



PR 2002/38 - Income tax: Vintage Park Vineyard Project

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 This document has changed over time. This is a consolidated version of the ruling which was published on *24 April 2002*



Product Ruling

Income tax: Vintage Park Vineyard 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**, **Previous Ruling**, **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.*

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

No guarantee of commercial success

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

Participants must form their own view about the commercial and financial viability of the product. This involves 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 this product fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for participants 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, participants lose the protection of this Product Ruling. Participants may wish to seek assurances from the promoter that the arrangement has been carried out as described in this Product Ruling.

Participants 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 laws' 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 Vintage Park Vineyard Project, or simply as 'the Project'.

Tax law(s)

2. The tax law dealt with in this Ruling is:
- Division 35 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. In order for an entity (referred to in this Ruling as a Grower) to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

Changes in the Law

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 taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers participating 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 participants in projects 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 Ruling is issued.

Class of persons

7. The class of persons to whom this Ruling applies is those persons who were accepted into the project between 15 April 1999 and 15 April 2000. 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. 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 have terminated or 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. Nor does the Ruling apply to Growers who elect to collect and market the grape produce from the leased area personally. They may seek a private ruling on the tax consequences of such action. Those Growers not exercising this election are referred to as 'non-electing Growers'.

Qualifications

9. The Commissioner rules on the precise arrangement identified 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. The Ruling will be withdrawn or modified.

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Date of effect

11. This Ruling applies prospectively from 17 April 2002 for Growers who, between 15 April 1999 and 15 April 2000, entered into the specified arrangement that is set out below. 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).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on that private ruling if the income year to which it relates has ended or has commenced but not yet ended. However if the arrangement covered by the private ruling has not commenced, 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

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, even following its withdrawal, in respect of the tax laws ruled upon, to all persons within the specified class who entered into the specified arrangement that is set out below between 15 April 1999 and 15 April 2000. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

Arrangement

14. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- Information Memorandum dated 15 April 1999 outlining the Vintage Park Vineyard Project prepared and issued by Windaman Holdings Pty Ltd as Trustee for the Vintage Park Trust (the Manager) and Vintage Park Pty Ltd (the Lessor);
- **Joint Venture Agreement between Windaman Holdings Pty Ltd as Trustee for the Vintage Park Trust (the Manager), Vintage Park Pty Ltd (the Lessor), the Shareholders and the Growers, undated;**
- **Lease and Management Agreement between Windaman Holdings Pty Ltd as Trustee for the Vintage Park Trust (the Manager), Vintage Park Pty Ltd (the Lessor) and the Grower, undated;**
- Constitution of Vintage Park Pty Ltd, dated 18 December 1998;
- Product Ruling application received from the applicant dated 26 September 2001;

- Notification of intention to submit a Product Ruling application dated 18 June 2001;
- Vintage Park Vineyard Project Summary, undated;
- Copies of other information provided to investors:
 - Covering Letter to client, dated 15 April 1999;
 - Adviser disclosure and notification, undated;
 - Authority to proceed, undated;
 - Authority to lodge application for finance, undated;
- Correspondence with the applicant dated 22 June 2001.

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

15. The documents highlighted are those that the Growers entered into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of the Grower, was or is a party to.

16. 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

17. The salient features and effect of these arrangements are summarised below:

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Location	13 kilometres West of the town of Frankland in the Great Southern region of Western Australia.
Type of business each participant is carrying on.	Commercial growing and harvesting of grapevines for the sale of grape produce.
Number of hectares offered for cultivation.	60 Hectares.
Possible total subscription	20 Leased areas.
Size of each leased area	3 hectares.
Minimum allocation	1 Leased area.
Number of vines established per hectare	Minimum of 1,543 vines per hectare.
Expected Production	Full yield of 11 tonnes per hectare from year five.
The term of the project	15 years.
Minimum Subscription	15 Leased areas.
Initial cost	\$140,055 per leased area; \$46,685 per hectare.
On-going costs	Annual Management Fee Rent.

18. An Information Memorandum dated 15 April 1999 was provided on a personal basis to specific recipients (in the context of it being an “excluded offer or invitation” as referred to in Section 66(3) of the Corporations Law) inviting their application to invest in the Vintage Park Vineyard Project. The purpose of the project is to establish and operate a commercial vineyard at Frankland in Western Australia’s Great Southern wine region.

19. Growers were offered an opportunity to participate with other Growers in the production of premium grapes. This involves a 15 year Lease and Management Agreement over a 3 hectare leased area to be planted with 4,629 grape vine rootlings. A fee of \$46,685 per hectare (\$140,055) covering the initial 13 month establishment period was payable on 1 June 1999. The commencement date of the Project, as set out in the Lease and Management Agreement, is 30 June 1999.

