PR 2009/13 - Income tax: Tasmanian Premium Cherries Project (May 2009 Growers)

Product Ruling

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Contents Para

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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives 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. The Commissioner recommends 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 Product Ruling relates. All legislative references in this Product 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 scheme, the 'Tasmanian Premium Cherries Project (May 2009 Growers)' or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities:

- are subject to the taxation obligations; and
- can rely on the tax benefits,

set out in the Ruling section of this Product Ruling.

3. The class of entities who can rely on the tax benefits set out in this Product Ruling 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 this Product Ruling is made and who have executed relevant Project Agreements set out in paragraph 30 of this Ruling on or before 31 May 2009. They must stay in the scheme until its completion and derive 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:

- terminate their involvement in the scheme prior to its completion; or do not derive assessable income from it;
- are accepted into this Project before the date of this Product Ruling or after 31 May 2009;
- fail to pay the Initial cost of $9,504 per Allotment in full by the 31 May 2009; or
- participate in the scheme through offers made other than through the Product Disclosure Statement (PDS).

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 30 to 96 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.

Date of effect

9. This Product Ruling applies prospectively from 25 March 2009, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 25 March 2009 until 31 May 2009 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 2011 being its period of application. This Product Ruling will continue to apply to those entities even after its period of application has ended for schemes entered into during the period of application.

10. However this Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

Changes in the law

11. Although this Product Ruling deals with the income tax 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.

12. 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

13. 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

14. 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 Product 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

15. 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 30 to 96 of this Ruling.

16. The Grower's participation in the Project must constitute the carrying on of a 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 Management Agreement and Licence Agreement, on or before 31 May 2009.

Minimum subscription

17. 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. There is no minimum subscription of Allotments which must be achieved before a Grower's application will be accepted or the Project will proceed.

Small business concessions

18. 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').

19. 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. Accordingly, unless otherwise stated, application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Product Ruling.

Assessable income

Section 6-5

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

Deductions for Initial Management Services Fee, Ongoing Management Services Fee, Land and Water Licence Fee, Plant & Equipment Rent, Interest and Borrowing Costs

Sections 8-1 and 25-25 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936

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

Fee Type	Year ended 30 June 2009	Year ended 30 June 2010	Year ended 30 June 2011
Initial Management Services Fee	$6,496 See Notes (i), (ii) & (iii)	Nil	Nil
Ongoing Management Services Fee	Nil	$2,707 See Notes (i), (ii) & (iii)	$2,971 See Notes (i), (ii) & (iii)
Land and Water Licence Fee	$232 See Notes (i), (ii) & (iii)	$1,249 See Notes (i), (ii) & (iii)	$1,280 See Notes (i), (ii) & (iii)
Plant & Equipment Rent	$80 See Notes (i), (ii) & (iii)	$770 See Notes (i), (ii) & (iii)	$936 See Notes (i), (ii) & (iii)

Interest on loans with Total Beverage Australia Pty Ltd	As incurred See Notes (ii) (iii) & (iv)	As incurred See Notes (ii) (iii) & (iv)	As incurred See Notes (ii) (iii) & (iv)
Borrowing costs for loans with Total Beverage Australia 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 outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.

(ii) The Initial Management Services Fee, Ongoing Management Services Fee, Land and Water Licence Fee, Plant & Equipment Rent and interest on loans with Total Beverage Australia Pty Ltd (Total Beverage Australia) are deductible under section 8-1 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 paragraphs 108 to 112 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 agreements entered into with financiers other than Total Beverage Australia, is outside the scope of this Product Ruling. Prepayments of interest to any lender, including Total Beverage Australia are not covered by this Product Ruling. Growers who enter into agreements with other financiers and/or prepay interest may request a private ruling on the deductibility of the interest incurred.

(v) The Loan Application Fee payable to Total Beverage Australia is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing money that is used or is 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. Borrowing expenses of $100 or less are deductible in the year in which they are incurred. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Total Beverage Australia is outside the scope of this Product Ruling.

Deductions for capital expenditure (non small business entities)

Division 40

22. A Grower, excepting a Joint Venturer, who is not a 'small business entity', will also be entitled to tax deductions relating to water facilities (for example, irrigation), a 'landcare operation' and establishment of cherry trees. All deductions shown in the following Table are determined under Division 40.

Fee Type	ITAA 1997 section	Year ended 30 June 2009	Year ended 30 June 2010	Year ended 30 June 2011
Water facility (irrigation)	40-515	$744 See Notes (i) & (vi)	$743 See Notes (i) & (vi)	$743 See Notes (i) & (vi)
Landcare operation	40-630	$468 See Notes (i) & (vii)		
Establishment of cherry trees	40-515	Must be calculated See Notes (i) & (viii)	Must be calculated See Notes (i) & (viii)	Must be calculated See Notes (i) & (viii)

Notes:

(vi) Any 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. As the condition in subsection 40-525(1) is met, a deduction is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure of $2,230 incurred in the year ended 30 June 2009 (less Note (i) adjustment where applicable) 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 2 years of income (section 40-540).

(vii) Any capital expenditure, being $468 for this Project, (less Note (i) adjustment where applicable) incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630.

