



PR 2008/22 - Income tax: Barossa Vines Project 2007 - Applicant Group 2 (using finance from Barossa Vines Limited)

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 This document has changed over time. This is a consolidated version of the ruling which was published on 7 May 2008



Product Ruling

Income tax: Barossa Vines Project 2007 – Applicant Group 2 (using finance from Barossa Vines Limited)

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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 under-paid 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.

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

No guarantee of commercial success

The 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 provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. Unless otherwise indicated, all legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997). In this Product Ruling the scheme is referred to as the Barossa Vines Project 2007 or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities can rely on the taxation benefits set out in the Ruling section of this Product ruling and which entities cannot rely on those tax benefits.

3. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities that are accepted to participate in the scheme specified below on or after the date of this Product Ruling is made and who have executed the relevant Project agreements set out in paragraph 32 of this Ruling on or before 31 May 2008. They must have a purpose of staying in the scheme until it is completed (that is being party to the relevant agreements until their term expires), and deriving assessable income from this involvement.

4. **The class of entities to whom this Ruling applies are only entities who:**

- **enter into the finance arrangement with Barossa Vines Ltd (Responsible Entity) under the Loan Agreement for Terms Payment Option.**

5. 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:

- are accepted into this Project before 5 March 2008 or after 31 May 2008;
- participate in the scheme through offers made other than through the Prospectus & Product Disclosure Statement (PDS);
- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- have their application conditionally accepted by the Responsible Entity subject to finance for the payment of the Application Fee, where the funds have not been made available to the Responsible Entity by 15 June 2008; or

- have their Application Fee transferred by the Responsible Entity other than in accordance with paragraphs 52 and 53 of this Ruling.

6. A separate Product Ruling will issue that may apply to Growers who do not enter into the Loan Agreement for Terms Payment Option with the Responsible Entity.

Qualifications

7. 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 32 to 96 of this Ruling.

8. 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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Superannuation Industry (Supervision) Act 1993

10. 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.

Date of effect

11. This Product Ruling applies prospectively from 5 March 2008, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme after the date of this Ruling and on or before 31 May 2008, 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 for the income years up to 30 June 2010.

12. 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.

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).

Changes in the law

16. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments to the law may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to the extent of those amendments this Product Ruling will be superseded.

17. 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

18. 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

19. 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**

20. 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 32 to 96 of this Ruling.

21. The Grower's participation in the Project must constitute the carrying on of business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Licence Agreements and Management Agreement.

Minimum subscription

22. 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 PDS, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 100 interests is achieved.

Concessions for 'small business entities'¹

23. From the 2007-08 income year, a range of concessions previously available under the simplified tax system (STS), will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

¹ The meaning of 'small business entity' is explained in section 328-110.

24. A 'small business entity' can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions the application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Ruling.

Assessable income

Sections 6-5 and 17-5

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

Deductions for Management Fees, Vineyard Operating Costs and Licence Fees

Section 8-1 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936

26. A Grower may claim tax deductions for the following fees and expenses on a per Vineyard Lot basis, as set out in the Table below.

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
Management Fees	\$3,619 See Notes (i) & (ii)	Nil	Nil
Vineyard Operating Costs		\$330 See Notes (i), (ii) & (iii)	\$330 See Notes (i), (ii) & (iii)
Licence Fees	See Notes (i) & (ii)	\$132 See Notes (i), (ii) & (iii)	Amount for previous income year indexed See Notes (i), (ii) & (iii)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.

- (ii) The Management Fees, Licence Fees and the Vineyard Operating Costs are deductible under section 8-1 in the income year that the relevant fee is incurred.

For the year ended 30 June 2008, the Licence Fee is \$11 per Vineyard Lot per month or part thereof, for the period from the date the Grower is accepted into the Project (Commencement Date) to 30 June 2008.

- (iii) This Ruling does not apply to Growers who choose to prepay fees (see paragraphs 104 to 108 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.

Deductions for capital expenditure

Division 40

27. A Grower may claim tax deductions for the following capital expenses on a per Vineyard Lot basis:

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
Trellising	Must be calculated See Notes (i) & (iv)	Must be calculated See Notes (i) & (iv)	Must be calculated See Notes (i) & (iv)
Irrigation	\$101 See Notes (i) & (v)	\$101 See Notes (i) & (v)	\$100 See Notes (i) & (v)
Establishment of Grapevines	Nil	Nil	Must be calculated See Notes (i) & (vi)

Notes:

- (iv) Each Grower's interest in the trellising is a 'depreciating asset'. The 'cost' of the asset is the amount paid by the Grower. The decline in value of the asset is calculated using the formula in either subsection 40-70(1) (diminishing value method) or subsection 40-75(1) (prime cost method). Both formulas rely on the 'effective life' of the trellising.