20. A Grower or an entity associated with each Grower, was to subscribe for 53,000 shares in Vintage Park Pty Ltd (‘the Lessor’) at an issue price of \$1 per share in respect of each leased area, the full subscription price of \$53,000 being payable on application. By

subscribing for shares, each Grower obtained an ongoing interest in the land and facilities owned by the Lessor.

21. It was only possible to subscribe for shares in the Lessor in conjunction with an application for a leased area.

22. Annual management fees and rent are payable in years 2 to 15 of the project. From year five onwards, the management fees and rent can be deducted from the sale of produce from the Grower's leased area.

23. The property acquired for the Project is known as Lot 8 Ferngrove Estate and is located 13 kilometres west of the town of Frankland in the Great Southern wine region of Western Australia. The property has a total area of 110 hectares. 60 hectares of the land suitable for viticulture was offered in 20 leased areas or allotments of 3 hectares each. The balance consists of dams and catchment areas, headlands, building sites and retained natural bushland.

24. Growers participating in the arrangement have entered into both a Joint Venture Agreement between the Windaman Holdings Pty Ltd (the Manager), Vintage Park Pty Ltd (the Lessor), the shareholders and the Growers and a Lease and Management Agreement between Windaman Holdings Pty Ltd (the Manager), Vintage Park Pty Ltd (the Lessor) and the Grower. The Agreement gives a Grower a lease from the Lessor over an identifiable area of land called a "leased area" until the Project is terminated on 31 December 2014. The Manager maintains a register of Growers, identifying the leased areas held by Growers. The Project is for a period of 15 Years.

25. Possible projected returns for Growers are outlined in the Information Memorandum. The projected returns are subject to the inherent risks of primary production and the commercial risks of a long-term venture of cultivating, growing and harvesting a commercial vineyard. The risks associated with the Project have been outlined in the Information Memorandum. Growers executed a Power of Attorney enabling the Manager to act on their behalf as required when they made an application for a leased area.

26. The Grower engaged the Manager to cultivate and maintain the leased area and to harvest and sell the grape produce. The Grower paid for the rootlings, the irrigation system and the trellising that was installed on the leased area. Unless the Grower elected to collect and market the grape produce from the leased area personally, the Manager will sell the grape produce on behalf of the Grower.

27. The Project does not involve guaranteed returns or non-recourse financing. Nor are there risk reduction mechanisms or express or implied undertakings to reverse the transactions if tax deductions are not allowed by the Commissioner of Taxation.

Joint Venture Agreement

28. The Joint Venture Agreement established the Project and operates as an agreement binding on all of the Growers and Shareholders of the Project, the Manager and the Lessor. The Joint Venture Agreement provides that the Lessor and its Shareholders and each Grower will enter into the Lease and Management Agreement with the Manager as joint venturers. It sets out the terms and conditions under which the Manager agreed to act for the Growers to develop and cultivate a vineyard on the land owned by the Lessor. The Lease and Management Agreement is annexed to the Joint Venture Agreement and was executed by the Grower following the Grower signing the Application in the Information Memorandum.

Lease and Management Agreement

29. Under the Lease and Management Agreement a Grower makes payments for rental and management fees and payments were made upon application for rootlings, trellising and irrigation.

30. The Lessor has granted the Grower a lease of a leased area known as vinelot (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 viticulture 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.

31. 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 grape produce from the leased area and the right to have the grape produce for the leased area sold for the benefit of the Grower. 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.

32. The Manager has carried out the following first year services under this agreement:

Establishment

Administration and maintenance of operations relating to the establishment of the vinelot.

Irrigation and Reticulation

- sub-contract with an irrigation and reticulation specialist to design /install irrigation and reticulation on the Land;
- obtain from irrigation specialist plans showing irrigation infrastructure and create an irrigation management plan;
- dig trenches , install mains and sub-mains and other irrigation pipes and irrigation system capable of delivering (30) litres of water per week to each vine.

Trellising

- dig holes and install steel trellising posts, strainer posts and CCA treated pinus radiata posts and wire.

Rootstock and Planting

- deep rip land for planting of Vines at intervals of 3 metres to a depth of 75cm to 1 metre;
- plant vine rootlings at the rate of 1543 rootlings per hectare for each variety planted.

Management

- tend the vines;
- train the vines;
- prune the vines in each calendar year according to quality and yield requirements of each variety;
- protect the vines from grapevine pest and disease which may damage the vines;
- irrigate the vinelot;
- supply the vinelot with the correct fertilisers and nutrients;
- using best endeavours to ensure that the grape produce is grown in accordance with grape growing and winemaking legislation and maintenance of all records pertaining to requirements under relevant legislation;

- using best endeavours to maintain the vinelot and surrounding lands in good order and maintain soil quality.

