



PR 1999/18 - Income tax: Norfolk Ridge Vineyards Project

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Product Ruling

Income tax: Norfolk Ridge Vineyards Project

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Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 98/1 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Product Ruling is about

1. This Ruling sets out the Commissioner’s opinion on the way in which the ‘tax law(s)’ identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Norfolk Ridge Vineyard Project offered by Egerton Vineyard Management Ltd, or just simply as ‘the Project’.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- section 6-5 (*Income Tax Assessment Act 1997* (‘ITAA1997’));
 - section 8-1 (ITAA 1997);
 - section 42-15 (ITAA 1997);
 - section 387-55 (ITAA 1997);
 - section 387-125 (ITAA 1997);
 - Part 2-25 (ITAA 1997);
 - Part 3-1 (ITAA 1997);
 - section 82KL (*Income Tax Assessment Act 1936* (‘ITAA 1936’));
 - section 82KZM (ITAA 1936); and
 - Part IVA (ITAA 1936).

Class of persons

3. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as ‘Growers’.

4. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

Qualifications

5. The Ruling provides this specified class of persons with a binding ruling as to the tax consequences of this product. The Commissioner accepts no responsibility in relation to the commercial viability of this product and gives no assurance the prices charged for the product are reasonable, appropriate, or represent industry norms. A financial (or other) adviser should be consulted for such information.

6. The Commissioner rules on the precise arrangement identified in the Ruling.

7. The class of persons defined in the Ruling may rely on its contents, provided the arrangement (described below at paragraphs 12 to 23) is carried out in accordance with details described in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out:

- the Ruling has no binding effect on the Commissioner, as the arrangement entered into is not the arrangement ruled upon; and
- the Ruling will be withdrawn or modified.

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Date of effect

9. This Ruling applies prospectively from 5 May 1999, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

10. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, the Product Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

11. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

12. The arrangement that is the subject of this Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Norfolk Ridge Prospectus dated 12 May 1998 and Supplementary Prospectus dated 26 February 1999;
- Product Ruling application received from the applicant dated 1 February 1999;
- Norfolk Ridge Trust Deed dated 29 April 1998;
- Lease and Management Agreement between Egerton Vineyard Management Ltd (Manager), Charters

Securities Pty Ltd (Trustee), Egerton Vineyards Mt Barker Ltd (Lessor) and the Grower;

- Memorandum and Articles of Association of Egerton Vineyard Management Ltd dated 4 December 1997; and
- additional correspondence received from the applicant dated 2 February 1999, 16, 19 and 23 March 1999 and 16 and 23 April 1999.

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

13. For the purpose of describing the arrangement 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 the Grower, will be party to. The effect of these agreements is summarised as follows.

Overview

14. This arrangement is called the Norfolk Ridge Vineyards Project. The Project is to carry out a large scale planting of grape vines upon land held by the Lessor and located in the vicinity of Mt Barker, Western Australia, for a period of 15 years. Growers entering into the Project will lease land including planted vines on cleared land complete with dams, catchments, roads and firebreaks from the Lessor. The Growers pay for the irrigation and trellising system that is on their leased area. Growers then contract with Egerton Vineyard Management Ltd for the management of the vineyard and harvesting of their grapes. Unless the Grower has elected to take possession of their grapes, the manager will sell the grapes on behalf of the Grower.

15. The minimum individual holding is one leased area of 0.4 hectare. Overall, it is proposed that 50 hectares will be planted. The 125 leased areas this represents are identified on the plan of the vineyard attached to the Lease and Management Agreement. Growers may also subscribe for shares in Egerton Vineyards Mt Barker Ltd.

Lease and Management Agreement

16. Under the Lease and Management Agreement a Grower makes payments for lease rental, administration and management fees, and payments for trellising and irrigation. The Agreement will be executed no later than 30 June 1999.

17. The Lessor grants the Grower a lease of a leased area (set out in the Schedule attached to the Lease and Management Agreement) and the Grower:

- will not use or permit any other person to use the leased area for any purpose other than that of commercial horticulture and the Project;
- will not erect any building or construction (whether temporary or permanent) on the leased area, except with the approval of the lessor and for the purpose of commercial horticulture and the Project; and
- will not use, or permit any other person to use the leased area for residential, recreational or tourist purposes.

18. In return, the Grower has the right to pass over the leased area at any time and the Grower will at all times have full right, title and interest in the Grower's grapes produced from the leased area. At the expiration of the term, the Grower will peaceably surrender and yield up to the Lessor the leased area free and clear of rubbish and in good and substantial repair order and condition. The trellising remains the property of the Grower.

19. The Grower appoints the Manager to plant, develop, manage and maintain the vines on the leased area and to harvest the grape produce from the leased area; and the Manager accepts the appointment upon the terms and conditions contained in the Deed and undertakes to provide the Services on behalf of the Grower, with the Lessor's consent.