Growers can either self-assess the effective life (section 40-105) or use the Commissioner's determination of effective life (section 40-100). The Commissioner has determined that trellising has an effective life of 20 years. For Growers who are accepted into the Project on or after 5 March 2008, the trellising will be installed and first used during the year ended 30 June 2008. The Responsible Entity will advise Growers when this occurs to enable Growers to calculate the deduction for the decline in value.

For a Grower who purchases one or two Vineyard Lots in this Project, their interest in the trellising will be a 'low cost asset' that is, an asset costing less than \$1,000. A low-cost asset can be allocated to a 'low-value pool'. Once any low-cost asset of a Grower is allocated to a low-value pool, all other low-cost assets the Grower starts to hold in that year or a later year must be allocated to that pool. If the Grower has already allocated an asset to a low-value pool, the trellising would also have to be allocated to that pool. Otherwise, the Grower must decide whether to create a low-value pool.

If the asset is allocated to a low-value pool, the capital expenditure on the trellising will be deducted under the diminishing value methodology of the pool based on a rate of 18.75% in the year the trellising is first used and a rate of 37.5% in subsequent years (section 40-440). If the trellising is not allocated to a low-value pool, it can be written off based on the effective life of the asset.

- (v) An irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. A deduction for water facilities is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure of \$302 per Vineyard Lot incurred by each Grower on the installation of the water facility in the year in which it is incurred and one-third in each of the next two years of income (section 40-540).
- (vi) The Grapevines meet the definition of 'horticultural plant' in subsection 40-525(2). As Growers hold the land under a licence, the condition in item 3 of subsection 40-525(2) is met and a deduction for the decline in value of horticultural plants is available under paragraph 40-515(1)(b).

The deduction for the Grapevines is determined using the formula in section 40-545 and is based on the capital expenditure of \$121 per Vineyard Lot incurred by the Grower that is attributable to their establishment. If the Grapevines have an effective life of greater than 13 but fewer than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13% per annum. The deduction is allowable when the Grapevines enter their first commercial season (section 40-530, item 2). The Project Manager will inform Growers of when the Grapevines enter their first commercial season.

Shares

28. The shares in Barossa Vines Landholdings Ltd are CGT assets (section 108-5) and the amounts paid by a Grower to acquire the shares are an outgoing of capital and not allowable as a deduction.

29. The amounts paid for each share will represent the first element of the cost base of the share (subsection 110-25(2)). Any disposal of the shares by a Grower will be a CGT event and may give rise to a capital gain or loss.

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

Section 35-55 – exercise of Commissioner’s discretion

30. A Grower who is an individual accepted into the Project in the year ended 30 June 2008 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 Growers for the income years ended **30 June 2008 to 30 June 2012**. This conditional exercise of the discretion will allow those losses to be offset against the Grower’s other assessable income in the income year in which the losses arise.

Prepayment provisions and anti-avoidance provisions

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

31. For a Grower who commences participation in the Project and incurs expenditure as required by the Licence Agreements and Management Agreement, 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 (but see paragraphs 104 to 108 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.

Scheme

32. 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 7 September 2006 as constituted by the following documents and additional correspondence, including emails, received 27 and 29 September 2006, 15, 21 and 22 December 2006, 20 February 2007, 13, 16, 20, 23 and 29 March 2007, 16 August 2007, 12, 13 and 27 September 2007, 23 October 2007, 7, 14 and 15 November 2007, 11 and 12 December 2007, 8, 14 and 17 January 2008, 5, 13, 21 and 25 February 2008 and 10, 16, 21 and 22 April 2008;
- Draft Prospectus & Product Disclosure Statement of the Barossa Vines Project 2007, received 14 January 2008;
- Draft Constitution of the Barossa Vines Project 2007, received 8 January 2008;
- Draft **Licence Agreement No. 1 (Commencement Date to 30 June 2012)** of the Barossa Vines Project 2007, between Barossa Vines Ltd (Licensor) and the Grower, received 29 March 2007;
- Draft **Licence Agreement No. 2 (1 July 2012 to 30 June 2017)** of the Barossa Vines Project 2007, between Barossa Vines Ltd and the Grower, received 29 March 2007;
- Draft **Licence Agreement No. 3 (1 July 2017 to 30 June 2023)** of the Barossa Vines Project 2007, between Barossa Vines Ltd and the Grower, received 7 November 2007;
- Memorandum of Lease (CT 5663 28 and CT 5936 897) between Barossa Vines Landholdings Ltd (Landholder and Lessor) and Barossa Vines Ltd (Lessee), dated 23 May 2007;

