



PR 2005/34 - Income tax: 2005 Timbercorp Table Grape Project - 2006 Growers (from 1 July 2005)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *16 March 2005*



Product Ruling

Income tax: 2005 Timbercorp Table Grape Project – 2006 Growers (from 1 July 2005)

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Preamble

*The number, subject heading, **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 Tax Office **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.

Potential participants 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 and how the product fits an existing portfolio. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the 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, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office 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.

Potential participants may wish to refer to the Tax Office website at www.ato.gov.au or contact the Tax Office directly to confirm the currency of this Product Ruling or any other Product Ruling that the Tax Office has issued.

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is referred to as the 2005 Timbercorp Table Grape Project or simply as 'the Project'.

Tax law(s)

2. The tax laws dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 17-5 of the ITAA 1997;
- section 25-25 of the ITAA 1997;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Division 40 of the ITAA 1997;
- Division 328 of the ITAA 1997;
- section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- sections 82KZME and 82KZMF of the ITAA 1936; and
- Part IVA of the ITAA 1936.

Goods and Services Tax

3. All fees and expenditure referred to in this Ruling include the 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. Although this Ruling deals with the laws 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 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 the persons more specifically identified in the Ruling part of this Product Ruling and who enter into the arrangement specified below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (that is, 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 it;
- persons who participate in the Project through offers made other than through the Product Disclosure Statement;
- persons who are accepted to participate in the Project during the period on or before 30 June 2005;
- persons who are accepted to participate in the Project after 15 June 2006;
- persons who finance their participation in the Project through loans with Timbercorp Finance Pty Ltd other than those described at paragraphs 50 to 59 of this Product Ruling; and
- Timbercorp Securities Limited and its associates.

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 16 March 2005, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. 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 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 2008. 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

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

- Revised application for a Product Ruling dated 30 January 2005 as constituted by documents received on 2 December 2004 and additional correspondence dated 21 February 2005, 22 February 2005, 24 February 2005, 28 February 2005 and 1 March 2005;
- Draft Product Disclosure Statement for the 2005 Timbercorp Table Grape Project (PDS), undated, received on 2 March 2005, prepared for Timbercorp Securities Limited (TSL);
- Draft **Constitution** of the 2005 Timbercorp Table Grape Project, dated 1 March 2005;
- Draft **Licence Agreement**, between each Grower and TSL, dated 30 January 2005;
- Draft **Grapelot Management Agreement**, between each Grower and TSL, dated 1 March 2005;
- Draft Lease Agreement, between the Purchaser of the Project Land (the Purchaser), Timbercorp Limited and TSL, dated 30 January 2005;
- Draft Sub-lease Agreement, between Timbercorp Limited, TSL and the Purchaser, dated 30 January 2005;
- Draft Management Agreement between TSL and Grapecorp Management Pty Ltd (Grapecorp), dated 30 January 2005;
- Draft Table Grape Vineyard Management Agreement, between Grape House Pty Ltd, Costa Management Group Pty Ltd, the Covenantor, Grapecorp and TSL, dated 30 January 2005;
- Compliance Plan for the 2005 Timbercorp Table Grape Project, undated, received on 2 December 2004;
- Draft Custody Agreement between TSL and the Custodian, undated, received on 2 December 2004;
- 2005 Timbercorp Projects Finance Package and Special Finance Offer (finance documents), received on 2 March 2005; and
- Plant Breeder's Rights Licence Agreements dated 9 October 2003 and 12 November 2004.

Note: certain information 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 Growers may enter into. A loan agreement will be executed where a Grower successfully applies for finance from Timbercorp Finance Pty Ltd. For the purposes of describing the arrangement to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are a part of the arrangement. In this Ruling the term 'associate' has the meaning given by section 318 of the ITAA 1936. The effect of these agreements is summarised as follows.

16. It should be noted that the term Grower as used in this Ruling means each several person who becomes a party to these documents as a result of the allotment of 'Grapelots' pursuant to an application in the PDS. In these documents, a Grower is referred to as 'Participant Grower'.