(viii) Cherry trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a lease or a licence, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the cherry trees is determined using the formula in section 40-545 and is based on the capital expenditure of $1,236.43 in the year ended 30 June 2009 and $118.40 in the year ended 30 June 2010 incurred by the Grower that is attributable to their establishment. If the cherry trees 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%. The deduction is allowable when the cherry trees enter their first commercial season (section 40-530, item 2). The Project Manager will inform Growers of when the cherry trees enter their first commercial season.

Deductions for capital expenditure (small business entities)

Subdivision 328-D and Subdivisions 40-F and 40-G

23. A Grower, excepting a Joint Venturer, who is a 'small business entity', will also be entitled to tax deductions relating to water facilities (for example, irrigation), a 'landcare operation' and cherry trees. A 'small business entity' may claim deductions in relation to water facilities under Subdivision 40-F and in relation to a 'landcare operation' under Subdivision 40-G. If the 'water facility' or 'landcare operation' expenditure is on a 'depreciating asset' used to carry on the business, they may choose to claim deductions under Division 328. Deductions for the cherry trees must be determined under Subdivision 40-F.

24. The deductions shown in the following Table assume, for representative purposes only, that a Grower has either chosen to or can only claim deductions for expenditure on water facilities or a 'landcare operation' under Subdivisions 40-F or 40-G and not under Division 328. If the expenditure has been incurred on 'depreciating assets' and is claimed under Division 328, the deduction is determined as discussed in Notes (ix) and (x) of paragraph 25 of this Ruling.

25. Under Division 328, if the 'cost' of a 'depreciating asset' at the end of the income year is less than $1,000 (a 'low-cost asset'), it can be claimed as an immediate deduction when first used or 'installed ready for use'. This is so provided the Grower is a 'small business entity' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income.

Fee Type	ITAA 1997 section	Year ended 30 June 2009	Year ended 30 June 2010	Year ended 30 June 2011
Water facility (irrigation)	40-515	$744 See Notes (i) & (ix)	$743 See Notes (i) & (ix)	$743 See Notes (i) & (ix)
Landcare operation	40-630	$468 See Notes (i) & (x)		
Establishment of cherry trees	40-515	Must be calculated See Notes (i) & (viii)	Must be calculated See Notes (i) & (viii)	Must be calculated See Notes (i) & (viii)

Notes:

(ix) Any 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. As the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-F. For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. The capital expenditure incurred on the water facility is $2,230 in the year ended 30 June 2009. If the 'cost' apportionable to that deemed 'depreciating asset' is less than $1,000, the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is a 'small business entity' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction allowable in the year ended 30 June 2009 is determined by multiplying its 'cost' by half the relevant small business pool rate. At the end of the year, it is allocated to the relevant small business pool and in subsequent years the full pool rate will apply.

Alternatively, Growers may choose to claim deductions under Subdivision 40-F, paragraph 40-515(1)(a). As the condition in subsection 40-525(1) is met, a deduction is allowable equal to one-third of the capital expenditure 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 2 years of income (section 40-540).

(x) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630. If the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-G (although expenditure on some items of plant can only be deducted under Division 328). For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. If the 'cost' apportionable to that deemed 'depreciating asset' is less than $1,000, the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is a 'small business entity' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction is determined by multiplying its 'cost' by half the relevant small business pool rate. At the end of the year, it is allocated to the relevant small business pool and in subsequent years, the full pool rate will apply. If the expenditure is not on a 'depreciating asset', the expenditure is fully deductible under Subdivision 40-G.

Joint Venturers

26. A Joint Venturer may claim deductions, on a per Allotment basis, for the expenditure set out in the Table and Notes in paragraph 21 of this Ruling in the proportions described below. The tables and notes at paragraphs 22 and 25 of this Ruling have no application to Joint Venturers. Joint Venturers may apply for a private ruling on the deductibility of capital expenditure in relation to a water facility, landcare operation and establishment of cherry trees.

First Joint Venturer

- 100% of the Grower Fees payable in the 2009 Financial Year.

A First Joint Venturer who borrows from Total Beverage Australia to finance participation in the Project can also claim:

- a deduction for the interest incurred, under section 8-1 as outlined in Note (ii) to the Table at paragraph 21 of this Ruling; and
- the borrowing costs payable to Total Beverage Australia, under subsection 25-25(1), as outlined in Note (v) to the Table at paragraph 21 of this Ruling.

Second Joint Venturer

- 100% of the Grower Fees payable in the 2010 and 2011 Financial Years (inclusive).

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

Section 35-55 – exercise of Commissioner's discretion

27. Growers who will stay in the Project until its completion will be considered to be carrying on a business of primary production. Such Growers who are individuals (including Joint Venturers) and accepted into the Project in the year ended 30 June 2009 may make losses from the Project that may be affected by the loss deferral rule in section 35-10 in Division 35.

28. The discretion in paragraph 35-55(1)(b) will be exercised for such Growers to whom the loss deferral rule would otherwise apply, for the income years ended **30 June 2009 to 30 June 2013**. Exercise of the discretion in this case however is also conditional on the Project being carried out in the manner described in paragraphs 30 to 96 of this Ruling, but will allow Growers referred to who make losses, to offset them against their other assessable income in the income years in which those losses arise.

Prepayment provisions and anti-avoidance provisions

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

29. For a Grower who commences participation in the Project and incurs expenditure as required by the Management Agreement and Licence 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 108 to 112 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 Product Ruling.

