or, on the Grower'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, Growers 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 2007.

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

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL 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 Growers for the Project.

Commissioner of Taxation

30 May 2007

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 Grower carrying on a business?

73. For the amounts set out in the Tables above to constitute allowable deductions the Grower’s horticultural activities as a participant in the Primary Yield Tomato Project must amount to the carrying on of a business of primary production.

74. Two Taxation Rulings are relevant in determining whether a Grower will be carrying on of a business of primary production.

75. The general indicators used by the Courts are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

76. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Primary Yield Tomato Project. As Taxation Ruling TR 2000/8 sets out, the relevant principles have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

77. Having applied these principles to the arrangement set out above, a Grower in the Primary Yield Tomato Project is accepted to be carrying on a business of growing and harvesting tomatoes for sale.

The Simplified Tax System

Division 328

78. 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.

79. Changes to the STS rules apply from 1 July 2005. The question of whether a Grower 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 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 Tomato Plant Purchase Price, Initial and ongoing Management Fees, Rent and interest on loans with Primary Yield Finance Pty Ltd***Section 8-1***

80. The Tomato Plant Purchase Price, Initial Management Fee, ongoing Management Fees and Rent are deductible under section 8-1 (see paragraphs 43 and 44 of TR 2000/8). A 'non-income producing' purpose (see paragraphs 47 and 48 of TR 2000/8) is not identifiable in the arrangement and there is no capital component evident in the Tomato Plant Purchase Price, initial and ongoing Management Fees and Rent (see paragraphs 49 to 51 of TR 2000/8).

81. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Provided that the prepayment provisions do not apply (see paragraphs 85 to 87 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred. (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7.)

82. Some Growers may finance their participation in the Project through a Loan Agreement with Primary Yield Finance Pty Ltd. Applying the same principles as that used for the Tomato Plant Purchase Price, Initial Management Fee, ongoing Management Fees and Rent, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

83. Other than where the prepayment provisions apply (see paragraphs 85 to 87 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

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

84. 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.

85. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 (operative provisions).

Application of the prepayment provisions to this Project

86. Under the scheme to which this Product Ruling applies ongoing 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.

87. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Management Agreement or Grower Lease, or prepays interest under the Loan Agreement. 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.

88. 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.

Sections 35-10 and 35-30 – deferral of losses from non-commercial business activities and the assessable income test

89. A Grower who is an individual accepted into the Project by 15 June 2007 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10.

90. Financial projections by the Responsible Entity indicate that in each year of the Project the assessable income test in section 35-30 will be met. The assessable income test requires that a Grower derives at least \$20,000 of assessable income in an income year from their business of growing and selling tomatoes. For the purposes of the assessable income test in the income year in which the Grower commences to carry on their business of growing and selling tomatoes the Grower can use a reasonable estimate of what would have been the amount of their assessable income if they had carried on their business of growing and selling tomatoes throughout the whole of that financial year.

91. Where a Grower satisfies the assessable income test in an income year the Grower will not be required to defer any loss attributable to their business activity, to a later year. Instead, this loss can be offset against other assessable income of the Grower for the year in which the loss arises.

92. However, if a Grower either fails to pass the assessable income test in the income year ended 30 June 2007 or later, or fails to pass one of the other tests in Division 35, they should seek a private ruling on how Division 35 will apply to their business activity for that income year.

Section 82KL – recouped expenditure

93. 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 of the ITAA 1936. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA – general tax avoidance provisions

94. 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).

95. The Primary Yield Tomato 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 paragraph 25 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.

96. 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 'Tomatoes'. 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) 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.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/7; TR 97/11; TR 98/22;
TR 2000/8; TR 2002/6;
TR 2002/11

Subject references:

- carrying on a business
- commencement of business
- non-commercial losses
- primary production
- producing assessable income
- product rulings
- public rulings
- tax benefit under tax avoidance schemes
- 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
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A

- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- 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 35-30
- ITAA 1997 Subdiv 61-J
- ITAA 1997 Div 70
- ITAA 1997 70-35
- ITAA 1997 Div 328
- ITAA 1997 328-285
- ITAA 1997 328-285(1)
- ITAA 1997 328-285(2)
- ITAA 1997 Subdiv 328-F
- ITAA 1997 Subdiv 328-G
- IT(TP)A 1997 328-120
- IT(TP)A 1997 328-125
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968
- Corporations Act 2001
- SISA 1993

Case references:

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

ATO references

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