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

Overview

18. The salient features of the 2005 Timbercorp Table Grape Project are as follows:

Location	Euston in south west New South Wales, approximately 100 km southeast of Mildura
Type of business to be carried on by each participant	Commercial cultivation and growing of table grapes for the purpose of harvest and sale
Number of acres offered for cultivation	600 acres (approximately 243 hectares) with no capacity for oversubscription
Size of each 'Grapelot'	0.25 acres
Minimum allocation	Two (2) 'Grapelots' but TSL reserves the right to accept applications for less than two 'Grapelots'
Minimum subscription	None
Number of vines per acre	450
Term of the Project	15 years
Initial cost per Grapelot	\$9,000
Other costs to Growers	On going costs will be payable (refer to paragraphs 46 to 49).

19. The Project will be registered as a managed investment scheme under the *Corporations Act 2001*. 'Applications' to participate in the Project must be made during the 'Offer Period' which is:

- for 'Applications' received on or before 15 June 2005, the period commencing from date of issue of the PDS to 15 June 2005; and
- for 'Applications' received on or after 1 July 2005, the period commencing from 1 July 2005 to 15 June 2006 or such earlier date to be determined by the directors of TSL.

20. For the purposes of this Ruling, Growers whose 'Applications' are accepted during the period on or after 1 July 2005 and on or before 15 June 2006 will become 2006 Growers. **This Ruling only applies to 2006 Growers. Note that a separate Product Ruling PR 2005/33 has issued for Growers who are accepted into the Project on or before 15 June 2005.**

21. The offer to participate in the Project must be made through an 'Application' in the form attached to the PDS. There is no minimum amount that must be raised under the PDS and oversubscription will not be accepted. A Custodian will be appointed under the Custody Agreement to protect the interests of Growers in their dealings with TSL.

22. Under the Power of Attorney in the form attached to the PDS, 'Applicants' irrevocably appoint TSL to enter into the Licence Agreement and Grapelot Management Agreement on their behalf. They will also be bound by the Constitution on acceptance into the Project.

Constitution

23. The Constitution establishes the Project and operates as a deed binding all of the Growers and TSL (clause 8.6). The Constitution sets out the terms and conditions under which TSL agrees to act as Responsible Entity and thereby manage the Project.

24. Under clause 4, TSL holds the 'Application Money' on bare trust. TSL accounts for the 'Application Money' in a special trust account and deposits the money into a bank account solely for 'Application Money' for this Project. Once TSL is satisfied that all documents have been executed and any finance has been approved for an 'Applicant', the 'Application Money' is released and applied against the fees due to TSL (clause 9.3).

25. In summary, the Constitution also sets out provisions relating to:

- invitations and offers under the PDS (clause 2);
- appointment of TSL as the Grower's irrevocable agent, representative and attorney (clause 3);

- how the Responsible Entity is to hold property of the Grower (clause 5);
- procedures relating to 'Applications' (clause 6);
- the discretion of TSL to refuse an 'Application' (clause 7);
- the effect of an 'Application' being accepted by TSL (clause 8);
- preparation and execution of the Licence Agreement and Grapelot Management Agreement by TSL and release of the 'Application Money' (clause 9);
- preparation and issuing of 'Grapelot Statements' to Growers and the setting up and maintenance of a 'Register' (clause 10);
- TSL's powers (clause 11);
- the keeping of a separate 'Agency Account' for the holding of 'Proceeds and any other money', apart from 'Application Money' and interest thereon, that TSL may hold for the Grower (clause 12);
- the appointment of TSL as agent and attorney to deal with the processing and sale of the 'Table Grapes' and distributions from the 'Agency Account' of 'Proceeds' to Growers and insurance proceeds (clause 13);
- the right of TSL to be paid fees and other expenses (clause 14);
- authority to use money in the 'Agency Account' and powers of investment of the money standing in the 'Agency Account' (clauses 15 and 16);
- the status, the retention by TSL, and termination by TSL or the Growers, of the Grapelot Management Agreement and Licence Agreement (clause 18). This includes the right of Growers to obtain a copy of the above agreements by written request to TSL (clause 18.2) and the consequences of termination of these agreements (clause 18.4);
- the right of the Grower to inspect certain documents related to their participation in the Project and to offer and give opinions to TSL (clause 19.1);
- the assignment and transmission of 'Grapelots' (clause 20) and restrictions on such assignments and transmissions (clause 21);
- procedures for calling a meeting of Growers (clause 22);
- resolution of complaints made by the Grower in relation to the Project or TSL (clause 25); and
- termination of the Project (clause 26).