20. Unless a Grower elects to collect and market the collectable produce personally, the Manager is authorised to enter into a contract as agent for the Grower to collect and market the produce on their leased areas.

Fees

21. The Growers will make the following payments per leased area for the first year of operation:

- a management fee of \$14,800 to Egerton Vineyard Management Ltd for the management of the vineyard for the period 30 June 1999 to 30 June 2000;
- a lease fee of \$500 to Egerton Vineyards Mt Barker Ltd for lease of the Grower's leased area of the vineyard for the period 30 June 1999 to 30 June 2000;
- purchase cost of the irrigation system of \$2,500 to Egerton Vineyard Management Ltd; and

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- purchase cost of trellising of \$3,000 to Egerton Vineyard Management Ltd.

22. The Growers will make the following payments per leased area in subsequent years for the remainder of the fifteen year Project:

- thereafter, the rent and management fees payable per leased area will be the fees payable in the immediately preceding year increased by the greater of three percent or the percentage increase in the Consumer Price Index between the quarter ending 31 March in the year of payment and the quarter ending 31 March in the immediately preceding year (i.e., the previous year's fee increased for inflation).

Finance

23. Growers can fund the investments themselves or borrow from an unassociated lending body. No entity involved in the Project is involved in the provision of financing from the Project. Egerton Vineyard Management Ltd and Egerton Vineyards Mt Barker Ltd have provided undertakings that they will not provide any financial support, nor will they have any association or involvement with any financier providing financial support to investors wishing to participate in the Norfolk Ridge Vineyards Project.

Ruling

24. For a Grower who invests in the Norfolk Ridge Vineyards Project the following deductions will be available:

- rent paid by the Grower in relation to the leased area will be an allowable deduction in the year incurred (section 8-1 of the ITAA 1997);
- administration and management fees paid for the services outlined in the Lease and Management Agreement will be allowable deductions to the Grower in the year incurred (section 8-1 of the ITAA 1997);
- expenses incurred on irrigation will constitute allowable deductions to the Grower in the year incurred and the next two years at the rate of 33.3 % per annum (section 387-125 of the ITAA 1997); and
- depreciation of trellising will be an allowable deduction to the Growers at a rate of 20% per year diminishing value or 13% per year prime cost (section 42-15 of the ITAA 1997).

Sections 82KZM, 82KL and Part IVA

25. For a Grower who invests in the Project the following provisions have application as indicated:

- the expenditure by Growers does not fall within the scope of section 82KZM;
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the provisions in Part IVA will not be applied to the arrangement described in this Ruling.

Explanations

Section 8-1: lease and management fees

26. It is appropriate, as a starting point, to consider whether lease and management fees are deductible under paragraph 8-1(1)(a). This consideration proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoing is not deductible under paragraph 8-1(1)(b) if it is incurred when the business has not commenced; and
- where a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether paragraph 8-1(1)(b) applies. However, that does not preclude the application of paragraph 8-1(1)(a) in determining whether the outgoing in question would have a sufficient connection with activities to produce assessable income of the taxpayer.

27. A vineyard project can constitute the carrying on of a business. Where there is a business, or a future business, the gross sale proceeds from grapes from the scheme will constitute assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income. These operations will be the planting, tending, maintaining and harvesting of the vines.

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28. Generally, a Grower will be carrying on a business of a vineyard where:

- the Grower has an identifiable interest in specific grape vines coupled with a right to harvest and sell the grapes produced;
- the vineyard activities are carried out on the Grower's behalf; and
- the weight and influence of the general indicators of a business as used by the Courts point to the carrying on of a business.

29. Under the Lease and Management Agreement, Growers have rights in the form of a lease over an identifiable area of land consistent with the intention to carry on a business of a commercial vineyard. Under the Lease and Management Agreement, Growers appoint Egerton Vineyard Management Ltd, as Manager, to provide services such as planting. The agreement gives Growers full right, title and interest in the grapes produced and the right to have the grapes sold for their benefit.

30. Under the Agreement, Growers appoint the Manager to provide services such as preplanting and planting of grape vines (which are owned and paid for by the lessor), the installation of trellising and irrigation, and all operations necessary to develop and maintain a mature fruit bearing vine. The Manager is also responsible for harvesting and selling the grapes. The specific cost of these services provided in the first thirteen months is \$20,800.

31. The Lease and Management Agreement gives Growers an identifiable interest in specific vines and a legal interest in the land by virtue of a lease. Growers have the right personally to market the produce attributed to their leased area or they can elect to use the Manager, Egerton Vineyards Management Ltd, to market the produce for them.