Scheme

30. The scheme that is the subject of this Product Ruling is specified below and incorporates the following documents:

- Application for a Product Ruling received on 19 January 2009 as constituted by documents provided on 19, 21 and 28 January 2009 and 16 and 17 February 2009 and additional correspondence and emails dated 21 January 2009 and 10 February 2009;
- Product Disclosure Statement (PDS) of the Tasmanian Premium Cherries Project dated 29 February 2008;
- First Supplementary PDS of the Tasmanian Premium Cherries Project dated 30 May 2008;
- Draft Second Supplementary PDS of the Tasmanian Premium Cherries Project, received with the Application for a Product Ruling on 19 January 2009;
- **Constitution of the Tasmanian Premium Cherries Project (Constitution)** between the Growers, Food and Beverage Australia Limited (Responsible Entity) and Aussie Cherries Ltd (Land Owning Company), dated 23 January 2008;
- First, Second and Third **Supplemental Deeds to the Constitution of the Tasmanian Premium Cherries Project** between the Responsible Entity, Aussie Cherries Ltd and the Growers, dated 29 February 2008, 29 May 2008 and 30 May 2008 respectively;
- Draft **Fourth Supplemental Deed to the Constitution of the Tasmanian Premium Cherries Project** between the Responsible Entity, Aussie Cherries Ltd and the Growers, received on 28 January 2009;
- Draft **Management Agreement for Post 31 August 2008 Growers of the Tasmanian Premium Cherries Project (Management Agreement)** between the Responsible Entity and the Grower, received with the Application for a Product Ruling on 19 January 2009;
- Two Contracts for Sale of Real Estate – Lucaston Land between the Vendor and Aussie Cherries Ltd (Purchaser), dated 14 February 2008;
- Option to Purchase Lucaston Land between the Vendor and Aussie Cherries Ltd dated 14 February 2008;

- Two Memoranda of Lease (Lease) between Aussie Cherries Ltd (Lessor) and National Viticultural Fund of Australia Pty Ltd (Lessee), for the Lucaston Land and the Castle Forbes Bay Land, dated 13 February 2009;
- Two Memoranda of Lease (Sublease) between National Viticultural Fund of Australia Pty Ltd (Lessor) and Aussie Cherries Ltd (Lessee), for the Lucaston Land and the Castle Forbes Bay Land, dated 13 February 2009;
- Draft **Licence Agreement for Post 31 August 2008 Growers** between the Land Owning Company, the Responsible Entity and the Grower, received with the Application for a Product Ruling on 19 January 2009;
- Draft Compliance Plan, received with the Application for a Product Ruling on 19 January 2009;
- Draft Custodian Agreement between the Responsible Entity and National Viticultural Fund of Australia Pty Ltd (Custodian), received with the Application for a Product Ruling on 19 January 2009;
- Draft **Terms Loan Agreement (including the Direct Debit Agreement)** between Total Beverage Australia and the Grower and the Guarantor, received with the Application for a Product Ruling on 19 January 2009;
- Draft Marketing Agreement between Food and Beverage Australia Ltd (FABAL) and PJ Nash Pty Ltd (Westmores), received with the Application for a Product Ruling on 19 January 2009;
- Draft Grading, Packing and Storage Agreement between FABAL and Aussie Cherry Pty Ltd (Land Owning Company), received with the Application for a Product Ruling on 19 January 2009; and
- Undated Independent Horticultural Report received with the Application for a Product Ruling on 19 January 2009.

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

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

32. The documents highlighted are those that a Grower may enter into. For the purposes of describing the scheme to which this Product 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

33. All capitalised terms within this Ruling are capitalised terms within the scheme documentation. The main features of the Tasmanian Premium Cherries Project (May 2009 Growers) are as follows.

Location	Huon Valley region, Tasmania
Type of business to be carried on by each participant	Commercial growing and cultivation of cherry trees for the purpose of harvesting cherries for sale
Number of hectares offered for cultivation	Up to 30
Size of each Interest	0.10 hectare
Minimum allocation	One Allotment
Number of trees per Allotment	100 cherry trees
Term of the Project	Approximately 16 years
Initial cost per Allotment	$9,504
Ongoing costs	Ongoing Management Services Fee, Land & Water Licence Fee, Plant & Equipment Rental

34. The Project is a registered managed investment scheme under the *Corporations Act 2001*. Food and Beverage Australia Ltd (FABAL) has been issued with an Australian Financial Service Licence No 246650 and will be the Responsible Entity for the Project.

35. The Project will involve the planting and cultivating of new cherry trees as well as the cultivating of established cherry trees. The produce from the Trees will be harvested and sold by the Responsible Entity on behalf of the Growers in the Project. The Responsible Entity will enter the Marketing Agreement with Westmores for the purpose of marketing and sale of all cherries grown on the Land.

36. 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 Allotment, being 0.10 hectare in size. Each Allotment will be comprised of 100 cherry trees, of which 15 will be mature established trees (planted prior to 31 May 2009) and 85 will be newly established trees on or before 30 June 2009.

37. Under the PDS, FABAL proposes to offer up to 300 Interests called ‘Allotments’ of 0.10 hectare each. Upon application, Growers will execute a Power of Attorney enabling FABAL to act on their behalf as required.

