



PR 2001/58 - Income tax: Sunset Sultana Project

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 This document has changed over time. This is a consolidated version of the ruling which was published on *9 May 2001*



Product Ruling

Income tax: Sunset Sultana Project

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Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

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 1999/95 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.*

No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product as an investment. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

Terms of Use of this Product Ruling

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

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 have taken part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Sunset Sultana Project, or simply as 'the Project'.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- Section 35-55 of the *Income Tax Assessment Act 1997* ('ITAA 1997').

Goods and Services Tax

3. In this ruling all fees and expenditure referred to include Goods and Services Tax ('GST') where applicable.

Business Tax Reform

4. The Government is currently evaluating further changes to the tax system in response to the *Ralph Review of Business Taxation* and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the laws enacted at the time it was issued, future tax changes may affect the operation of those laws and, in particular, the tax deductions that are allowable. Where tax laws change, those changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who have invested in the Project 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

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for investors in projects such as this. In keeping with that intention, the Tax Office suggests that promoters and advisers ensure that potential investors are fully informed of any changes in tax laws that take place after the Ruling is issued. Such action should minimise suggestions that investors have been negligently or otherwise misled.

Class of persons

7. The class of persons to whom this Ruling applies is those who entered into the arrangement described below between and including the dates of 31 January 2000 and 30 June 2000. They will have had 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'.

8. 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 the Project.

Qualifications

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

10. If the arrangement described in this 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

12. This Ruling applies from 9 May 2001. 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).

13. 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, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

14. This Product Ruling is withdrawn and ceases to have effect after 30 June 2001. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who entered into the specified arrangement between and including the dates of 31 January 2000 and 30 June 2000. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

Arrangement

15. The arrangement that is the subject of this Ruling is described below. The relevant documents, or parts of documents, incorporated into this description of the arrangement include:

- Application for Product Ruling dated 11 July 2000;
- 'Sunset Sultana Project Prospectus' dated 31 January 2000;
- Sunset Sultana Project cash flow and calculation of internal rate of return schedule;
- 'Special Purpose Soil Survey' dated October 1999;
- **Pro-forma 'Contract of Sale of Real Estate' agreement between Sunset Land Pty Ltd and the Grower;**
- Sunraysia Rural Water Authority Diversion Licence No. 4257 / Assessment: 2007449 issued to Thomsons Agribusiness Ltd. [the Manager and the Responsible Entity];
- 'Licence Agreement' for irrigation pipeline between Thomsons Agribusiness Limited [the Manager and the Responsible Entity] and Sunset (Joint Venture) Pty Ltd [the pipeline owner] undated;
- hire agreement between Sunset (Joint Venture) Pty Ltd [the irrigation and drainage equipment owner] and

- Thomsons Agribusiness Limited [the Manager and the Responsible Entity] dated 24 January 2000;
- ‘Sunset Sultana Project - Agency Agreement – Custodian’ between Thomsons Agribusiness Limited, [the Manager and the Responsible Entity] and Australian Rural Group Limited [the Custodian] dated 2 February 2000;
 - ‘Vineyard Management Agreement’ between Thomsons Agribusiness Limited [the Manager and the Responsible Entity] and Sunset Sultana Management Pty Ltd [the Principal Contractor] dated 15 January 2000;
 - **‘Grower Management Agreement’ between Thomsons Agribusiness Limited [the Manager and the Responsible Entity] and the Grower dated 19 May 2000;**
 - **‘Sunset Sultana Project ARSN 091075713 - Constitution’ for the Sunset Sultana Project between Thomsons Agribusiness Limited [the Manager and the Responsible Entity] and the Grower dated 16 December 1999;**
 - ‘Price and Supply Agreement’ between Thomsons Agribusiness Ltd [the Manager and the Responsible Entity] and Angas Park Fruit Company Pty Ltd dated 13 October 2000; and
 - correspondence dated 10 January 2001, 25 October 2000, 11 October 2000, 14 August 2000 and 11 July 2000.

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

16. The documents highlighted in paragraph 15 in bold are those that were entered into by the Grower. For the purposes of describing the arrangements to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, to which the Grower, or an associate of the Grower will be a party.

17. All Australian Securities and Investments Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of the agreements may be summarised as follows.