32. Growers have the right to use the land in question for horticultural purposes and to have the Manager come onto the land to carry out its obligations under the Agreement. The Growers' degree of control over the Manager as evidenced by the Agreement, and supplemented by the Corporations Law, is sufficient. Under the Project, Growers are entitled to receive regular progress reports on the Manager's activities. Growers are able to terminate arrangements with the Manager in certain instances, such as cases of default or neglect. The activities described in the Agreement are carried out on the Growers' behalf.

33. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the arrangement's description for all the indicators. The Independent Horticultural report considers that the Project is realistic

and commercially viable. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections contained in the Prospectus that suggest the Project should return a 'before-tax' profit to the Growers, i.e., a 'profit' in cash terms that does not depend in its calculation, on the fees in question being allowed as a deduction.

34. Growers will engage the professional services of a Manager with appropriate credentials. There is a means to identify which vines Growers have an interest in. The services are based on accepted viticulture practices and are of the type ordinarily found in viticulture practices activities that would commonly be said to be businesses.

35. Growers have a continuing interest in the vines from the time they are acquired until they reach the end of the most productive period of their life. The vineyard activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. The Growers' vineyard activities will constitute the carrying on of a business.

36. The management fees and rent associated with the vineyard activities will relate to the gaining of income from this business, and hence have a sufficient connection to the operations by which this income (from the sale of grapes' produce) is to be gained from this business. They will, thus, be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. No capital component is identifiable. The tests of deductibility under paragraph 8-1(1)(a) are met. The exclusions of subsection 8-1(2) do not apply.

37. Lease and management fees are pre-paid. Taxation Ruling TR 94/25 states that the facts in *Coles Myer Finance Ltd v. Federal Commissioner of Taxation* (1993) 176 CLR 640; 93 ATC 4124; (1993) 25 ATR 95 were fundamentally different from those of a pre-payment and that the decision did not affect the deductibility of pre-paid expenses. The lease and management fees will be incurred in the year of payment.

Expenditure of a capital nature

38. Any part of the expenditure of a Grower entering into a horticultural business 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 of the ITAA 1997. In this Project, the costs of irrigation and trellising are considered to be capital in nature. The fees for these expenditures are not deductible under section 8 1. However, expenditure of this nature can fall for consideration under specific capital write-off provisions of the ITAA 1997.

Section 42-15: trellising expenditure

39. Growers accepted into the Project incur expenditure on trellising upon which the vines are attached and are to be used on their behalf in the operation of the vineyard business. This is attached to the land as a fixture. This expenditure is of a capital nature.

40. Under section 42-15, a taxpayer can deduct an amount for depreciation of a unit of plant used for the purpose or purposes of producing assessable income where they are the owner or quasi-owner of that plant. However, where an item is affixed to land so that it becomes a fixture, at common law it becomes part of the land and is legally, absolutely owned by the owner of the land.

41. It is, however, accepted in certain circumstances that a lessee is entitled to claim depreciation where they are considered to be the owner of those improvements. Income Tax Ruling IT 175 sets out the Australian Taxation Office's (ATO's) views on this issue. Where a lessee is considered to own the improvements under a state law, as detailed in the Ruling, or where they have a right to remove the fixture or are entitled to receive compensation for the value of the fixture, the ATO accepts the lessee is entitled to claim depreciation for the fixture.

42. A Grower accepted into the Project enters into a licence for a right to occupy certain land upon which they are entitled to grow grapes to conduct a viticulture business. Subject to the terms and conditions of the Lease and Management Agreement, they have a right to remove the trellising at the end of the Project.

43. The Manager will advise Growers the date the trellising is installed and begins to be used for the purpose of producing assessable income. Therefore, the cost that relates to the acquisition and installation of trellises on the land, will be eligible for depreciation deduction by the Growers under section 45-125, at a rate of 13% prime cost or 20% diminishing value from this date.

Subdivision 387-B: irrigation expenditure

44. Subdivision 387-B allows a taxpayer, who is carrying on a business of primary production on land in Australia, to claim a deduction for capital expenditure on conserving or conveying water. The deduction is allowed over a three year period and applies to plant or a structural improvement primarily or principally used for the purpose of conserving or conveying water for use in a primary production business. Irrigation systems of the kind proposed would be covered by this Subdivision.

45. As the taxpayer who can claim the deduction does not have to actually own the land but can be a tenant or lessee, a deduction would

be available to the Growers in the Project at a rate of 33.3% per annum for the cost of the irrigation system.

Section 82KZM: prepaid expenditure

46. Section 82KZM operates to spread over more than one income year a deduction for prepaid expenditure that would otherwise be immediately deductible, in full, under section 8-1 of the ITAA 1997. The section applies if certain expenditure incurred under an agreement is in return for the doing of a thing under the agreement that is not wholly done within 13 months after the day on which the expenditure is incurred.