26. Although Clause 6.4 of the Constitution provides that Growers may pay the 'Application Moneys' by instalments, **this Product Ruling does not apply to any Grower who enters into an arrangement to pay their 'Application Money' by instalments.**

Joint Venture

27. The Constitution allows two persons to enter into a 'Joint Venture'. Clause 29 of the Constitution deals with the rights and obligations of Growers who constitute themselves as 'Joint Venturers'. The 'Application' in the form attached to the PDS identifies the 'First Joint Venturer' and the 'Second Joint Venturer' in the 'Joint Venture'.

28. 2006 Growers who enter into a 'Joint Venture' will have the following 'Prescribed Proportion' of the 'Joint Venture Assets':

- the First Joint Venturer – 57.5%; and
- the Second Joint Venturer – 42.5% (clause 29.4).

Compliance Plan

29. As required by the *Corporations Act 2001*, TSL has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that TSL manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

Licence Agreement

30. The 'Land' on which the Project will be conducted is the proposed lot of 295 hectares to be carved out of a property described as Lot 2 DP 1067588. Timbercorp Ltd had advised that the 'Land' will be purchased from its current owner by either Orchard Investments Management Limited as responsible entity of the Timbercorp Orchard Trust or OIM #2 Pty Ltd as trustee for Timbercorp Orchard Trust #2 (the Purchaser). Pending their settlement of the 'Contract of Sale', the Purchaser will enter into an interim lease with the current owner of the 'Land'.

31. The 'Land' will be leased by the Purchaser to Timbercorp Ltd who in turn will sub-lease the 'Land' to TSL. Growers will enter into a Licence Agreement whereby TSL will grant each Grower a licence to use and occupy a minimum of two allotments for a period of 15 years. TSL may however accept an application for only one allotment. Each allotment, referred to in this Project as a 'Grapelot', is an allotment of 0.25 acres of land.

32. Under the Licence Agreement, each Grower will be granted a licence by TSL to use and occupy 'Grapelots' allotted to the Grower for the sole purpose of growing, cultivating and harvesting of 'Table Grapes' for commercial gain (clause 3.1).

33. Under clause 2.1 of this Agreement, TSL must procure the Purchaser, at its own cost, to establish the 'Grapelots' by undertaking activities including 'Pre-Plant Capital Works' which will be completed in full by 30 April 2005.

34. The Purchaser will plant the 'Table Grape Vines' on at least 60% the Grower's 'Grapelot' by 23 June 2005 and the balance by 31 July 2005.

35. The Licence Agreement also sets out:

- the water requirements for which water licences will be purchased and maintained by the Purchaser (clause 3.2);
- its Term (clause 4.1);
- the licence and royalty fees payable by Growers (clause 7);
- provisions dealing with damage to or reduction in the viability of the Grower's 'Grapelots' (clauses 10.3 and 10.4);
- the obligations and rights of the Grower (clauses 4.2 and 8), the obligations and rights of TSL (clauses 5 and 9.2) and rights of the Purchaser (clause 9.1); and
- provisions relating to early termination of this Agreement by the Grower or TSL and the effects of such termination (clause 10).

36. This Agreement is conditional on the Grower entering into the Grapelot Management Agreement with TSL and the 'Sub-lease' being entered into by TSL and Timbercorp Ltd (clause 6.1).

Plant Breeders' Rights

37. Clause 22 of the Licence Agreement deals with the Grower's rights and obligations in respect of the 'Table Grapes Vines' planted on the 'Grapelots'. Under clause 22.1, the Grower is granted the right to grow the 'Licensed Vines' on the relevant 'Grapelots' and the non-exclusive right to process and sell the 'Licensed Fruit' in the 'Licensed Territory'.

38. Clause 22 also sets out the Grower's obligations regarding:

- the intellectual property rights (clause 22.4);
- marketing of the 'Licensed Vine' and 'Licensed Fruit' (clause 22.2);
- labelling and packaging (clause 22.5); and
- the use of names to market the 'Table Grapes' (clause 22.10).

Grapelot Management Agreement

39. The Grapelot Management Agreement sets out the terms and conditions of TSL's appointment by the Grower as an independent contractor to manage the 'Grapelot'.