38. The Project will be situated in the Huon Valley region of Tasmania, being Volume 197651 Folio 1, Volume 25000 Folio 4, Volume 141642 Folios 5, 6, 7, 8 and 9, Volume 248854 Folio 2 (Castle Forbes Bay land) and Volume 128602 Folio 1, Volume 128077 Folio 4, Volume 128603 Folio 1, Volume 36065 Folio 1, Volume 12206 Folios 2 and 3 and Volume 147069 Folios 1, 2 and 3 (Lucaston land). The Castle Forbes Bay land and approximately 50% of the Lucaston Land has been purchased by Aussie Cherries Ltd (the Land Owning Company), who has leased the land to National Viticultural Fund of Australia Pty Ltd, which has subleased the land back to the Land Owning Company. The remaining Lucaston land is subject to an Option to Purchase, with its purchase by the Land Owning Company expected to be finalised in April or May 2009. The Land Owning Company has leased the land to National Viticultural Fund of Australia Pty Ltd, which has subleased the land back to the Land Owning Company. The Land Owning Company will grant a licence to the Growers to use and occupy the Allotment for the planting, growing and harvesting of cherries. A Grower acquiring a single interest in the Project will hold a licence over an Allotment on which the Grower can plant 85 cherry trees and will be provided with 15 existing cherry trees.

39. For Applicants who are accepted as Growers in the Project, FABAL, as Responsible Entity, will allocate Allotments, place their details in a Register and enter into Agreements on the Grower's behalf in relation to the Allotments allocated to the Grower. Each Grower will use their Allotment for the purpose of carrying on a business of cultivating and harvesting cherries and the sale of the harvested produce.

40. Growers enter into a Management Agreement with FABAL to manage their Allotments for the eventual harvest and sale of their cherry produce. FABAL will manage and cultivate the trees and will be responsible for harvesting and selling the cherries.

41. As an alternative to participation by a Grower as a single entity, the terms of the Constitution provide that two entities may enter into a Joint Venture as one Grower.

42. Under the PDS offer, Growers can enter the Project during the period up to 31 May 2009. Applicants will not be accepted into the Project from 1 June 2009. This Product Ruling only applies to Growers who enter into the Project from the date of this Product Ruling up to 31 May 2009.

43. The Responsible Entity has appointed Aussie Cherries Ltd to grade, pack and store all cherries produced on the Land prior to the marketing and sale of them by Westmores.

Constitution

44. The Constitution establishes the Project and operates as a deed binding all Growers and FABAL. The Constitution sets out the terms and conditions under which FABAL 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.

45. The Termination Date of the Scheme is 30 June 2024 but this date may be extended by up to two years if the Growers have not received a minimum income return equivalent to 9% on an internal rate of return basis (IRR). The Responsible Entity does not guarantee that the Project will achieve an IRR of 9% per annum or any particular IRR and the Project will not continue beyond the extended 2 years, irrespective of the IRR achieved.

46. In order to acquire an Interest in the Project, the Grower must make an application for Allotment(s) in accordance with clause 3. Among other things, the application must be completed in a form approved by the Responsible Entity and be accompanied by payment of the Application Processing Fee as set out in Schedule 2.

47. The acceptance date for an Interest will be when the Responsible Entity accepts the Applicant's Application and any other Agreements necessary to be entered into are entered into by the Responsible Entity and the Applicant and all things required to be done pursuant to the Constitution are completed. Where the Application Processing Fee is to be funded wholly or partially by a loan from Total Beverage Australia the issue date will be when FABAL actually receives the funds or receives written confirmation that the loan has been approved.

48. Under clause 4.1 FABAL will open a bank account, called the Application Fund, in which to deposit the Application fees received from Applicants.

49. FABAL will act as the agent, representative and delegate of the Grower (clause 13.1.3).

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

- the powers of the Responsible Entity (clause 8);
- the vesting of Assets (clause 6);
- power of the Responsible Entity to deal in the scheme property (clause 13);
- the term, purpose and winding up of the scheme (clauses 15 to 18);
- complaints handling and procedures (clauses 29 to 30); and
- distribution from the Proceeds Funds (clause 34).

Supplemental Deeds

51. The Third Supplemental Deed dated 30 May 2008 amends the Project Constitution to reflect that the cut off date for the acceptance of Applications to enter the Project is 31 May 2009.

Fourth Supplemental Deed

52. This Deed amends the Project Constitution to reflect the dates Grower Fees are payable under the Management Agreement and Licence Agreement.

Management Agreement

53. Under this Agreement the Grower appoints the Responsible Entity as an independent contractor to manage the Grower's Business on their Allotment for the Term and on the conditions contained in this Agreement and the Constitution. The Term commences on the date on which the Responsible Entity accepts the Grower's Application for an Interest and terminates on the earlier of 30 June 2024 (unless extended by up to two years as per the Constitution) or the date of the termination of the Grower's Interest (clause 3).

54. The Responsible Entity will provide the following services over the Term:

- Irrigation and Planting Services (clause 5);
- Initial Management Services (clause 6);
- Ongoing Management Services (clause 7); and
- Harvesting, Grading, Packing and Sale of Cherries (clause 8).