Overview

18. A summary of the arrangement that is the subject of this product ruling, drawn from the documents above, follows:

Location	Nangiloc, Victoria. This is in the Sunraysia Region, 40 kilometres south of Mildura, near the Murray River.
Type of business each participant is carrying on	Commercial viticulture and dried sultana production business for a period of 23 years.
Number of hectares under cultivation	200 hectares
Name used to describe the product	Sunset Sultana Project
Size of each freehold Allotment	4 hectares
Number of vines per hectare	826
Expected production	First harvest will be in 2002. Output per hectare in 2002 will be 12.857 tonnes, but will be sold to a winery. First harvest of dried sultanas will be in 2003. Output per hectare in 2003 will be 7.5 tonnes, growing to an average of 10 tonnes per hectare.
The term of the investment in years	23 years.
Initial cost at 30 June 2000	\$188,772
Initial cost per hectare	\$47,193
Ongoing costs	Management Fees of \$28,146 (paid in advance) (2002) and thereafter \$2,000 (indexed) plus Annual Vineyard Management Expenses per annum (expected to range between \$24,399 and \$32,253 p.a. net of GST).
Sultana Sales Contracts	Sales contract with Angas Park Fruit Company Pty Ltd for a specified tonnage from 2003 until 2013.
Total number of interests	50 project fully subscribed.

19. Growers who applied under the Prospectus dated 31 January 2000 entered into a Management Agreement, a Sale of Land Agreement, and agreed to be bound by the terms of the Constitution.
20. The Project Land is situated in the Sunraysia Region in Nangiloc, Victoria approximately 40 kilometres south of Mildura near the Murray River.
21. A Grower who purchased a single Project interest purchased freehold title to approximately 4 hectares of the Project Land. The Sale of Land Agreement was subject to the general conditions in Table A of the 7th schedule of the *Transfer of Land Act 1958* (Vic). This area of land is known as the Grower's 'Allotment'. The Manager under a Power of Attorney purchased the Allotment from Sunset Land Pty Ltd on behalf of the investor.
22. The Project is limited to 50 interests. These 50 interests are collectively developed into a vineyard of up to 200 hectares on the Project land. Each Grower has a minimum of one Allotment. The term of the project is approximately 23 years, commencing from the acceptance of the Grower's Application and ending on 30 June 2023.
23. The Prospectus states that the minimum subscription for the Project was 30 interests. The Project was fully subscribed as at 30 June 2000.
24. Sultana clones grafted to rootstocks have been planted at approximately 826 vines per hectare at spacings of 3.5m x 3.6m : a total of 3,304 vines per Allotment.
25. Possible projected returns for Growers are outlined in Table 8.4 on page 21 of the Prospectus. The internal rate of return for the project, calculated on pre tax cash flows is 16%.
26. The projected returns are subject to the inherent risks of primary production and the commercial risks of a long term venture of establishing growing and harvesting a commercial vineyard and the production, marketing and sale of dried sultanas.
27. The Prospectus expired on 31 January 2001, but was fully subscribed by 30 June 2000.

Constitution

28. The Constitution is the document under which the Project is established. It sets out the terms and conditions under which the Responsible Entity (Manager) agrees to act for the Growers and to manage the Project. The Responsible Entity will keep a register of Growers. Growers are entitled to assign their Grower's interest in certain circumstances.

29. The Management and Sale of Land Agreement were executed on behalf of a Grower. Growers are bound by the Constitution and the encumbrances attached to the Sale of Land Agreement by virtue of their participation in the Project.

30. Under clause 3 of the Constitution the Responsible Entity holds all Project property on trust for the Growers for the term of the project. The Responsible Entity may also appoint a custodian to hold the project property on its behalf.

31. On winding up of the Business, all Project property must be sold and the net proceeds distributed amongst the Growers in proportion to each Grower's interest.

Interest of Growers

32. A Grower has an interest in the 'Proceeds Fund' equal to the proportion that the number of Allotments held by the Grower compares to the total number of Allotments in the Project. A Grower does not have any interest in any particular part of the Proceeds Fund or in any investment.

Assets vested directly with each Grower

33. All investments, the Application Fund and the Proceeds Fund are held by the Responsible Entity for the benefit of the Growers.

34. The Responsible Entity holds the Water Licence on trust for the Growers and is to utilise it for the benefit of the Project. This licence entitles the Responsible Entity to 1,500 megalitres of water per annum.