33. The Manager will carry out the following ongoing services under this agreement for the term of the Project. The Manager must run the vinelot according to acceptable viticultural practice in the Great Southern wine growing region of Western Australia, which includes, without limiting the generality of the foregoing:

- prune the vines in each calendar year according to quality and yield requirements of each variety;
- protect the vines from grapevines pest and diseases which may damage the vines;
- irrigate the vinelot;
- supply the vinelot with the correct fertilisers and nutrients;
- tend the vines;
- using best endeavours to ensure that the grape produce is grown in accordance with grape growing and winemaking legislation and maintenance of all records pertaining to requirements under relevant legislation;
- using best endeavours to maintain the vinelot and surrounding lands in good order and maintain soil quality;
- sampling and testing the grape produce to determine if it is ready for harvesting;
- liaising with the buyer to agree to commencement of harvesting;
- harvesting the grape produce and using best endeavours to ensure that harvesting proceeds according to the requirements of the buyer and standard industry practice;
- loading the grape produce into suitable containers for delivery to the buyer subject to the terms of any grape sales agreement;
- carrying out non-monetary obligations of the Grower under the lease;
- if applicable, entering into a sales agreement as agent on behalf of the Grower.

34. Prior to 31 December 1999, a Grower was able to exercise an option to collect and market their own collectable grape produce.

However, where no election was made, the Manager will harvest from the date of the first commercially harvestable grape crop the grape produce grown on the vineyard at such time or times as, in the opinion of the Manager, will maximise the price receivable for such grape produce for the purpose of making quality wines. The Manager will be responsible for paying annual costs for insuring the Grower for public liability insurance on the leased area. The Grower will be responsible for additional insurances as required by the Grower such as destruction or damage to the vinelot and the improvements by fire and/or other risks.

Fees

35. The Growers made a payment of \$140,055 per leased area due on 1 June 1999 for the initial 13 month establishment period, being the period from the commencement date to 30 June 2000, comprising:

- a management fee of \$97,475 to the Manager for the management of the vineyard;
- cost of the irrigation system of \$12,000;
- cost of trellising of \$18,100;
- cost of root stock of \$6,480; and
- a lease fee of \$6,000 for the lease of the Grower's leased area of the vineyard.

36. The Growers made the following annual payments per leased area in the first and second years of operation:

- a management fee of \$30,000 payable annually in advance to the Manager for the management of the vineyard business for the period 1 July 2000 to 30 June 2002;
- a lease fee of \$6,000 payable annually in advance to the Lessor for the lease of the Grower's leased area of the vineyard for the 2 year period 1 July 2000 to 30 June 2002.

37. Thereafter, the annual rent and management fees payable annually in advance per leased area will be calculated with reference to the immediately preceding year increased by the greater of three percent or the annual percentage increase in the Consumer Price Index except that the annual management fee for the year ended 30 June 2003 is reduced to \$27,000 indexed and subject to any annual adjustment made in accordance with Clause 20 of the Agreement.

38. For the 12 month period commencing on 1 July 2000 and every 12 month period thereafter, the Grower shall pay to the Manager

the annual management fee adjusted in accordance with clause 20 of the Agreement. This clause contains a mechanism whereby Growers will be liable to pay the annual management cost, which will comprise the actual operating costs for the period plus a fixed rate management fee payable to the Manager, which the Manager will receive as remuneration for the provision of the ongoing services, as set out in the Lease and Management Agreement.

39. Within 6 months of the end of each financial year, the Manager will have its accounting records relating to income from the sale of grape produce and operating expenses audited by a registered company auditor and will provide a copy of those audited accounts and the auditor's report thereon to the Grower.

Harvesting

40. The Manager will be responsible for the harvesting of the grape produce grown on the vineyard. The harvest will commence from the date of the first commercially harvestable grape crop from the vineyard at such time or times as, in the opinion of the Manager, will maximise the price receivable for such grape produce for the purpose of making quality wines.

41. The Manager shall direct any purchaser of the grape produce to pay the gross proceeds of sale to the Manager. The Manager shall, out of the gross proceeds of sale, pay any unpaid rent to the Lessor, retain any unpaid Management Fee and retain any unpaid remuneration payable to the Manager under clause 20 of the Lease and Management Agreement; all on behalf of the Grower. The Manager will hold the balance on trust for the Grower and distribute the balance to the Grower within 7 days of receipt of the gross proceeds of sale.

42. Any income from the sale of grape produce harvested before 30 June 2001 can be retained by the Manager and deducted from operating costs when calculating the actual operating costs under clause 20. A Grower will accept the gross proceeds of sale in full satisfaction and discharge of the Grower's rights in relation to the grape produce.

Completion of the Project

43. The intended completion date of the project as provided in the Lease and Management Agreement is the earlier of:

- the date of payment by the Grower to the Lessor of the final payment of any unpaid rent or the date on which the Manager pays the Grower any outstanding amounts

payable under the Lease and Management Agreement, whichever is the latest; and

- 31 December 2014.