- Memorandum of Lease (CT 5936 898) between Barossa Vines Landholdings Ltd (Landholder and Lessor) and Barossa Vines Ltd (Lessee), dated 25 May 2007 and amended by Memorandum of Lease dated 13 December 2007;
- Draft **Management Agreement** of the Barossa Vines Project 2007 between Barossa Vines Ltd (Responsible Entity) and the Grower, received 7 November 2007;
- Draft Assignment of Licence Agreement of the Barossa Vines Project 2007, between the Assignor, the Assignee and Barossa Vines Ltd, received 7 September 2006;
- Draft Assignment of Management Agreement of the Barossa Vines Project 2007, between the Assignor, the Assignee and Barossa Vines Ltd, received 7 September 2006;
- Draft Compliance Plan for the Barossa Vines Project 2007, received 7 September 2006;
- Viticultural Report for the Barossa Vines Project 2007, received 11 December 2007;
- Vineyard Management Agreement of the Barossa Vines Project 2007, between the Responsible Entity and Agribusiness Services Pty Ltd (Vineyard Manager), received 16 March 2007;
- Letter between Preferred Financier and Responsible Entity, dated 16 March 2007;
- Draft **Loan Agreement for Terms Payment Option – 12 months only**, received 20 February 2007;
- Rural Contract for the land comprised in Volume 5442 Folio 809, dated 7 April 2008;
- Rural Contract for the land comprised in Volume 5814 Folio 790, dated 31 March 2008;
- Rural Contract for the land comprised in Volume 5652 Folio 727, dated 7 April 2008;
- Lease Agreement for the land comprised in Volume 5814 Folio 790, between the Lessor and Barossa Vines Landholdings Ltd (Lessee), dated 1 April 2008;
- Lease Agreement for the land comprised in Volume 5442 Folio 809 and Volume 5652 Folio 727, between the Lessor and Barossa Vines Landholdings Ltd (Lessee), dated 7 April 2008;

- Draft Memorandum Of Lease (CT 5442 809, CT 5814 790 and CT 5652 727) between Barossa Vines Landholdings Ltd (Lessor) and Barossa Vines Ltd (Lessee), received 10 April 2008; and
- Letter from the horticultural consultant, dated 14 April 2008.

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

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

34. 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.

Overview

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

Location	Barossa Valley, South Australia
Type of business to be carried on by each Grower	Viticulture
Term of the Project	16 years
Number of hectares offered for cultivation	180.57 hectares
Size of each Vineyard Lot	0.05 hectares
Minimum allocation per Grower	One Vineyard Lot
Minimum subscription	100 Vineyard Lots
Initial cost	\$4,400
Subscription for one 'D' class share in Landholder	\$1 of the cost of \$1,000 for one share in Barossa Vines Landholdings Ltd paid on Application, the balance of \$999 payable on 1 July 2013
Ongoing costs	Annual Management Fee, annual Licence fee, Vineyard Operating Costs, insurance costs and Harvesting Costs

36. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Barossa Vines Ltd has been issued with an Australian Financial Service Licence No. 227136 and will be the Responsible Entity for the Project.

37. The Project will involve the applicants or 'Growers', establishing and maintaining a vineyard, for the purpose of producing wine grapes for sale.

38. An offer to participate in the Project will be made through a combined Prospectus & PDS. The offer under the PDS is for 180.57 hectares, which corresponds to 3,611 Vineyard Lots in the Project. In addition, the offer is for shares in the 'Landholder', Barossa Vines Landholdings Ltd.

39. A Grower that participates in the Project will do so by acquiring an interest in the Project, which will consist of a minimum of one Vineyard Lot each of 0.05 hectares in size. The Grower must also subscribe for one 'D' class share in the Landholder, for each Vineyard Lot they acquire.

40. Applicants execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints Responsible Entity to enter into, on behalf of the Grower, the Licence Agreements, the Management Agreement and the application for shares in the Landholder.