55. The Responsible Entity is entitled to the following payments:

- Irrigation and Planting Fee (for the provision of Irrigation and Planting Services) (Schedule 3);
- Initial Management Services Fee (for the provision of Initial Management Services) (Schedule 2);
- Ongoing Management Services Fee (for the provision of Ongoing Management Services and Harvesting, Grading, Packing and Sale of Cherries) (Schedule 4);
- Horticulture Costs (for the reimbursement of all costs and expenses which are incidental to the provision of Ongoing Management Services and Harvesting, Grading, Packing and Sale of Cherries) (clause 14);
- Performance Incentive Fee (payable where the cherry sale receipts are above budgeted returns) (clause 13); and

- Call on Growers (payable to reimburse the Responsible Entity for unexpected expenses of, or in relation to, the Grower's Allotment) (clause 15 and Item 2 of Schedule 4).

Pooling of amounts and distribution of Proceeds

56. In terms of clause 33 of the Constitution, the Responsible Entity must:

- Collect, receive and get in all income due and payable to the Scheme;
- Arrange the picking, grading, packing and cold storage of all the cherries from each Grower's Allotment;
- Arrange the marketing and sale of all of the cherries from all Allotments without having regard to the quantity or quality of produce gathered in, from any particular Allotment; and
- Cause to be established a bank account for the purpose of holding all income attributable to Grower Allotments (the Proceeds Fund).

57. The Responsible Entity must pay into the Proceeds Fund the proceeds of sale of cherries attributable to each Grower's Allotment after payment of harvesting and marketing costs and the proceeds of any income protection insurance policy where all Growers have contributed to the payment of premiums in relation to that insurance.

58. A Grower is entitled to that percentage of the money in the Proceeds Fund which reflects that portion which the Grower's Allotment bears to the total number of Grower Allotments, less all fees payable pursuant to the Constitution, Management Agreement and Licence Agreement and amounts needed to meet Horticulture Costs (clause 34.1 of the Constitution).

59. The Responsible Entity will deduct the fees stated in paragraph 58 of this Ruling and pay those to the persons entitled to them. Where there are insufficient monies in the Proceeds Fund to make all payments, they are paid in the order shown in clause 34.1. If the monies in the Proceeds Fund are insufficient to cover all fees payable to the Responsible Entity, the Grower will be fully liable to pay the outstanding amounts. Any monies remaining in the Proceeds Fund after the payments in clause 34.1 are made are to be paid by the Responsible Entity within five calendar months of 30 June in each year.

60. A Grower whose Allotment does not cause a deposit to be made to the Proceeds Fund is not entitled to any part of the Proceeds Fund. If a Grower's Allotment is partially or totally destroyed, or if the contribution made by that Allotment to the Proceeds Fund is otherwise reduced or inadequate compared to other Allotments, the Grower's entitlement to the amounts in the Proceeds Fund shall be reduced to reflect the reduced level of contribution of that Grower's Allotment (clause 34.8 of the Constitution).

61. Where income protection insurance is paid in respect of one or more Grower Allotments only, and not all Grower Allotments, proceeds from the insurance policy shall be divided between those Allotments only and in accordance with the proportion their Allotment bears to the total number of Allotments affected and covered by protection insurance. In the event that this occurs, then the entitlement of those Growers to the Proceeds Fund shall be reduced in accordance with clause 34 of the Constitution. Any proceeds paid out pursuant to a cherry tree replacement insurance policy shall be paid directly to the Responsible Entity and used to replace or repair the cherry trees to which the pay out pursuant to the insurance policy relates.

Joint Venture

62. As an alternative to participation by a single entity as a Grower, the terms of the Constitution provide that two entities may enter into a Joint Venture. The First Joint Venturer and Second Joint Venturer will be invoiced separately for any and all fees payable by them. The Constitution defines a Joint Venturer Applicant as the two persons who comprise the Joint Venture Growers. The expression First Joint Venturer means the First Joint Venturer described in the Application form and the expression Second Joint Venturer means the Second Joint Venturer described in the Application form.

63. The First Joint Venturer and Second Joint Venturer are each entitled to a specified percentage (the Prescribed Proportion) of the Joint Venture Assets. The Prescribed Proportions of the First Joint Venturer (47%) and Second Joint Venturer (53%) and the proportion of fees and other costs of which each Joint Venturer is liable are set out in the Table in Section 4 of the PDS, as follows:

The First Joint Venturer is solely responsible for:

- 100% of the Grower Fees payable in the 2009 Financial Year;
- 50% of the Grower Fees payable in the 2012 Financial Year;
- 47% of each of the Ongoing Management Services Fees and Horticultural Costs payable in the 2013 to 2024 Financial years; and
- If the Grower borrows the Grower Fees from Total Beverage Australia, 100% of the interest incurred on the borrowed funds.

The Second Joint Venturer is responsible for:

- 100% of the Grower Fees payable in the 2010 and 2011 Financial Years;
- 50% of the Grower Fees payable in the 2012 Financial Year; and
- 53% of each of the Ongoing Management Services Fees and Horticultural Costs payable in the 2013 to 2024 Financial Years.

64. The interests of the Joint Venturers in the Joint Venture and the Joint Venture Assets and any losses realised from the Joint Venture will be as tenants in common in their Prescribed Proportions, that is, 47% for the First Joint Venturer and 53% for the Second Joint Venturer (clause 50.2.3 of the Constitution).

Leases

65. The Project Land is situated in the Castle Forbes Bay and Lucaston areas of the Huon Valley region of Tasmania, approximately 50 to 100 kilometres south west of Hobart.