40. This Agreement will commence on the date TSL accepts the Grower's 'Application' under the PDS for the Project and the Agreement is executed under the Power of Attorney. It will continue until the termination of the Project at 30 June 2020 (clause 2.1). Other grounds for termination by either the TSL or the Grower and the procedures to be followed following such termination are set out in the Agreement. These grounds include default by one party in the performance of its duties (clause 15).

41. The 'Table Grapes' from the relevant 'Grapelots' will be pooled with 'Table Grapes' from other 'Grapelots' and Growers will be entitled to their pro rata proportion of the 'Table Grapes' and the 'Table Grapes' sold (clause 7.3).

42. Under the Agreement, the Grower engages TSL to manage and cultivate the 'Grapelots' on behalf of the Grower in accordance with the 'Management Plan' and 'Best Viticultural Practice', harvest the 'Table Grapes' and procure the processing of the 'Table Grapes' into saleable condition. Clause 5 sets out some of the services that TSL is required to perform under the Agreement.

43. Commencing on the later of 1 July 2005 and completion of the planting of the 'Table Grape Vines' on the Grower's 'Grapelot' and during each subsequent 'Financial Year', TSL will provide the services stipulated in clause 5.2A of the Agreement.

44. Under clause 1.5 of the Grapelot Management Agreement, TSL can delegate its obligations under this Agreement. Pursuant to this right to delegate, TSL will enter into a Management Agreement with Grapecorp Management Pty Ltd, an associate of TSL, who in turn will enter into a Table Grape Management Agreement with a number of parties.

Pooling of amounts and distribution of 'Proceeds'

45. Both the Constitution (clause 13) and the Grapelot Management Agreement (clause 7.3) set out provisions relating to the pooling of amounts held by TSL on behalf of Growers. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed 'Table Grapes', the 'Product' or insurance proceeds to the pool making up the 'Proceeds' are entitled to benefit from distributions from those 'Proceeds'; and

- any pooled 'Table Grapes', the 'Product' or other 'Proceeds' must consist only of 'Table Grapes', the 'Product' or other 'Proceeds' contributed by Growers from this Project.

Fees

46. Fees payable per 'Grapelot' by a 2006 Grower who is not in 'Joint Venture' are as follows. These fees are specified in the Licence Agreement (clause 7) and Grapelot Management Agreement (clause 11).

Management Fees

- i for the period from 'Commencement Date' until 30 June 2006, **\$8,500**, payable on or before 'Commencement Date';
- ii for the period 1 July 2006 to 30 June 2007, fixed management fees of **\$1,500**, payable on 31 October 2006 plus a further amount (called the deferred management fee). The deferred management fee represents part of the management fee for the 'Financial Year' ending 30 June 2007. It is payable in each 'Financial Year' at the rate of **4.95% of the 'Gross Proceeds'** of the sale of 'Table Grapes' payable at the time any 'Proceeds' are received by TSL;
- iii from and including the 'Financial Year' ending 30 June 2008, the management fee for services in each 'Financial Year' is the **estimated operating costs** payable on 31 October each year; and
- iv a fee of 25% of so much of the annual 'Net Proceeds' in a 'Financial Year' as exceeds the 'Incentive Fee Threshold' (Incentive Fees).

Licence Fees

- v for the period from 'Commencement Date' until 30 June 2006, **\$500**, payable on or before 'Commencement Date';
- vi for the 'Financial Year' ending 30 June 2007, **\$500**, payable on 31 October 2006, respectively;
- vii for the 'Financial Year' ending 30 June 2008, **\$1,314**, payable on 31 October 2007;
- viii for subsequent 'Financial Years', the annual 'Licence Fees' will be the annual 'Licence Fee' payable on the immediately preceding 31 October, 'Indexed', payable on 31 October each year; and
- ix a fee equal to 3.3% of the 'Shed Door Proceeds' payable at the time any 'Proceeds' are received by TSL ('Royalty Fees').

47. As noted above, from the 2008 'Financial Year', the annual fee will consist of an amount for the estimated costs of operating the 'Grapelot'. The estimated costs of operating the 'Grapelot' for a 'Financial Year' will include an adjustment for the difference between the actual costs and the estimated costs of managing the 'Grapelot' during the preceding 'Financial Year'.

48. Fees payable per 'Grapelot' by a 2006 Grower who is in 'Joint Venture' (Joint Venture Growers) are stipulated in clause 29.5 of the Constitution. Under this clause, the actual amount of fees to which a Joint Venture Grower will be solely responsible for are expressed as percentages of the fees outlined in paragraph 46 which are as follows.