35. The Grower is, or is entitled, to be registered as the proprietor of an estate in fee simple (or such other estate as is specified in the Prospectus pursuant to which the Grower acquires the Grower's interest) in respect of the Allotment subject to the encumbrances of the sale contract and, unless otherwise specified in the Constitution or the Management Agreement, all improvements in the Grower's Allotment shall vest in the Grower.

Growers' income and payment

36. The Responsible Entity is entitled to gather all of the Grapes attributable to the Growers' Allotments, and store, market and sell the produce without regard to the quantity and quality of the particular produce from particular Allotments.

37. Incomes attributable to the Growers' interests are to be paid into the Proceeds Fund. The Grower is entitled to the Grower's

proportion of money in the Proceeds fund less outstanding amounts that are attributable to the Grower's interests.

38. The application amount in the prospectus for an interest in the project was \$168,966. The Prospectus was issued on 31 January 2000.

Grower Management Agreement

39. This agreement engages the Responsible Entity (Thomsons Agribusiness Limited) to manage the business for the Grower up until the earlier of the termination of the Grower's interest or 30 June 2023.

40. Under clause 4 of the Grower Management Agreement the Responsible Entity is responsible for and must carry out establishment duties in the first 18 months as follows:

- prepare the Growers' land so that it will be suitable for the planting and growing of sultana grapes;
- prepare an irrigation, drainage and water management plan and begin to implement the plan, with a view to ensuring there is adequate water supplied to the Growers' land and the land has adequate drainage;
- supply sultana vines in healthy condition;
- tend the rootstock supplied to the Growers;
- establish the vines and Growers' land in a proper and skilful manner;
- provide suitable irrigation, fertilisation and nutrients to the vines as and when required in order to promote the production of grapes and to maximise yields;
- as far as reasonably possible keep the Growers' land free from competitive weeds and other vegetation which may affect the growth or yield of the vines;
- maintain in good repair and condition existing buildings, machinery, fire-breaks, wind-breaks, access roads, tracks and fences which are required for managing and protecting the Growers' land;
- embark on such operations as may be required to prevent or combat land and soil degradation on the land and maintain soil quality on the land;
- if consistent with the production of high quality sultanas and if required, then eradicate as far as reasonably possible any insects, pests or diseases which may affect the growth or yield of the vines;

- keep proper accurate records of fertilisers and nutrients applied to the Growers' land or the vines; and
- comply with all laws and regulations relating to the use and occupancy of the land and in carrying out actions on the land.

On-going management and harvesting duties

41. The Responsible Entity will on an ongoing basis for the duration of the project:

- keep the Growers' land free from any competitive weeds or other vegetation which may affect growth or yield of the vines;
- monitor and review the irrigation, drainage and water management plan;
- maintain Project improvements and assets;
- monitor and correct soil degradation;
- monitor pests, insects and diseases of the vines and eradicate as necessary;
- record fertiliser and nutrient applications; and
- market and sell product in accordance with the contract with Angas Park Fruit Company Pty Ltd.

42. Under certain circumstances the Responsible Entity may be removed. This may occur under the Constitution (clause 20.6) or pursuant to section 601FM of the *Corporations Law* or the Grower Management Agreement pursuant to clause 10 of that agreement.

Fees payable and work to be performed

43. The fees payable on application were as follows:

Land	\$20,600
Stamp Duty & Title Registration	\$422
Water Right	\$24,145
Drainage	\$4,780
Vermin Proof Fence	\$406
Irrigation equipment	\$27,614
Vines	\$17,426
Trellis-Post & Wire	\$27,623

Trellis-Heads	\$24,214
Total	\$147,230
Management Fees for the period from the commencement date to 30 June 2000	\$17,572
Estimated GST	\$4,064
Total application fee paid per Interest	\$168,866
Management Fee for the period 1 July 2001 to 30 June 2001	\$19,906
Management Fee of for period 1 July 2001 to 30 June 2002	\$28,146

44. For years subsequent and up until termination of the agreement, an annual fee of \$2,000 indexed as at the quarter preceding the commencement of the management period is payable, plus the Grower's proportion of the estimated costs of the vineyard paid in advance adjusted for the discrepancies in the actual vineyard cost of the previous period.