66. The Lessor, being Aussie Cherries Ltd, grants the Leases to the Lessee, being National Viticultural Fund of Australia Pty Ltd, for the Term of the Lease, subject to the Lessee extending the Leases for a period of up to two years. The Lessee must only use the Land in accordance with the Constitution, Compliance Plan, Management Agreement and Licence Agreement (clause 6.1).

67. The Lessee must pay to the Lessor as a lump sum annually in advance, an amount of ten dollars plus GST by way of rent for the first year of the Term of the Leases. At the end of the first year of the Term of the Leases, and then annually during the Term of the Leases, the rent must be increased by the same percentage increase as the CPI (clause 4).

Subleases

68. The Sublessor, being National Viticultural Fund of Australia Pty Ltd, grants the Subleases to the Sublessee, being Aussie Cherries Ltd, for the Term of the Subleases, subject to the Sublessee extending the Subleases for a period of up to two years. The Sublessee must only use the Land in accordance with the Constitution, Compliance Plan, Management Agreement and Licence Agreement (clause 6.1).

69. The Sublessee must pay to the Sublessor as a lump sum annually in advance, an amount of ten dollars plus GST by way of rent for the first year of the Term of the Subleases. At the end of the first year of the Term of the Subleases, and then annually during the Term of the Subleases, the rent must be increased by the same percentage increase as the CPI (clause 4).

Licence Agreement

70. Pursuant to this Agreement Aussie Cherries Ltd agrees to licence to the Grower land, plant and equipment to be used either directly or through the Responsible Entity to carry out the Business for the Term. The Term commences on the date on which the Responsible Entity accepts the Grower's Application for an Interest in the Project and terminates on the earlier of 30 June 2024 (unless extended by up to two years as per the Constitution) or the date of the termination of the Grower's Interest (clause 2).

71. The Land Owning Company grants to the Grower a licence for the Term to use and occupy the Allotment of 0.10 hectares for the purposes of the Business only and to draw water supplied by the Land Owning Company as far as is necessary for the purposes of the Business only (clause 3.1). In consideration of providing this licence, the Grower will pay to the Land Owning Company the Land and Water Licence Fee as set out in Item 1 of Schedule 2 of the Agreement (clause 3.2).

72. The Land Owning Company grants to the Grower a licence for the Term to use, either directly or through the Responsible Entity, plant and equipment owned by the Land Owning Company which is suitable for the Business, for the purpose of the Business only (clause 4.1). In consideration of providing this licence, the Grower will pay to the Land Owning Company the Plant and Equipment Rental as set out in Item 1 of Schedule 2 of the Agreement (clause 4.2).

73. The Land Owning Company must establish and maintain a water pipeline, including pipelines, bores, dams, pump sets and mainlines, to the Land for the purpose of servicing the Grower's Allotment for the Term. The Land Owning Company will permit the Grower to establish and maintain an irrigation system, including dripper system, risers and sub-mains, on the Grower's Allotment at the Grower's own cost (clause 6).

74. The Land Owning Company may elect to delay demanding payment by no more than eleven calendar months for certain amounts payable pursuant to this Agreement, in the situation where the services relating to those payments have not been provided (clause 5.3).

75. The Grower's title and Interest in the Trees on the Allotment is limited to such title and Interest as is required for the Grower to grow and maintain the Trees; and harvest and sell cherries from the Trees (clause 9.1). The Grower will have full title in and to any cherries grown on the Trees from the date the cherries commence to grow to the date of the sale of the cherries in any year. The Grower acknowledges and agrees that title in and to the Trees will at all times remain the absolute property of the Land Owning Company (clause 9.2).

Compliance Plan

76. The Project has a Compliance Plan in accordance with the Corporations Act. Under the Compliance Plan, a Compliance Committee monitors FABAL's conduct of the Project to ensure it meets its obligations and responsibilities contained in the Constitution and to ensure the rights of Growers are protected.

Custodian Agreement

77. The Responsible Entity appoints National Viticultural Fund of Australia Pty Ltd (the Custodian) as the custodian of the Assets on the terms and conditions of the Agreement. The Custodian's general duties and obligations are stated at clause 3 and the specific methods and standards for assessing custodian performance are listed at Schedule C. The fees payable to the Custodian for carrying out its obligations under the Agreement are shown at Schedule G.

Marketing Agreement

78. FABAL appoints Westmores during the Term of the Project, as its exclusive agent for the purpose of the marketing and sale of any and all cherries grown on the Land. Under this Agreement Westmores agrees to market and sell any and all cherries grown on the Land and, prior to remitting net funds to FABAL on behalf of the Project, deduct from the gross proceeds of sale the commissions and expenses listed at clause 3.

79. The duties of Westmores under the Agreement are stated at clause 4 and the duties of FABAL under the Agreement are stated at clause 5.

Grading, Packing and Storage Agreement

80. Under this Agreement FABAL appoints Aussie Cherries Ltd during the Term of the Project, to be responsible for:

- grading, packing and storing all and any cherries produced on the Land prior to the marketing and sale of them by Westmores;
- bearing the full costs of the delivery of the cherries to any location within the Commonwealth of Australia; and
- undertaking, attending to and paying for all reasonable promotions and advertising tasks as directed by FABAL (clause 2).

81. Aussie Cherries Ltd shall be remunerated for the duties carried out by it, on the basis of a fee per kilogram of cherries graded, packed, stored and delivered, as stated at clause 3. The duties of Aussie Cherries Ltd are stated at clause 4 of this Agreement and the duties of FABAL are stated at clause 5 of this Agreement.