First Joint Venture Grower

- 100% of the management fees set out in subparagraph 46(i);
- 57.5% of the deferred management fees set out in subparagraph 46(ii);
- 57.5% of the management fees set out in subparagraph 46(iii) from and including the 'Financial Year' ending 30 June 2010;
- 100% of the licence fees set out in subparagraph 46(v);
- 57.5% of the licence fees set out in subparagraph 46(viii) from and including the 'Financial Year' ending 30 June 2010; and
- 57.5% of the Royalty Fees set out in subparagraph 46(ix).

Second Joint Venture Grower

- 100% of the fixed management fees set out in subparagraph 46(ii);
- 42.5% of the deferred management fees set out in subparagraph 46(ii);
- 100% of the of the management fees set out in subparagraph 46(iii) for the income years ending 30 June 2008 and 2009;
- 42.5% of the management fees set out in subparagraph 46(iii) from and including the 'Financial Year' ending 30 June 2010;
- 100% of the of the licence fees set out in subparagraphs 46(vi) to 46(viii);
- 42.5% of the licence fees set out in subparagraph 46(viii) from and including the 'Financial Year' ending 30 June 2010; and

- 42.5% of the Royalty Fees set out in subparagraph 46(ix).

49. Joint Venture Growers will be responsible for any Incentive Fees set out in paragraph 46(iv) in their respective 'Prescribed Proportions'.

Finance

50. Growers can fund their involvement in the Project by borrowing from independent sources or from Timbercorp Finance Pty Ltd ('the Financier'), a lender associated with the Responsible Entity. Details of the loans that will be offered to Growers by the Financier are set out in the finance documents provided to the Tax Office by TSL with their application for this Product Ruling.

51. The Financier will provide Growers with loans on a full recourse basis and will pursue legal action against any defaulting borrowers. Growers can apply to borrow up to 90% of the 'Application Money'. If approved, the 'Loan Amount' will be used to pay the balance of the 'Application Money' and the \$250 'Loan Application Fee'. On application to participate in the Project, Growers will be required to pay a deposit, being the balance still to be paid for their 'Grapelots' after deducting the 'Loan Amount'.

52. The types of loans to which this Ruling applies are as follows:

- principal and interest loans; and
- loans with interest only period then becoming principal and interest.

53. These types of loans have the following features:

- during the 'Loan Term' the Grower will assign and transfer over to the Financier by way of fixed charge, all its rights, title and interest at any time in the Project including 'Grapelots' and the 'Project Agreements';
- the Grower is entitled to repay the whole or any part of the 'Total Amount Owing' without penalty for early repayment;
- the 'Lower Interest Rate' is fixed for the term of the loan; and
- in the event that any amount is overdue, the Financier may charge interest at the 'Higher Interest Rate'.

54. It is also a common feature of these types of loans that the interest and the 'Loan Amount' will be paid by monthly instalments. Principal and interest loans are repayable by equal monthly instalments of principal and interest over the 'Loan Term'. In respect of loans with interest only period then becoming principal and interest, the monthly instalments during the interest only period will be sufficient to pay the accruals of interest only and the monthly instalments during the principal and interest period will be sufficient to repay the loan by the end of the 'Loan Term'.

55. Each monthly instalment is due and payable on the last 'Business Day' of each month with the first instalment due on the last 'Business Day' of the month in which the 'Loan Term' commences. Monthly instalments will be deducted from the borrower's bank account under a direct debit authority.

56. The 'Loan Terms' available under the types of loans discussed above are summarised below.

Principal and interest loans

- 3 years at 9.0% p.a.;
- 4 years at 9.95% p.a.;
- 5 years at 10.5% p.a.; and
- 7 years at 10.95% p.a.

Loans with interest only period then principal and interest:

- 1 year interest only, then 3 to 5 years principal and interest at 10.50% p.a. interest applicable to all years;
- 2 years interest only, then 3 to 5 years principal and interest at 10.95% p.a. interest applicable to all years; and
- 3 years interest only, then 3 to 5 years principal and interest at 11.50% p.a. interest applicable to all years.