44. Upon the expiry of the 15 year Lease and Management Agreement and subject to the Growers exercising their rights to remove the vines, trellising and irrigation, the vineyard will be owned in its entirety by the Lessor. Growers or their associates, through their ownership of 100% of the shares in the Lessor, will be entitled to 100% of the Lessor's assets. A general meeting of shareholders will then be called to determine the future of the project. If the majority vote is to sell the vineyard and other assets, then the proceeds will be distributed to shareholders. Alternatively, the Lessor can continue to carry on business as a grape grower on behalf of the shareholders.

Finance

45. Growers were able to fund their investment in the project themselves, borrow from a preferred Australian bank, which has been appraised of the Project details or borrow from an independent lender.

46. This Ruling does not apply if the finance arrangement entered into by the Grower includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL 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 other than Vintage Park Vineyard Project are involved or become involved in the provision of finance to Growers for the Project.

Ruling

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

Section 35-55 – Commissioner’s discretion

47. For a non-electing Grower who is an individual and who entered the Project between 15 April 1999 and 15 April 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. This is provided that the Project has been, and continues during the remainder of the term of the Project to be, carried on in a manner that is not materially different to that described in the arrangement that is set out in paragraphs 14 to 46 of this Product Ruling.

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

- the ‘exception’ in subsection 35-10(4) applies (see paragraph 54 in the Explanations part of this ruling, below);
- a non-electing Grower’s business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45;
- the non-electing Grower’s business activity produces assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsection 35-10(2)); or

49. Where, the ‘exception’ in subsection 35-10(4) applies, the non-electing Grower’s business activity satisfies one of the tests, or the discretion in subsection 35-55(1) is exercised, section 35-10 will not apply. This means that a non-electing 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.

50. Non-electing Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, non-electing Grower 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 commercially viable. 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

51. Division 35 applies to losses from certain business activities for the income year ended 30 June 2001 and subsequent years. Under the rule in subsection 35-10(2) a deduction for a loss made by an individual (including an individual in a general law partnership) from certain business activities will not be taken into account in an income year unless:

- the exception in subsection 35-10(4) applies;
- one of four tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or
- if one of the tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

52. 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.

53. Losses that cannot be taken into account in a particular year of income, because of subsection 35-10(2), can be applied to the extent of future profits from the business activity, or are deferred until one of the tests is passed, the discretion is exercised, or the exception applies.

54. For the purposes of applying the Division 35, 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 non-electing Grower who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

55. In broad terms, the 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, or an interest in real property, (excluding any private dwelling) 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 (excluding cars, motor cycles and similar vehicles) are used on a continuing basis in carrying on the business activity in that year (section 35-45).

56. A non-electing Grower who was accepted into and who has participated in the Project between 15 April 1999 to 15 April 2000, is carrying on a business activity that is subject to these provisions.

57. Information provided with the application for this Product Ruling and additional information provided since, indicates that a non-electing Grower who acquired the minimum allocation of 3.0 hectares interest in the Project is unlikely to have their business activity pass one of the tests until the income year ended 30 June 2003. Non-electing Grower who acquired more than 3.0 hectares interest in the Project may however, find that their activity meets one of the tests in an earlier income year.

58. 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 non-electing Grower's participation in the Project.

59. 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, the second arm of 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;
- (ii) because of its nature, it has not yet met one of the tests set out in Division 35; and
- (iii) there is an expectation that the business activity of an individual taxpayer will either pass one of the tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

60. The information provided by the applicant indicates that a non-electing Grower who acquired the minimum allocation of 3.0 hectares interest(s) in the Project is expected to be carrying on a business activity that will either pass one of the tests, or produce a taxation

profit, for the year ended 30 June 2003. The Commissioner has decided for such a non-electing Grower that it would be reasonable to exercise the second arm of the discretion until the year ended 30 June 2002.

61. The applicant has stated 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 that is set out in paragraphs 14 to 46 of this Product Ruling. If, however, the Project is not carried on during the income years specified above (see paragraph 47), in the manner described in the arrangement, this Ruling may be affected. Specifically, the decision in relation to paragraph 35-55(1)(b), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) not apply, may be affected, because the Ruling no longer applies (see paragraph 9). Growers may need to apply for private rulings on how paragraph 35-55(1)(b) will apply in such changed circumstances.

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

- the report of the independent viticulturist and additional expert or scientific evidence provided with the application by the Manager.

Detailed contents list

63. Below is a detailed contents list for this Product Ruling:

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Commissioner of Taxation

17 April 2002

Previous draft:

Not previously released in draft form

*Related Rulings/Determinations:*PR 1999/95; TR 92/1; TR 92/20;
TR 97/16; TR 98/22; TD 93/34*Subject references:*

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

Legislative references:

- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
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