Fees

82. Under the Management Agreement and Licence Agreement a Grower is required to pay the following fees:

Initial Management Services Fee

(Item 1 of Schedule 2 of the Management Agreement)

Year	Fees Payable ($)	Due Date
1	6,964 (includes $468 attributable to landcare activities)	31 May 2009

Irrigation and Planting Fees

(Item 1 of Schedule 3 of the Management Agreement)

Year	Irrigation Fee Payable ($)	Planting Fees Payable ($)	Total Fees Payable ($)	Due Date
1	992	1,236	2,228	31 May 2009
2	1,238	118	1,356	31 August 2009

Ongoing Management Services Fees

(Item 1 of Schedule 4 of the Management Agreement)

Year	Ongoing Management Services Fees ($)*	Horticulture Costs Estimate ($)**	Total ($)	Due Date
1	Nil	Nil	Nil	
2	2,707	Nil	2,707	31 August 2009
3	2,971	Nil	2,971	31 July 2010
4	2,780	Nil	2,780	31 July 2011
5	507	2,657	3,164	31 July 2012

* Refer to Item 1 of Schedule 4 of the Management Agreement for details of Fees for years 6 to 16.

** This is an estimate only.

Rent

(Item 1 of Schedule 2 of the Licence Agreement)

Year	Land & Water Licence Fee ($)*	Plant & Equipment Rent ($)*	Total Rent ($)*	Due Date
1	232.28	79.97	312	31 May 2009
2	1249.08	769.97	2,019	31 August 2009
3	1279.69	936.23	2,216	31 July 2010
4	1313.32	1637.92	2,951	31 July 2011

* Refer to Item 1 of Schedule 2 of the Licence Agreement for details of Fees for Years 5 to 16.

Call for Funds

83. In addition to any amounts payable to the Responsible Entity pursuant to either the Management Agreement or the Constitution, the Responsible Entity is entitled to request each Grower to make a payment to contribute to all or any unexpected expenses of or in relation to the Allotment, the amount of that payment not to exceed $5,301 in any year. Such money is not to be used to provide remuneration to the Responsible Entity for activities or responsibilities which are intended to be funded by other fees payable pursuant to the Management Agreement or the Constitution but for expenses, whether they are revenue or capital in nature, which have not been anticipated by the Responsible Entity. These payments can be called at any time during the Term and the Responsible Entity will advise Growers of the nature of the activities to which the payments are directed (clause 15 of the Management Agreement).

Performance Incentive Fee

84. In addition to all other fees payable to the Responsible Entity pursuant to clause 13 of the Management Agreement, each Year the Responsible Entity is entitled to be paid an additional fee (Performance Incentive Fee) on account of the performance by it of its duties which leads to above budget returns attributable to the Grower's Allotment, which additional fee will be paid at the time of the distribution of proceeds. The Fee is calculated as 30% of the amount that the actual profit for a particular Year exceeds the threshold profit amounts for a particular Year as set out in the PDS.

Payment of fees by Joint Venturers

85. For Joint Venturers these Fees are apportioned as prescribed in clause 50 of the Constitution and section 4.9 of the PDS.

86. The First Joint Venturer is solely responsible for paying:

(i) 100% of the Grower Fees payable in the 2009 Financial Year;

(ii) 50% of the Grower Fees payable in the 2012 Financial Year; and

(iii) 47% of each of the Ongoing Management Services Fee and Horticulture Costs from the 2013 Financial Year.

87. The Second Joint Venturer is solely responsible for paying:

(i) 100% of the Grower Fees payable in the 2010 and 2011 Financial Years; and

(ii) 50% of the Grower Fees payable in the 2012 Financial Year; and

(iii) 53% of each of the Ongoing Management Services Fee and Horticulture Costs from the 2013 Financial Year.

Finance

88. Growers can fund their participation in the Project themselves, borrow from Total Beverage Australia (a lender associated with the Responsible Entity) or borrow from an independent lender external to the project.

89. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with Total Beverage Australia that materially differs from that set out in the documentation provided to the Tax Office with the application for 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.

90. Growers cannot rely on any part of this Ruling if the Application Payment is not paid in full on or before 31 May 2009 by the Grower or, on the Grower's behalf, by a lending institution. Where an application is accepted subject to finance approval by any lending institution Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by the lending institution by 31 May 2009.

91. There are three finance options offered by Total Beverage Australia to Growers, excluding Second Joint Venturers, to finance their Interests in the Project. Upon acceptance of the Grower's application by Total Beverage Australia, the Grower will be bound by the terms and conditions of the Terms Loan Agreement.

92. As security for the due and punctual payment of all Moneys owed to Total Beverage Australia under the Terms Loan Agreement, Growers will charge to Total Beverage Australia by way of a fixed Charge, all of the Grower's Interest in the project (clause 9.1.1 of the Terms Loan Agreement).

Loan Options

93. 12 month loan with terms and conditions as follows:

- applies to the Initial Fees payable by Growers or First Joint Venturers;
- equal monthly principal instalments over 12 months commencing on 31 July 2009;
- no interest applicable;
- instalments paid by direct debit; and
- $50 Application Fee payable on application.