57. Growers cannot rely on this Product Ruling if they enter into a finance agreement with the Financier that materially differs from that set out in the finance documents provided to the Tax Office by TSL with their application for this Product Ruling. Examples of such situations would be where a Grower enters into:

- a principal and interest loan with a 'Loan Term' longer than 7 years; or
- an interest only period then becoming principal and interest loan with the interest only period longer than 3 years and the principal and interest period longer than 5 years.

58. Growers also cannot rely on this Product Ruling if 'Application Moneys' otherwise remain unpaid by 15 June 2006. Where an application is accepted subject to finance approval by any lending institution, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by 15 June 2006.

59. This Ruling also does not apply if the finance arrangement entered into by the Grower with the Financier or any other lender 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 Timbercorp Finance Pty Ltd, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

60. Subject to paragraph 8, this Ruling applies only to Growers who are accepted to participate in the Project and who have executed a Grapelot Management Agreement and a Licence Agreement on or after 1 July 2005 and on or before 15 June 2006.

61. The Growers' participation in the Project must constitute the carrying on of a business of primary production. A Grower is not eligible to claim any tax deductions until the Growers' application to enter the Project is accepted and the Project has commenced.

The Simplified Tax System ('STS')

Division 328

62. For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower is an 'STS taxpayer'. To be an 'STS taxpayer' a Grower:

- must be eligible to be an 'STS taxpayer'; and
- must have elected to be an 'STS taxpayer'.

Qualification

63. This Product Ruling assumes that a Grower who is an 'STS taxpayer' is so for the income year in which their participation in the Project commences. A Grower may become an 'STS taxpayer' at a later point in time. Also, a Grower who is an 'STS taxpayer' may choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer', during the term of the Project. These are contingencies relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

Assessable income***Sections 6-5 and 328-105***

64. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

65. The Grower who is not an 'STS taxpayer' recognises ordinary income from carrying on the business of horticulture at the time that income is derived.

66. The Grower who is an 'STS taxpayer' recognises ordinary income from carrying on the business of horticulture at the time that income is received (paragraph 328-105(1)(a)).

Deductions for Management Fees, Licence Fees, interest and 'Loan Application Fee'***Sections 8-1, 328-105 and 25-25***

67. A Grower (who is not a Joint Venture Grower) accepted into the Project on or before 15 June 2006 may claim, on a per 'Grapelot' basis, tax deductions for the following expenditure.

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Fee Type	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Management Fees	\$8,500 See Notes (i), (ii) & (iii)	\$1,500 plus 4.95% of any 'Gross Proceeds' See Notes (i), (ii), (iii) & (iv)	Estimated operating costs See Notes (i), (ii), (iii) & (v)
Licence Fees	\$500 See Notes (i), (ii), (iii) & (vi)	\$500 See Notes (i), (ii) & (iii)	\$1,314 See Notes (i), (ii) & (iii)
Royalty Fees	n/a	3.3% of any 'Shed Door Proceeds' See Notes (i), (ii), (iii) & (iv)	3.3% of any 'Shed Door Proceeds' See Notes (i), (ii), (iii) & (iv)
Interest on loans with Timbercorp Finance Pty Ltd	As incurred (Non-STS taxpayers) Or as paid (STS taxpayers) See Notes (iii) & (vii)	As incurred (Non-STS taxpayers) Or as paid (STS taxpayers) See Notes (iii) & (vii)	As incurred (Non-STS taxpayers) Or as paid (STS taxpayers) See Notes (iii) & (vii)
'Loan Application Fee' for loans with Timbercorp Finance Pty Ltd	Must be calculated – See Note (viii)	Must be calculated – See Note (viii)	Must be calculated – See Note (viii)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example input tax credits): Division 27. See Example 1 at paragraph 112.
- (ii) The Management Fees and Licence Fees shown in the Grapelot Management Agreement and the Licence Agreement, respectively, are deductible under section 8-1 in full in the year that they are incurred (where the Grower is not an 'STS taxpayer') or, under paragraph 328-105(1)(b) in the year in which they are paid (where the Grower is an 'STS taxpayer').