41. For the purposes of this Ruling, Applicants who are accepted to participate in the Project on or after 5 March 2008 and who execute the relevant agreements on or before 31 May 2008 will become 'Applicant Group 2' Growers.

42. Under terms of the PDS, the interests in the Growers' Vineyard Lots will be issued after a minimum subscription of 100 Vineyard Lots has been achieved.

43. The Responsible Entity is currently leasing Land for the Project within the Barossa Valley, South Australia. Specifically, it is described as:

- Hundred of Nuriootpa – the land comprised in Certificate of Title Register Book Volume 5442 Folio 809, Volume 5814 Folio 790 and Volume 5652 Folio 727, comprising 122.22 hectares, all of which will be available for the Project's Applicant Group 2 Growers;
- Shea-Oak Log – the land comprised in Certificate of Title Register Book Volume 5663 Folio 28, Volume 5936 Folio 897 and Volume 5936 Folio 898, comprising 142 hectares, of which 58.35 hectares will be available for the Project's Applicant Group 2 Growers.

44. This Land will be divided into 0.05 hectare Vineyard Lots and licensed to the Growers accepted in the Project. Therefore, 3,611 Vineyard Lots are available for the Project.

45. The Responsible Entity may secure additional land and accept oversubscriptions to the extent of the additional land available. However, this will only occur if the land has similar characteristics to the land already secured for the Project and meets the requirements set out in the Viticultural Report. This Ruling will not apply to this additional land, unless the Responsible Entity obtains an addendum to this Ruling to include the land.

46. The water supply required for the properties listed in paragraph 43 of this Ruling is a minimum annual amount of one Megalitre (ML) per hectare, per annum. The Responsible Entity stated it has obtained the water licences to enable water supply in excess of the minimum amount required for the property.

47. The Project Term is to 30 June 2023.

48. This Ruling only applies to Growers who fund their participation in the Project using finance provided by the Responsible Entity under the Loan Agreement for Terms Payment Option.

49. A separate Product Ruling will issue that may apply to Growers who do not enter into the Loan Agreement for Terms Payment Option with the Responsible Entity.

Constitution

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

51. In order to acquire an interest in the Project, the Grower must make an Application for Vineyard Lots in accordance with clause 7. Among other things, the Application must be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant, lodged at the registered office, or such other place as the Responsible Entity will from time to time determine and accompanied by payment of the Application Fee in a form acceptable to the Responsible Entity.

52. The Responsible Entity will deposit all Application Fees paid on behalf of the Growers under the Loan Agreement for Terms Payment Option into the Project trust account on or before 15 June 2008.

53. Once the Responsible Entity has accepted the Applications and all of the Project documents have been executed and remain in force, the Application Fees must be transferred from the Project trust account to the Responsible Entity for conduct of the Project. This transfer must occur on or before 15 June 2008 (clauses 7.14 and 7.15).

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

- Period and termination of Project (clause 10);
- Fees and expenses (clause 4);
- Gross Proceeds (clause 13);
- Register of Growers (clause 14); and
- Insurance (clause 17).

Compliance Plan

55. The Responsible Entity has prepared a Compliance Plan in accordance with the Corporations Law. Under the Compliance Plan, a Compliance Committee will monitor to what extent the Responsible Entity meets its obligations as the Responsible Entity of the Project and if the rights of the Growers are protected.

Leases

56. Under the memorandums of lease, Barossa Vines Landholdings Ltd (Lessor) leases the Project Land to the Responsible Entity. The Lessor agrees the Responsible Entity may licence the land or portions of the land without the consent of the Lessor.

Licence Agreements

57. The Responsible Entity, as Licensor, grants a licence to the Grower for a portion of the Project Land, the Grower's Vineyard Lot, for the purpose of establishing and maintaining a vineyard and subsequently to harvest and sell grapes. The terms and conditions under which the licence of the Vineyard Lot is granted to the Grower are contained in the Licence Agreements.

58. Each Grower will enter into three consecutive Licence Agreements with the Licensor. The first Licence Agreement takes effect from the Commencement Date until 30 June 2012, the second Licence Agreement will be in effect from 1 July 2012 to 30 June 2017 and the third Licence Agreement will be in effect from 1 July 2017 to 30 June 2023. The Commencement Date is the date the Grower is accepted into the Project.

