

PR 2002/46 - Income tax: Hillston Grove Vineyards Project No. 2

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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: Hillston Grove Vineyards Project No. 2

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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 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. 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 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 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 will be 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.

Participants 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.

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 took part in the arrangement to which this Ruling refers. In this Ruling this arrangement is sometimes referred to as the Hillston Grove Vineyards Project No 2, or just simply as 'the Project'.

Tax law(s)

2. The tax law dealt with in this Ruling are:
- 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 who are considering investing 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 22 January 1999 and 21 January 2000, still remain in the Project, and fully funded their fees either:

- by cash payment,
- by borrowing from an independent lender, or
- who re-financed the initial promissory note borrowing or bridging finance loan for payment of the initial fee by 30 June 2000.

8. 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'.

9. 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.

10. The class of persons does **not** include any person who may have purchased an established vinelot by way of a secondary sale, through a rights issue or acquired a unit by way of a fringe benefit.

Qualifications

11. 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.

12. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no Product Ruling may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Manager, Legislative Services, AusInfo, GPO Box 1920, Canberra ACT 2601.

Date of effect

13. This Ruling applies prospectively from 24 April 2002 for Growers who, between 22 January 1999 and 21 January 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).

14. 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

15. 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 arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement 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

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

- Prospectus prepared for Grapes of Australia Management Limited ('GAML' or 'the Manager');
- Project Deed between Grapes of Australia Management Limited (which has since resigned and been replaced with Managed Investments Australia Limited) ('the Manager'), Inteq Custodians Limited (later renamed Cardinal Financial Securities Limited, which has since resigned and been replaced with Burke Bond Securities Limited), Hillston Grove Vineyards Limited ('HGVL' or 'the Landowner') and Investment Licencing Pty Ltd

(‘IL’) dated 12 May 1998 together with Supplemental Deeds between these same parties dated 1 June 1998 and 4 February 1999, collectively referred to as ‘the Project Deed’;

- Deed of Retirement and Appointment of Manager Hillston Grove Vineyards Project dated 12 October 1999 under which Grapes of Australia Management Limited retired as manager under the Project Deed and was replaced by Managed Investments Australia Limited (‘MIAL’ or ‘the Manager’);
- Deed of Retirement and Appointment of Trustee Hillston Grove Vineyards Project dated 5 February 2001 under which Cardinal Financial Securities Limited retired as trustee under the Project Deed and was replaced by Burke Bond Securities Limited (‘Burke’ or ‘the Trustee’);
- Regulation 1 of the Articles of Association for HGVL, as it was and as since amended by the resolution dated 1 September 2000 by replacing paragraph 3(a), under which a Grower has rights to occupy an area of land for their vineyard or ‘vinelot’;
- Deed of Trust and Right to Occupy dated 7 March 2000 between HGVL and Cardinal Financial Securities Limited;
- General Right to Occupy Land Agreement between HGVL and Inteq;
- **Management Agreement between the Manager and each Grower.**

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.

17. The documents highlighted are those that Growers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower will be a party to that are a part of the arrangement to which this Ruling applies.

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

Overview

19. This arrangement is called the Hillston Grove Vineyards Project No 2.

Location	25 km west of the town of Hillston in New South Wales
Type of business each participant is carrying on	A long term commercial viticulture business.
Number of hectares under cultivation	Up to a maximum 292 hectares
Size of each Vinelot	150 vines
Number of vines per hectare	1800
The term of the investment in years	20 to 21 years
Initial cost per Grower	\$9,705
Initial costs on a per hectare basis, including shareholding cost	\$116,460
2 nd year's costs per Grower	\$1,866
3 rd year's costs per Grower	\$1,866
Ongoing costs per Grower	Ongoing Management Fees and Occupancy Fees.
Cost of stapled investment being shares in Hillston Grove Vineyards Limited	\$250

20. Participants were invited by the Manager to conduct a primary production business of growing grapes as part of the Project, upon certain land under a crown lease held by HGVL on the property known as 'The Lea South', 25 kilometres west of the town of Hillston in New South Wales. A general right to occupy has been granted by HGVL to Inteq. Inteq, acting on behalf of Growers, will has issued to them a Right to Occupy. Participation in the venture includes:

- (a) the Grower subscribing for 250 'A' class shares in HGVL for a cost of \$1 each, which carry with them a right to occupy/licence for their own vineyard, for 150 vines;
- (b) the Grower entering into a 'Right to Occupy Agreement' with the Trustee in respect of their vineyard in consideration of payments to the Landowner of:
 - (i) a fee of \$300 per year until year fifteen; and
 - (ii) a fee of 7.5% of gross annual vinelot income from year sixteen;

- (c) the Grower, if he or she chooses the services of GAML, entering into a 'Management Agreement' with GAML for services including the establishment of the vineyard, maintenance, annual harvesting and marketing, under which the Grower pays GAML:
 - (i) a fee of \$1,633 comprised of \$575 for acquisition and installation of trellises, \$429 for acquisition and installation of above ground drip irrigation, \$8 for share of cost of roads and mixing pad, \$283 for share of vermin fence and other land degradation work and \$338 for pre-planting and planting work;
 - (ii) an initial management fee of \$7,522 for other services to be provided in the first year;
 - (iii) a further management fee of \$1,566 for each of years two and three; and
 - (iv) further management fees being the greater of \$690 or 25% of the gross sales proceeds from year four.
- (d) a Grower could arrange their own finance to make some or all of the above payments. However, GAML made arrangements with a number of lending institutions for the provision of finance to cover the fees payable to the Manager.

21. There were 3,500 'vinelots' on offer of 150 grapevines per vinelot at the cost detailed above. The total land area for this stage of the Project was 292 hectares. There was no minimum subscription for the Project. An average of 1,800 vines per hectare was planted in the 13 months following execution of the Right to Occupy and Management Agreements.

Years 1 to 3 fees

22. The fees payable by a participant in the project in the first three years are:

	Year 1	Year 2	Year 3
Initial Management Fee – pre-planting, vines & planting	\$338		
Irrigation	\$429		
Trellising	\$575		
Internal roads	\$8		
Landcare	\$283		
Further Management Fee	\$7,522	\$1,566	\$1,566
Occupancy Fee	\$300	\$300	\$300
Shares	\$250		
Total	\$9,705	\$1,866	\$1,866

Share ownership and occupancy rights

23. Under the Project a Grower must have subscribed for a minimum of 250 'A' class Ordinary Shares in HGVL, which were paid for on application. Each shareholding entitles the Grower to a right to occupy one vinelot containing 150 grapevines for a period of 20 to 21 years ceasing on 30 June 2020. After this date shareholders will rank pari passu with holders of other Ordinary Shares. Details regarding the shares and accompanying special rights are contained in 'Regulation 1 of Articles of Association' for HGVL.

24. GAML have indicated in the Prospectus that shareholders could reasonably expect to receive dividend returns on their shareholding, and at the termination of the managed vineyard project would then participate fully in the financial results of HGVL.

Right to occupy

25. HGVL have entered into a Deed of Trust and a General Right to Occupy agreement with the Trustee, Inteq, who have granted to individual Growers a Right to Occupy.

26. Growers who have entered into a Right to Occupy Agreement will pay occupancy fees to HGVL under clause 1 of this Agreement. Regulation 1 of the Articles of Association for HGVL detail further the rights and obligations in respect of vinelot occupancy.

27. Under Regulation 1, with the approval of HGVL's directors, the right to occupy a vinelot may be leased, assigned, transferred or

disposed of or otherwise dealt with, as well as by the transfer of the shares (cl 2). The right to occupy includes the entitlement to use access roads and the agricultural infrastructure on the land (cl 3). Each Grower has an exclusive right to occupy a vinelot, which is an identifiable area of land sufficient for a minimum of 150 vines. Each Grower has been advised of the exact location of their vinelot (cl 3). On the vinelot a Grower may carry on business of grape growing in their own right, may appoint GAML as the Manager, or utilise the services of any competent contractor (cl 4). In consideration for the Right to Occupy an annual occupancy fee is payable to HGVL (cl 9).

Project Deed

28. Participants who chose to utilise the services of, and entered into a Management Agreement with GAML, will be covered by the Project Deed dated 12 May 1998 and the Supplemental Deed dated 1 June 1998 effected between GAML, HGVL, Inteq, and Investment Licensing Pty Ltd (Recital D of the Management Agreement). Participants, by entering into the Management Agreement, agreed to the terms of the Project Deed. Inteq acts in a trustee capacity for the participant to review, on a continuing basis, the development and management of the vineyard over the period to 30 June 2020.

Management Agreement

29. Growers who chose to utilise the services of GAML as the Manager of their vinelot entered into a Management Agreement, of which a summary of the principle provisions of the Agreement appears as Schedule B at pages 32 to 37 of the Prospectus.

