


***PR 2010/21 - Income tax: National Viticulture Fund of Australia Project No. 3 (1 November 2004 - 15 June 2005 Growers)***

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## Product Ruling

### Income tax: National Viticulture Fund of Australia Project No. 3 (1 November 2004 – 15 June 2005 Growers)

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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, 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**

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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**

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This Product Ruling has been given on the basis that the entity(s) who applied for the Product Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

## What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.
2. In this Product Ruling, this scheme is referred to as the National Viticulture Fund of Australia Project No. 3 (1 November 2004 – 15 June 2005 Growers) or simply as 'the Project'.

### Class of entities

3. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Growers.
4. The class of entities who can rely on those tax benefits consists of those entities who were specifically identified in paragraphs 49 to 50 of Product Ruling PR 2004/70 and who entered into the specific scheme that is set out in paragraphs 14 to 48 of that Ruling between 1 November 2004 and 15 June 2005.
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:
  - have terminated their involvement in the scheme prior to its completion, or who otherwise did not intend to derive assessable income from it;
  - were accepted into this Project before 1 November 2004 or after 15 June 2005; or
  - have participated in the scheme through offers made other than through the Product Disclosure Statement.

### ***Superannuation Industry (Supervision) Act 1993***

6. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA). The Commissioner gives no assurance that the scheme 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 scheme may contravene the provisions of SISA.

**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 14 to 48 of PR 2004/70.

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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National Circuit  
Barton ACT 2600

or posted at: <http://www.ag.gov.au/ccca>

**Date of effect**

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10. This Product Ruling applies only to the specified class of entities that entered into the scheme set out in paragraphs 14 to 48 of PR 2004/70 between 1 November 2004 and 15 June 2005.

11. 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.

**Ruling**

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**Continuing application of PR 2004/70**

12. Although now withdrawn, the tax benefits set out in PR 2004/70 continue to apply to Growers who are within the specified class of entities to which the Product Ruling applied and who entered into the specified scheme between 1 November 2004 and 15 June 2005. This is subject to there being no material difference in the scheme or in the entities involved in the scheme.

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

13. A Grower who is an individual and within the defined class of entities outlined in paragraphs 3 to 5 of this Ruling may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10.

## **Section 35-55 – exercise of Commissioner’s discretion**

### ***2008-09 income year***

14. Subject to the Project being carried out in the manner described in paragraphs 14 to 48 of PR 2004/70, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for Growers for the 2008-09 income year. 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.

### ***2009-10 income year***

15. For the 2009-10 income year, the Commissioner will exercise the discretion in subsection 35-55(1) once the following conditions are satisfied:

- the Grower carried on their business of viticulture during the income year; and
- the business activity that is carried on is not materially different to that in the scheme described in paragraphs 14 to 48 of PR 2004/70; and
- the Grower has incurred a taxation loss for the income year from carrying on that business activity.

16. If these conditions are met for the 2009-10 income year, the Commissioner will exercise the discretion under:

- paragraph 35-55(1)(b) for a Grower in the Project who satisfies the income requirement in subsection 35-10(2E); and
- paragraph 35-55(1)(c) for a Grower in the Project who does not satisfy the income requirement in subsection 35-10(2E).

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## Scheme

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17. The scheme that is the subject of this Ruling is called the National Viticulture Fund of Australia Project No. 3 (1 November 2004 – 15 June 2005 Growers) and is described in paragraphs 14 to 48 of PR 2004/70. It also incorporates the following additional documents:

- Correspondence dated 16 February 2010, 11 May 2010, and 12 August 2010;
- Revised cashflow model for 2004 Growers received 12 August 2010;
- Revised cashflow model for 2005 Growers received 12 August 2010;
- Grape Purchase Agreement between Orlando Wyndham Group Pty Ltd and National Viticultural Fund of Australia, dated 21 May 2004;
- Sheoak Log, Barossa Valley Viticultural Reviews dated May 2007, August 2007, May 2008, and February 2009;
- National Viticulture Fund of Australia Project No. 3 Annual Works Programs dated June 2008 and June 2009; and
- Barossa Valley Wine Region, Regional Summary reports for 2008 and 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.