Management Agreement

59. Each Grower enters into a Management Agreement with the Responsible Entity, contracting the Responsible Entity to establish, manage and maintain the Grower's Vineyard Lot in accordance with good viticultural practices.

60. Specific activities must be carried out during the 'Establishment Period'. The Establishment Period, for Growers in Applicant Group 2, is defined in clause 30, as being from the Commencement Date to 30 June 2008. The Commencement Date is the date the Grower is accepted into the Project.

61. During the Establishment Period, the Responsible Entity will carry out the following activities to establish the vineyard on behalf of the Grower:

- preparing that part of the Grower's Vineyard Lot which can be used to satisfactorily grow Grapevines, obtaining healthy Grapevine rootlings for planting and planting these Grapevine rootlings on the Grower's Vineyard Lot (the PDS states that the Responsible Entity will plant approximately 93 rootlings per Vineyard lot, that is, 1,860 per hectare);
- installing the trellising; and
- installing the appropriate irrigation equipment (clause 2).

62. In addition, the Responsible Entity will provide initial management services during the Establishment Period. These services include:

- eradicating vermin;
- fertilising;
- controlling diseases;
- regular inspection of trellising, irrigation and Grapevines; and
- providing any other services incidental to conduct of the Grower's Business, including engaging the services of an external viticultural consultant (clause 3 of the Management Agreement and clause 1.1 of the Vineyard Management Agreement).

63. After the Establishment period, the Responsible Entity will provide ongoing vineyard maintenance and management services for the term of the Project. These services include:

- pruning the Grapevines by mechanical or other methods;
- as permitted by Law, eradicate vermin which have or may cause damage to the Grapevines or the Grower's Vineyard Lot and put in place measures to control such vermin;
- operating the irrigation system in order to irrigate the Grower's Vineyard Lot;
- fertilising the Grower's Vineyard Lot as required to maintain satisfactory rates of growth and productivity of the Grapevines;

- protecting the Grapevines from insect infestation and competition from competing growth using good viticultural practices;
- regularly inspecting the Grapevines, trellising and irrigation equipment;
- replacing and replanting any of the Grapevine rootlings which dies at any time during the first 12 months following planting, subject to clauses 2.6 and 2.7; and
- any other service or thing, which, in the reasonable opinion of the Responsible Entity, is incidental and/or ancillary to the conduct of the Grower's business (clause 3).

64. The Responsible Entity will send a report to the Grower within 90 days of the end of each financial year containing information on matters considered material to the Grower's Business, including harvest and sales results, the Proceeds of Sale and the condition of the Grower's Vineyard Lot (clause 4).

65. In addition, the Responsible Entity must ensure that insurance policies are taken out to cover the destruction or loss of Grapevines and the Grapes as well as a public liability insurance policy. This is provided cost of insuring the risk is reasonable. Each Grower's Proportion of the insurance premiums will be reimbursed to the Responsible Entity from the Gross Proceeds of the Project (clause 11 of the Management Agreement and clauses 9.7 and 13.3 of the Constitution).

Harvesting

66. Under the Management Agreement, the Responsible Entity must harvest all of the mature Grapes grown on the Grower's Vineyard Lot (clause 5). The Responsible Entity will determine when the harvest will commence by assessing the maturity of the Grapes in accordance with good viticultural practices.

67. Harvesting may be done mechanically or by hand or a combination of both. Until sold, the Responsible Entity will use reasonable endeavours to store the Grapes so as to maintain their quality.

68. The costs of providing the harvesting services will be met from the Grower's payment of Harvesting Costs (clauses 9 and 12), which will be deducted from the Gross Proceeds.

Sale of Grapes

69. The Grower unconditionally appoints the Responsible Entity as its sole and exclusive agent to market and sell the Grapes, for the term of the Project (clause 6). The Grapes from each Vineyard Lot in the Project will be pooled and sold, by the Responsible Entity on behalf of the Growers. The Responsible Entity will use all reasonable endeavours to sell the Grapes at a price equivalent to the price likely to be paid for the majority of the fruit variety grown in the vicinity of the land.

Vineyard Management Agreement

70. Under the Vineyard Management Agreement, the Responsible Entity will engage the Vineyard Manager, Agribusiness Services Pty Ltd, to establish the Growers' Vineyard Lots and to manage and maintain the Vineyard Lots on the terms and conditions contained in the Agreement. The Vineyard Manager will be subject to the direction of the Responsible Entity in all matters relating to the Vineyard Management Agreement.