45. The Responsible Entity is also required, pursuant to Clause 7.1 of the Grower Management Agreement, to insure the Responsible Entity and Grower against public risk, the ordinary risks associated with the Land (having regard to its use) and also provide crop insurance.

46. The Responsible Entity is required to pay the cost of insurance from its own funds.

Vineyard Management Agreement

47. The Responsible Entity has engaged a manager to manage the Vineyard on behalf of the Responsible Entity.

48. The manager is required, under this agreement, to run the Joint Venture. It must:

- make cash calls;
- pay, when due, all Vineyard expenses;
- establish and maintain the Vineyard; and
- harvest and deliver produce as per any agreement the responsible entity may be a party to.

49. The manager has the powers and functions and authority from the Responsible Entity to:

- develop the vineyard;
- maintain vineyard assets; and
- do all things reasonably necessary or desirable for the conduct of the vineyard.

50. Clause 5 of the Vineyard Management Agreement provides that the Manager shall prepare and deliver to the Responsible Entity and the Growers a half yearly progress report. The report will cover the work performed during the period, summarise all expenses incurred, compare expenses with estimates made in the annual program and outline plans for further work to be performed.

51. Remuneration of the manager is as follows:

	AMOUNT
Period ending 30 June 2000	\$157,450
Period 1 July 2000 to 30 June 2001	\$840,680
Period 1 July 2001 to 30 June 2002	\$1,187,335
For 2003 and each subsequent year, \$1,000 per Allotment plus agreed vineyard costs.	\$50,000 plus costs

Agency Agreement - Custodian

52. Under this agreement the 'Custodian' (Australian Rural Group Limited) holds the Project property as agent for the Responsible Entity (Thomsons Agribusiness Limited).

Pipeline Agreement

53. There is a Hire Agreement in place between the Responsible Entity and Sunset (Joint Venture) Pty Ltd as agent for Sunset Vineyards Joint Venture for the hire of the irrigation pipeline. The arrangement will operate for a period of twenty years commencing on 1 July 2000 with an option of a further twenty years at the end of the term of the initial agreement.

Licence Agreement

54. A licence agreement between Sunset (Joint Venture) Pty Ltd and the Responsible Entity allows the responsible entity to establish a pipeline across the joint venture land to convey irrigation water to the project land for the term of the Hire Agreement.

Special purpose soil report

55. A detailed soil survey of the proposed Project was conducted with the findings released in October 1999. It was found that in general, the majority of land under consideration for development was ideally suited to sultana grape vines on rootstocks. However, some of the land was not capable of growing the vines successfully in its current state and remedial action would be necessary.

Price and supply Agreement

56. The Manager of the project has put in place a contract for the sale to Angas Park Fruit Company Pty Ltd of specified tonnages of dried sultana fruit for a 10 year term, commencing on 1 January 2003.

Sunset Sultana prospectus

57. There is an undertaking within the prospectus in Section 3, clause 3.12, that each year the manager will arrange a field day at the vineyard which the Growers may attend. Also, the Manager will keep the Growers informed about the progress of the vineyard by distributing a biannual newsletter and video.

58. The assessable income projected to be produced from each individual interest in the Project over the first 3 years is set out below.

Project year	Year 1	Year 2	Year 3	Year 4
Financial year	2000	2001	2002	2003
Tonnes /4 hectares	0	0	51.4 for wine	30 for sultana
Price/tonne			\$350	\$1,760
Assessable income	0	800	\$18,000	\$52,800

Compliance plan

59. The Responsible Entity has prepared a Compliance Plan in accordance with the Corporations Law. Its purpose is to ensure that the Responsible Entity meets its obligations as the Responsible Entity of the Project and that the rights of the Growers are protected.

Finance

60. Growers had the option of funding their investment in the Project themselves or borrowing from an independent lender.

61. This Ruling does not apply if a Grower entered into a finance agreement that includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL or the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender, or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, are involved or become involved, in the provision of finance to Growers for the Project.

There is no agreement, arrangement or understanding between any entity or party associated with the Project and any financial or other institution for the provision of any finance to the Growers for any purpose associated with the Project.

Ruling

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

Section 35-55 - Commissioner's discretion

62. For a Grower who is an individual and who entered the Project on or after 31 January 2000 and up until and including 30 June 2000, the rule in section 35-10 may apply to the business activity comprised

by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner has decided for the income years ended 30 June 2001 to 30 June 2002 that the rule in section 35-10 does not apply to this business activity provided that the Project has been, and continues to be, carried on in a manner that is not materially different to the arrangement described in this Ruling.