94. 2 or 5 year loans with terms and conditions as follows:

- the 2 year loan applies to the fees payable by Growers for either the first year, the first two years or the first three years of the Project;
- the 5 year loan applies to the fees payable by Growers for either the first year, the first two years, the first three years or the first four years of the Project;
- both loans apply to Initial Fees only for First Joint Venturers;
- equal monthly principal and interest instalments over the term of the loan payable monthly in arrears commencing on 31 July 2009;
- fixed interest of 11.05% per annum;
- instalments paid by direct debit; and
- $50 Application Fee payable on application.

95. If a First Joint Venturer applies for a loan, the loan will be used to meet the obligations as detailed in subparagraph 86(i) of this Ruling. Total Beverage Australia will not be offering finance to Second Joint Venturers.

96. This Ruling does not apply if the finance arrangement entered into by the Grower includes 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-arms 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 Total Beverage Australia (excluding its assigns), are involved or become involved in the provision of finance to Growers for the Project.

Commissioner of Taxation
25 March 2009

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 21, 22 and 25 of this Ruling to constitute allowable deductions the Grower's cherry growing activities as a participant in the Tasmanian Premium Cherries Project (May 2009 Growers) must amount to the carrying on of a business of primary production.

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

99. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Product Ruling, the Full Federal Court in *Hance v. FC of T; Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 applied these principles to conclude that 'Growers' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

100. Application of these principles to the arrangement set out above leads to the conclusion that Growers (as described in paragraphs 2 to 4 of this Ruling), who will stay in the Project until its completion, will be carrying on a business of primary production involving growing and harvesting cherries for sale.

Deductions for the Initial Management Services Fee, Ongoing Management Services Fee, Land and Water Licence Fee, Plant & Equipment Rent, Interest and Borrowing Costs

Section 8-1

101. The Initial Management Services Fee, Ongoing Management Services Fee, Land and Water Licence Fee and Plant & Equipment Rent are deductible under section 8-1. A 'non-income producing' purpose is not identifiable in the arrangement and there is no capital component evident in the management fees, rent and licence fees.

102. 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 108 to 112 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.)

103. Some Growers may finance their participation in the Project through a Terms Loan Agreement with Total Beverage Australia. Applying the same principles as that used for the management fees, rent and licence fees, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

104. Other than where the prepayment provisions apply (see paragraphs 108 to 112 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

Borrowing costs

Section 25-25

105. A deduction is allowable for expenditure incurred by a Grower in borrowing money to the extent that the borrowed money is used for the purpose of producing assessable income (subsection 25-25(1)).

106. In this Project, the Application fee of $50 is incurred to borrow money that is used or is to be used solely for income producing purposes during each income year over the term of the loan.

107. The deduction for the borrowing expense is spread over the period of the loan or 5 years, whichever is the shorter (subsection 25-25(4)). If the borrowing expenses are $100 or less they are deductible in the year in which they are incurred.

Prepayment provisions

Sections 82KZL to 82KZMF

108. 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.

109. 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

110. Under the scheme to which this Product Ruling applies Initial Management Services Fees, Ongoing Management Services Fee, Land and Water Licence Fee and Plant & Equipment Rent are incurred annually and the interest payable to Total Beverage Australia is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

111. 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 and Licence Agreement, or prepays interest under a loan agreement (including loan agreements with lenders other than Total Beverage Australia). Where such a prepayment is made these prepayment provisions will also apply to small business entities because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

112. As noted in the Ruling section above, Growers who prepay management fees, rent, licence 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.

Expenditure of a capital nature

Divisions 40 and 328

113. 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 water facilities, a 'landcare operation', and the establishment of the cherry trees is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328.

114. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is a 'small business entity'.

115. The tax treatment of capital expenditure has been dealt with in a representative way in the Table(s) and accompanying notes of paragraphs 22 and 25 of this Ruling.

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

116. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for income years ending **30 June 2009 to 30 June 2013**, based on the evidence supplied, the Commissioner has determined that for the income years ended 30 June 2009 up to and including 30 June 2013:

- 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 cherry industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

117. 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.

118. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) for Growers who will stay in the Project until its completion is conditional on the Project being carried on in the manner described in this Product Ruling during the income years specified. If the Project is carried out in a materially different way to that described in this Product 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

119. 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

120. 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).

121. The Tasmanian Premium Cherries Project (May 2009 Growers) 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 21, 22 and 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.

122. Growers to whom this Product Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the cherries. 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 Product Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Appendix 2 – Detailed contents list

123. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/7; TR 97/11; TR 98/22

Subject references:

- carrying on a business
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZLA
- 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 25-25(1)
- ITAA 1997 25-25(4)
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 40
- ITAA 1997 Subdiv 40-F
- ITAA 1997 Subdiv 40-G
- ITAA 1997 40-515
- ITAA 1997 40-515(1)(a)
- ITAA 1997 40-515(1)(b)
- ITAA 1997 40-520(1)
- ITAA 1997 40-520(2)
- ITAA 1997 40-525(1)
- ITAA 1997 40-525(2)
- ITAA 1997 40-530
- ITAA 1997 40-540
- ITAA 1997 40-545
- ITAA 1997 40-630
- ITAA 1997 40-635
- ITAA 1997 Div 328
- ITAA 1997 Subdiv 328-D
- TAA 1953
- Copyright Act 1968
- Corporations Act 2001
- SISA 1993

Case references:

- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085

ATO references

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