71. The Vineyard Manager will perform services including planting and the installation of irrigation during the Establishment Period. After the Establishment Period the Vineyard Manager will provide Ongoing Services and Harvesting Services in relation to the Vineyard Lots (clause 1).

Pooling of Crops and Grower's entitlement to proceeds

72. The Constitution sets out the circumstances relating to the pooling of Growers' produce and the distribution of proceeds from the sale of the produce. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed produce from a harvest to a pool are entitled to benefit from distributions from the proceeds of sale; and
- produce can only be pooled with the produce of Growers who are accepted to participate in the Project.

73. The Grower's share of the pool or Gross Proceeds is based on the proportion of the Vineyard Lots they licence in relation to total number of the Vineyard Lots licensed under the Project.

74. However, before the distribution, the proceeds will be reduced by any of the Grower's fees or costs payable under the Licence Agreements, Management Agreement or amounts payable by the Grower under the Constitution (clause 13.3 of the Constitution).

75. In the event that a Grower's Vineyard Lot(s) is destroyed or partially destroyed, the Grower's sale proceeds will be reduced in accordance with the terms of clause 13.3.6 of the Constitution.

Fees

76. Under the Constitution, Management Agreement and the Licence Agreements the Grower is required to pay the following:

- Application Fees;
- Vineyard Operating Costs;
- annual Management Fees;
- annual Licence Fees;
- reimbursement of insurance costs; and
- Harvesting Costs.

Application Fees

77. For each Grower, an Application Fee of \$4,400 per Vineyard Lot, is payable on application (item 5 of Schedule 1 to the Management Agreement). This fee consists of:

- \$121 for initial planting and preparation, to be provided by 30 June 2008;
- \$358 for trellising to be provided by 30 June 2008;
- \$302 for installing irrigation to be provided by 30 June 2008; and
- \$3,619 for all other maintenance and management services to be provided by 30 June 2008 (clause 12 of the Management Agreement) (clause 4.4 of the Constitution).

78. Also, on application a Licence Fee is payable of \$11 per Vineyard Lot per month, or part thereof, for the period from the Commencement Date to 30 June 2008 (item 6 of Schedule 1 to the Licence Agreement No. 1).

Vineyard Operating Costs

79. The Vineyard Operating Costs for the financial years ending 30 June 2009 and 30 June 2010 are \$330 per year. These amounts are payable by the Grower on 1 July 2008 and 1 July 2009, respectively (item 6 of Schedule 1 to the Management Agreement and clauses 4.3.7 and 4.3.8 of the Constitution).

80. From 1 July 2010, Vineyard Operating Costs will be the actual direct costs incurred by the Vineyard Manager (on behalf of the Responsible Entity) in maintaining and managing the Grower's Vineyard Lot. These costs will be payable from the Grower's Gross Proceeds derived from the Project (item 6 of Schedule 1 to the Management Agreement and clause 4.3.9 of the Constitution).

Annual Management Fees

81. From 1 July 2010 until the end of the Project, the Management Fee will be an amount equal to 8.25% of the Grower's Proportion of the Gross Proceeds and will be deducted from these proceeds (item 5 of Schedule 1 to the Management Agreement and clause 4.3.2 of the Constitution).

Annual Licence Fees

82. The Licence Fees for the financial years ending 30 June 2009 and 30 June 2010 are \$132 per year. These amounts are payable by the Grower on 1 July in each financial year. From 1 July 2008 the fees will be adjusted to reflect movements in the Consumer Price Index (CPI) (item 5 of Schedule 1 to the Licence Agreement – No. 1 and clauses 4.3.4 and 4.3.5 of the Constitution).

83. Commencing from 1 July 2010 until the end of the Project, the Licence Fees will be 2.75% of the Grower's Proportion of the Gross Proceeds and the fees will be deducted from these proceeds (item 6 of Schedule 1 to the Licence Agreement No. 1 and clause 4.3.6 of the Constitution).

Reimbursement of Insurance Costs

84. The Grower's Proportion of the cost of insurance taken out by the Responsible Entity on behalf of the Growers will be reimbursable to the Responsible Entity from the Grower's Gross Proceeds (clause 11 of the Management Agreement and clause 9.7 of the Constitution).

Harvesting Costs

85. Harvesting Costs will be deducted from the Grower's Proportion of the Gross Proceeds commencing on 1 July immediately following the first harvest and thereafter on 1 July immediately following each succeeding harvest (item 7 of Schedule 1 to the Management Agreement and clause 4.3.10 of the Constitution).