30. Growers entered into this Agreement until the year ended 30 June 2020, or earlier if the Grower ceases to have a Right to Occupy a vinelot or termination of the investment deed occurs on an earlier date (cl 3). Upon termination of the Management Agreement a Grower has the right to remove the trellising and above ground irrigation lines should he/she desire to do so (cl 3). This right also appears as clause 11 in the Articles of Association for HGVL.

31. The Manager established the Grower's vineyard with 150 vines by the end of year one, and can identify with appropriate markings the vines in the ownership of each Grower (cl 4.3).

32. The Vinelot Management Services to be provided by GAML are detailed at clause 5. These include, amongst other things:

- pre-planting and planting services (cl 5.1(a));
- post planting services (cl 5.1(d));

- harvesting the grapes produced and, if the grower elects, making the grapes available to the grower (cl 5.1(f)); and
- marketing and selling the grape produce (cl 5.1(g)).

33. Growers have the right to elect to have any grapes harvested from their vinelot made available to them to sell or deal with as they determine (cl 5.1(f)).

34. GAML is entitled to delegate all or any of the functions to be performed by it pursuant to the Management Agreement, subject to the Landowner's Articles of Association (cl 5.6).

35. GAML will pool for sale all produce of each Grower's business with that of each other Grower and will market and sell all such produce. The proceeds of the pooled sales will be paid to the Trustee for crediting to the account of each Grower on a proportional basis without reference to grape type, quality, volume, prices or any other factor in relation to the Grower's product or those of any other Grower (cl 6).

36. Income of the Project is to be held in trust for the Growers by the Trustee and to be applied in payment of the Growers' obligations under the Management Agreement. Any net income remaining after the payment of these fees is to be distributed to Growers within 21 days after the final payment is received for each sale of produce (cl 6.4).

37. The Grower may terminate the Management Agreement in certain instances, including where the Manager makes default in the performance of its duties (cl 10.2(a)).

38. All costs and expenses incurred by the Manager in carrying out its duties are to be borne by it and the Grower has no further obligation to make any payment, save those under clauses 9(b) and 9(c) of the Management Agreement (cl 9(d)). However, Growers will be liable for the payment of any goods and services tax applicable to the supply of the services under this agreement.

39. Pursuant to its right to delegate any functions required of it, GAML has contracted with an external, independent contractor, Lushvale Pty Ltd ('Lushvale'), to undertake the obligations under the Management Agreement to establish the vineyard in year one and undertake all necessary cultural work in both years one and two. A Vineyard Establishment contract exists between GAML and Lushvale detailing those services to be undertaken by Lushvale in both years. A summary of this contract appears as Schedule D at page 39 of the Prospectus. Under the contract Lushvale will undertake all pre-planting activities, planting of vines, installation of trellising and irrigation, internal roads and firebreaks and carry out the necessary cultural obligations for years one and two.

40. If in any year of the Project the income resulting from the sale of produce is insufficient to meet the annual management and occupancy fees of that year, participants are still liable to pay the shortfall and any shortfall may be deducted from future years' income under clause 26.3(iii) of the Project Deed.

41. There are no sale agreements in place for the grapes that will be produced and harvested under the Project. Growers are paying, as part of the management fees in years one to three, an amount to GAML for it to market and sell the grapes (cl 5.1(g)).

Other fees payable by a participant

42. The Management Agreement and Project Deed will bind a participant who entered into the Hillston Grove Vineyards Project No 2 and chose to utilise the services of GAML. These documents detail, amongst other things, the fees and charges for which an investor is liable. In addition to the fees that have been detailed above, a Grower may be liable, in certain circumstances, for a number of other fees and charges, which are not currently quantified. These include the possibility, should the need arise, of:

- the Manager retaining and applying income of the Project in meeting outgoings of a capital nature (cl 29.3, Project Deed);
- the Manager creating from time to time provisions for future expenditure or liabilities of a Grower's interest (cl 29.4, Project Deed);
- the Manager charging for any taxes and duties required to be paid by the Project (cl 29.5, Project Deed); and
- the Manager passing on any goods and services tax that might become applicable to either the supply of the services under the Management Agreement (cl 9(d)), or occupancy fees under the Right to Occupy Agreement (cl 3).