18. 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.

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

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**Commissioner of Taxation**

22 September 2010

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## Appendix 1 – Explanation

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

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

20. Based on information provided with the application for this Product Ruling, a Grower within the class of entities defined in paragraphs 3 to 5 of this Ruling who carries on a business of viticulture individually (alone or in partnership) is expected to incur losses from their participation in the Project which will be subject to Division 35.<sup>1</sup> These losses will be subject to the loss deferral rule in section 35-10 unless an exception applies or, for each income year in which losses are incurred, the Commissioner exercises the discretion in subsection 35-55(1)

21. The exceptions to the loss deferral rule depend upon the circumstances of individual Growers and are outside the scope of this Ruling.

22. The Commissioner will apply the principles set out in Taxation Ruling TR 2007/6 Income tax: non-commercial business losses: Commissioner's discretion when exercising the discretion.

### **Section 35-55 – exercise of Commissioner's discretion**

#### **2008-09 income year**

23. The discretion in subsection 35-55(1)(b) has been exercised for the 2008-09 income year because the Commissioner has determined:

- it is because of its nature that the business activity of the 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 viticulture industry, the Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

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<sup>1</sup> Division 35 does not apply to Growers who do not carry on a business or who carry on a business other than as individuals (alone or in partnership).

24. 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 paragraphs 14 to 48 of PR 2004/70 during the income year 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.

***2009-10 income year***

25. From the 2009-10 income year an income requirement was introduced in subsection 35-10(2E) (see paragraph 30 of this Ruling).

26. Where, in the 2009-10 income year, a Grower with income for non-commercial loss purposes of less than \$250,000 (that is, the Grower satisfies the income requirement in subsection 35-10(2E)) the discretion in subsection 35-55(1)(b) has been exercised for the 2009-10 income year because the Commissioner has determined:

- it is because of its nature that the business activity of the 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 viticulture industry, the Grower's business activity will satisfy one of the four tests set out in Division 35 or produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C)).

27. Where, in the 2009-10 income year, a Grower with income for non-commercial loss purposes of \$250,000 or more (that is, the Grower does not satisfy the income requirement in subsection 35-10(2E)) the discretion in subsection 35-55(1)(c) has been exercised for the 2009-10 income year because the Commissioner has determined:

- it is because of its nature that the business activity of the Grower will not produce assessable income greater than the deductions attributable to it; and
- there is an objective expectation that within a period that is commercially viable for the viticulture industry, the Grower's business activity will produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C)).



28. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) or 35-55(1)(c) is conditional on the Project being carried on in the manner described in paragraphs 14 to 48 of PR 2004/70 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.

29. In each individual year where the Commissioner's discretion is exercised a Grower within either paragraph 35-55(1)(b) or paragraph 35-55(1)(c) who would otherwise be required to defer a loss arising from their participation in the Project under section 35-10 until a later income year is able to offset that loss against their other assessable income.

## **Subsection 35-10(2E) – income requirement**

30. A Grower will satisfy the income requirement in subsection 35-10(2E) where the sum of the following amounts is less than \$250,000:

- taxable income for that year (ignoring any loss arising from participation in the Project or any other business activity);
- total reportable fringe benefits for that year;
- reportable superannuation contributions for that year; and
- total net investment losses for that year.

## **Appendix 2 – Detailed contents list**

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2007/6; PR 2004/70

*Subject references:*

- Commissioner's discretion
- non commercial loss
- product rulings

- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(2C)
- ITAA 1997 35-10(2E)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(b)
- ITAA 1997 35-55(1)(c)
- SISA 1993
- TAA 1953
- Copyright Act 1968

*Legislative references:*

- ITAA 1997
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ATO references

NO: 2010/3870  
1-2300PDK

ISSN: 1441-1172

ATOlaw topic: Income Tax ~~ Product ~~ vineyards & wineries