Fees and costs that are deducted from Gross Proceeds

86. The Gross Proceeds from the sale of the Grapes will be paid into a Gross Proceeds Account to be established by the Responsible Entity. From 1 July 2010 annual Management Fees, annual Licence Fees, Vineyard Operating Costs, insurance costs and Harvesting Costs will be deducted from the Gross Proceeds before the proceeds are distributed to the Grower.

87. If Gross Proceeds are insufficient to pay any fees in any financial year, the Grower will either be required to pay the amount of the excess, or if the Responsible Entity chooses, the amount will be carried forward to be deducted in a later financial year. The maximum period that such amounts will be carried over is two years, after which Growers will be required to pay any amounts outstanding. No amount may be carried forward beyond the final year of the Project (clause 13.3 of the Constitution).

Shares

88. Each Grower must also subscribe for a share in the Landholder, Barossa Vines Landholdings Ltd, for each Vineyard Lot. The cost of each share is \$1,000 of which \$1 is payable on application and \$999 on 1 July 2013.

Finance

89. A Grower who does not pay the Application Fee in full upon application can enter into the Loan Agreement for Terms Payment Option with the Responsible Entity, borrow from MI Professional Funding Pty Ltd as the Preferred Financier, or borrow from an independent lender external to the Project.

90. This Ruling only applies to Growers who enter into the Loan Agreement for Terms Payment Option with the Responsible Entity, as set out below. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with the Responsible Entity that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling.

91. Growers cannot rely on any part of this Ruling if the Application Fee is financed by the Responsible Entity and written evidence of that approval has not been provided by 31 May 2008 and the Application Fee is not paid in full on or before 15 June 2008.

Loan Agreement for Terms Payment Option

92. Where the Responsible Entity accepts an application from a Grower to pay the Application Fee under the 'Loan Agreement for Terms Payment Option', the amount, after the payment of a deposit, is payable by **twelve equal monthly instalments**.

93. The deposit of between 10% and 90% of the Application Fee is due and payable on or before 31 May 2008.

94. If a Grower does not pay the required instalments under the terms payment option, the Responsible Entity will undertake action to recover the debt. The Responsible Entity may take legal proceedings to recover the amount due, including, resuming all rights and interest which the Grower has in their Vineyard Lot(s).

95. The Responsible Entity will offer loans on a full-recourse commercial basis only to the extent it has funds available to lend to Growers.

96. 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; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

Appendix 1 – Explanation

❗ *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?

97. For the amounts set out in paragraphs 26 and 27 of this Ruling to constitute allowable deductions the Grower's viticultural activities as a participant in the Project must amount to the carrying on of a business of primary production.

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

99. 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?

100. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the 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.

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

Deductions for Management Fees, Vineyard Operating Costs and Licence Fees

Section 8-1

102. The Management Fees, Vineyard Operating Costs and Licence Fees 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 Management Fees, Vineyard Operating Costs and Licence Fees (see paragraphs 49 to 51 of TR 2000/8).

103. 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 104 and 105 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.)

Prepayment provisions

Sections 82KZL to 82KZMF

104. 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.

105. 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

106. Under the scheme to which this Product Ruling applies Management Fees, Vineyard Operating Costs and Licence Fees are incurred annually. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

107. 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 Licence Agreements and/or Management Agreement.

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

Expenditure of a capital nature

Division 40

109. Any part of the expenditure of a Grower that is 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, expenditure attributable to trellising, irrigation and the establishment of the Grapevines is of a capital nature. This expenditure falls for consideration under Division 40.

110. The tax treatment of capital expenditure has been dealt with in a representative way in paragraph 27 of this Ruling.

Division 35 - deferral of losses from non-commercial business activities and the Commissioner's discretion**Sections 35-10 and 35-55**

111. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the years ending **30 June 2008 to 30 June 2012**, the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 Income tax: non-commercial business losses: Commissioner's discretion. Based on the evidence supplied, the Commissioner has determined that for those income years:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the viticultural industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

112. A Grower 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.

113. 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 Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Section 82KL – recouped expenditure

114. 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

115. 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).

116. The Project will be a scheme. A Grower will obtain a tax benefit from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 26 and 27 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.

117. 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 grapes. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) 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 2002/11;
TR 2007/6

Subject references:

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

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
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- ITAA 1936 177A
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