63. This exercise of the discretion in subsection 35-55(1) will not be required where, for any year in question:

- a Grower's business activity satisfies one of the objective tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the 'Exception' in subsection 35-10(4) applies (see paragraph 69 in the Explanations part of this ruling, below).

64. Where either the Grower's activity satisfies one of the objective tests, the discretion in subsection 35-55(1) is exercised, or the Exception in subsection 35-10(4) applies, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of deductions attributable to their business activity in excess of any assessable income from that activity, i.e., any 'loss' from that activity, to a later year. Instead, this 'loss' can be offset against other assessable income for the year in which it arises.

65. Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner's decision to exercise the discretion in paragraph 35-55(1)(b) as an indication that the Tax Office sanctions or guarantees the Project or the product to be a commercially viable investment. An assessment of the Project or the product from this perspective has not been made.

Explanations

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

66. Under the rule in subsection 35-10(2) a deduction for a loss incurred by an individual (including an individual in a general law partnership) from certain business activities will not be allowable in an income year unless:

- the 'Exception' in subsection 35-10(4) applies;
- one of four objective tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or

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- if one of the objective tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

67. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

68. Under the loss deferral rule in subsection 35-10(2) the relevant loss is not able to be taken into account in the calculation of taxable income in the year that loss arose. Instead, in a later year it may be offset against any income from the same or similar business activity, or, if one of the objective tests is passed, or the Commissioner's discretion exercised, against other income.

69. For the purposes of applying the objective tests, subsection 35-10(3) allows taxpayers to group business activities 'of a similar kind'. Under subsection 35-10(4), there is an 'Exception' to the general rule in subsection 35-10(2) where the loss is from a primary production business and the individual taxpayer has other assessable income for the income year from sources not related to that activity of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

70. In broad terms, the objective tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);
- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year) (section 35-35);
- (c) at least \$500,000 of real property is used on a continuing basis in carrying on the business activity in that year (section 35-40); or
- (d) at least \$100,000 of certain other assets is used on a continuing basis in carrying on the business activity in that year (section 35-45).

71. A Grower who was accepted into, and who has participated in, the Project since 31 January 2000 is carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling and additional information provided since, indicates that a Grower who acquired the minimum investment of one interest in the Project is unlikely to pass one of the objective tests until the income year ended 30 June 2003. Growers who acquired more than one interest in the Project may, however, pass one of the tests in an earlier income year.

72. Therefore, prior to this time, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

73. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, for an individual Grower who acquired an interest(s) in the Project on or after 31 January 2000 and prior to any withdrawal of this Product Ruling, the Commissioner has decided that it would be unreasonable not to exercise the second arm of the discretion in paragraph 35-55(1)(b) for the years ended 30 June 2001 to 30 June 2002.

74. The discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where:

- (i) the business activity has started to be carried on; and
- (ii) there is an objective expectation that the business activity of an individual taxpayer will either pass one of the objective tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

75. Information provided by the applicant states that the business activity comprised by a Grower's involvement in this Project has started to be carried on, and will continue to be carried on, in a manner that is not materially different to that described in the Arrangement in this Product Ruling.

76. In deciding to exercise the discretion in paragraph 35-55(1)(b) the Commissioner has relied upon:

- the report of the independent horticulturalist and additional expert and scientific evidence provided by the Responsible Entity with the application and, in further information requested by the Commissioner;
- the binding sultana contract with Angas Park Fruit Company Pty Ltd for the sale of the sultanas setting out prices that realistically reflect the existing market;
- independent, objective and generally available information relating to the dried fruit industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity.

Detailed contents list

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Commissioner of Taxation

9 May 2001

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

PR 1999/95; TR 92/1; TR 97/11;
TR 97/16; TR 92/20; TR 98/22;
TD 93/34

Subject references:

- carrying on a business
- commencement of a business
- management fees
- primary production
- producing assessable income
- product rulings
- public rulings
- schemes
- tax avoidance
- tax benefits

- viticultural expenses

Legislative references:

- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(3)
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(a)
- ITAA 1997 35-55(1)(b)
- ITAA 1936 82KL
- ITAA 1936 Pt IVA

ATO references:

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