47. Under the Lease and Management Agreement the fee of \$15,300 per holding will be incurred on execution of the Agreement. This fee is charged for providing services to a Grower only for the period of 13 months from the execution of the Agreement. For this Ruling's purposes, no explicit conclusion can be drawn from the arrangement's description that the fee has been inflated to result in reduced fees being payable for subsequent years. The fee is expressly stated to be for a number of specified services. There is evidence this fee is for services to be provided within 13 months of incurring the expenditure in question.

48. Thus, for the purposes of this Ruling, it is accepted that no part of the fee of \$15,300 is for the Manager to do 'things' that are not to be done wholly within 13 months of the fee being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditure by Growers of \$15,300 per leased area.

Section 82KL

49. Section 82KL is a specific anti-avoidance provision that operates to deny an otherwise allowable deduction for certain expenditure incurred, but effectively recouped, by the taxpayer. Under subsection 82KL(1), a deduction for certain expenditure is disallowed where the sum of the 'additional benefit' plus the 'expected tax saving' in relation to that expenditure equals or exceeds the 'eligible relevant expenditure'.

50. 'Additional benefit' (see the definition of 'additional benefit' at subsection 82KH(1) and paragraph 82KH(1F)(b)) is, broadly speaking, a benefit received that is additional to the benefit for which the expenditure is ostensibly incurred. The 'expected tax saving' is essentially the tax saved if a deduction is allowed for the relevant expenditure.

51. Section 82KL's operation depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'.

Insufficient 'additional benefits' will be provided to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA: general tax avoidance provision

52. For Part IVA to apply there must be a 'scheme' (section 177A); a 'tax benefit' (section 177C); and a dominant purpose of entering into or carrying out the scheme to enable the relevant taxpayer to obtain a tax benefit in connection with the scheme (section 177D).

53. The Norfolk Ridge Vineyards Project will be a 'scheme'. The Growers will obtain a 'tax benefit' from entering into the scheme, in the form of the tax deductions per leased area 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 enabling the relevant taxpayer to obtain this tax benefit.

54. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the sale of the grapes from the vines. Further, there are no features of the Project, such as the payment of excessive management fees and non-recourse loan financing by any entity associated with the Project, that might suggest the Project was so 'tax driven', and so designed to produce a tax deduction of a certain magnitude, that it would attract the operation of Part IVA. No ruling is given on the application of Part IVA to financing arrangements entered into between investors and other financiers in respect of lending arrangements to invest in the Project.

Section 6-5: assessable income

55. Gross sale proceeds derived from the sale of grapes harvested from the Project will be assessable income of the Growers, under section 6-5.

56. Once harvested, a Grower's grapes will, in most circumstances, be trading stock of the Grower. As a consequence, if grapes or grape juice are on hand at the end of the income year, the Grower will need to account for that trading stock in accordance with the trading stock provisions contained in Part 2-25 of the ITAA 1997. In Income Tax Ruling IT 2001, it is accepted that costs associated with the establishment of a vineyard do not form part of the trading stock ultimately produced by the vineyard.

Part 3-1: capital gains tax

57. Unless any shares in the Lessor are trading stock of the Grower or otherwise assessable on revenue account to the Grower, a capital gain or loss will arise on the sale of those shares.

58. In the event that the Lessor is liquidated at the conclusion of the Project, further taxation considerations arise for the Grower holding shares in the Lessor. Any distribution made to a Grower on liquidation of the Lessor would be deemed to be a dividend to the Grower, to the extent of the undistributed profits of the Lessor. This dividend would be assessable as a normal dividend and may have franking credits attached. Further, a capital gain or loss could arise, based on the difference between the Grower's indexed cost base and the amount distributed.

Detailed contents list

59. Below is a detailed contents list for this Ruling:

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Commissioner of Taxation

5 May 1999

Previous draft:

No draft issued

- tax shelters
- tax shelters project

Related Rulings/Determinations:

PR 98/1; TR 92/1; TR 97/11;
TR 97/16; TD 93/34, IT 2001

Legislative references:

- ITAA1936 82KH(1)
- ITAA1936 82KH(1F)(b)
- ITAA1936 82KL
- ITAA1936 82KL(1)
- ITAA1936 82KZM
- ITAA1936 Pt IVA
- ITAA1936 177A
- ITAA1936 177C
- ITAA1936 177D
- ITAA1997 6-1
- ITAA1997 8-1
- ITAA1997 42-15
- ITAA1997 Pt 2-25
- ITAA1997 Pt 3-1
- ITAA1997 Subdiv 387-B
- ITAA1997 Subdiv 387-125

Subject references:

- carrying on a business
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- fee expenses
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Case references:

ATO references:

NO 98/11452-2; 99/1961-9

BO

FOI number: I 1018493

ISSN: 1039-0731

Price: \$1.40