Vineyard establishment

43. Under the Management Agreement, once a Grower subscribed for shares in HGVL, and elected to use the services of GAML, GAML was responsible for planting 150 vines on each vinelot no later than the following 30 June (cl 4.3). For persons who were accepted as Growers on or before 30 June 1999, certain pre-planting work was carried out by that date. The Manager should have advised each Grower when certain 'business operations' had commenced on their

behalf, and when his/her trellising and irrigation items were installed, and when his/her vines were planted.

Finance

44. As disclosed in the Prospectus, Growers could fund their investment in the Project themselves, borrow from an independent lender, or borrow through finance arrangements organised by GAML.

45. GAML engaged the services of Laton Securities Pty Ltd. ('Laton'), a company not associated with GAML or any associates of GAML, to arrange loans from a number of independent financiers, to cover the fees payable to GAML. As per the Prospectus, the amount borrowed from Laton Securities Pty Ltd was to be on normal commercial terms. The loan was to be both in form and substance, full recourse, and borrowers were obliged to make the regular repayments regardless of any income being derived from the Project. GAML was to be put in the funds directly as a result of these loans, on the Grower being accepted as a borrower. GAML was not to put any of these funds on deposit with Laton Securities Pty Ltd, or any of the financiers in question, or any associated persons but was to substantially use these funds in carrying out its obligations under the Management Agreement. However upon review it was ascertained that many Growers entered the project using unfunded bridging finance arrangements through an associated entity.

46. This Ruling does not apply to those persons who used unfunded finance and who did not re-finance the initial promissory note borrowings for payment of the initial fee by 30 June 2000.

47. This **entire** Ruling does not apply if the finance arrangement entered into by the Grower included and continues to include any of the following features:

- there were split loan features of a type referred to in Taxation Ruling TR 98/22;
- there were indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' granted to the borrowers for the purpose of section 82KL, or the funding arrangements transformed the Project into a 'scheme' to which Part IVA may apply;
- the loan terms or rate of interest are of a non-arm's length nature;

- repayments of the principal and interest were or continue to be linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, not available for the conduct of the Project but transferred (by any mechanism, directly or indirectly) back to the lender or any associate;
- 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 Laton Securities Pty Ltd) are involved in the provision of finance to the Grower for the Project.

Ruling

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

Section 35-55 – Commissioner’s discretion

48. For a Grower who is an individual and who entered the Project between 22 January 1999 and 21 January 2000 and is within the defined class of persons identified in paragraphs 7 to 10 above, then 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 will decide for the income year ending 30 June 2001, the rule in section 35-10 does not apply to this activity. This is provided that the Project has been, and continues during the remainder of the term of the Project to be, carried out in the manner that is not materially different to that described in the arrangement that is set out in paragraphs 16 to 48 of this Product Ruling.

49. 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 55 in the Explanations part of this ruling, below);
- a Grower’s business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the 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)).

50. Where, the 'exception' in subsection 35-10(4) applies, the 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 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.

51. 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 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

52. 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.

53. 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.

54. 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.

55. 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 Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

56. 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).

57. A Grower who was accepted into and who has participated in the Project between 22 January 1999 and 21 January 2000 and is within the defined class of persons identified in paragraphs 7 to 10 above, is carrying on a business activity that is subject to these provisions.

58. Information provided with the application for this Product Ruling indicates that a Grower who acquired the minimum allocation of one interest in the Project is unlikely to have his/her business activity pass one of the tests until the income year ended 30 June 2004. A Grower who acquired more than one interest in the Project may however, find that his/her activity meets one of the tests in an earlier income year.

59. 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.

60. 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.

61. The information provided by the applicant indicates that a Grower who acquired the minimum allocation of one interest 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 2002. The Commissioner has decided for such a Grower that it would be reasonable to exercise the second arm of the discretion until the year ended 30 June 2001.

62. 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 16 to 48 of this Product Ruling. If, however, the Project is not carried on during the income years specified above (see paragraph 48), 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.

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

- the report of the independent viticulturist provided with the application by the Responsible Entity;
- independent, objective, and generally available information relating to the viticulture industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity; and
- other expert opinion independently obtained by the Commissioner that specifically relates to the Project.

Detailed contents list

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

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Commissioner of Taxation
24 April 2002

Previous draft:

Not previously released in draft form.

PR 2002/46

Related Rulings/Determinations:

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

Subject references:

- carrying on a business
- interest expenses
- management fees
- non-commercial losses
- product rulings
- public rulings
- viticulture

- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(3)
- ITAA 1997 35-10(4)
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