- (iii) This Ruling does not apply to Growers who choose to prepay fees or who choose, or who are required to prepay interest under a loan agreement (see paragraph 99). Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.
- (iv) In any year where 'Table Grapes' are not harvested and sold 'Gross Proceeds' and 'Shed Door Proceeds' will be zero and, therefore, no amount based on the percentages shown above, will be payable. 'Gross Proceeds' and 'Shed Door Proceeds' are defined terms in the Project agreements.
- (v) The deduction for 'Management Fees' in each subsequent 'Financial Years' after 30 June 2007, will be based on the estimated annual operating costs for managing the 'Grapelot' (see paragraph 47).
- (vi) The deduction for 'Licence Fees' is \$41.67 per month for each month or part month. This means that a 2006 Grower accepted on or after 1 August 2005, the full \$500 Rent payable for the 2006 'Financial Year' will not be deductible. See paragraphs 94 and 95.
- (vii) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling. Growers who borrow from lenders other than Timbercorp Finance Pty Ltd may request a private ruling on the deductibility of the interest incurred.
- (viii) The 'Loan Application Fee' payable to Timbercorp Finance Pty Ltd is a borrowing expense and is deductible under subsection 25-25(1). It is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling.

68. Joint Venture Growers who are **not** 'STS taxpayers' may claim deductions under section 8-1 for the following expenditures as set out in the table and Notes above:

First Joint Venture Grower

- in the year ending 30 June 2006, \$8,500 for Management Fees and \$500 for Licence Fees;
- in year ending 30 June 2007, 57.5% of the amount incurred for deferred management fees set out in subparagraph 46(ii); and
- in the years ending 30 June 2006, 2007 and 2008, any interest incurred on funds borrowed from Timbercorp Finance Pty Ltd.

Second Joint Venture Grower

- in the year ending 30 June 2007, for fixed management fees of \$1,500 and 42.5% of the amount incurred for deferred management fees set out in subparagraph 46(ii) and \$500 for Licence Fees; and
- in the year ending 30 June 2008, 100% of the estimated annual operating costs for managing the 'Grapelot' and \$1,314 for Licence Fees.

69. Joint Venture Growers who **are** 'STS taxpayers', the deductions referred to in paragraph 68 are deductible in the income year in which they are paid by, or paid on behalf of the Joint Venture Grower (paragraph 328-105(1)(b)).

70. A First Joint Venture Grower can also claim under subsection 25-25(1), in the income years ending 30 June 2006, 2007 and 2008, the 'Loan Application Fee' payable to Timbercorp Finance Pty Ltd. Each 'Joint Venturer' can also claim deductions for its proportional share of the horticultural plant write-off explained below.

Deductions for capital expenditure

Division 40

71. Each Grower will also be entitled to tax deductions relating to the 'Table Grape Vines' planted on the 'Grapelot'. If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example input tax credits): Division 27. See example at paragraph 112.

72. A table grape vine is considered to be a 'horticultural plant' as defined in subsection 40-520(2). A Grower holds a licence to cultivate the 'Table Grape Vines' on a designated area of land called a 'Grapelot' for the growing of 'Table Grapes' for commercial gain. As a Grower holds the 'Grapelot' under a licence, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value.

73. The deduction is determined using the formula in section 40-545. Table grape vines have an 'effective life' of greater than 13 but fewer than 30 years and, for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the 'Table Grape Vines' enter their first commercial season (section 40-530, item 2). TSL will notify Growers when their 'Table Grape Vines' enter their first commercial season and the amount that may be claimed.

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

Section 35-55 – exercise of Commissioner's discretion

74. A 2006 Grower who is an individual may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for these Growers for the income years ending **30 June 2006 to 30 June 2008**. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

Sections 82KZME, 82KZMF and 82KL and Part IVA

75. For a Grower who participates in the Project and incurs expenditure as required by the Grapelot Management Agreement and the Licence Agreement, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraph 102);
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Explanation

Is the Grower carrying on a business?

76. For the amounts set out in the table above to constitute allowable deductions the Growers' activities of cultivating 'Table Grape Vines' and harvesting the 'Table Grapes' for eventual sale as a participant in the 2005 Timbercorp Table Grape Project must amount to the carrying on of a business of primary production.

77. Where there is a business, or a future business, the gross proceeds from the sale of the 'Table Grapes' will constitute gross assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income.

78. For schemes such as the 2005 Timbercorp Table Grape Project, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As Taxation Ruling TR 2000/8 sets out, these circumstances have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

79. Generally, a Grower will be carrying on a business of growing 'Table Grapes', and hence primary production, if:

- the Grower has an identifiable interest in the land (by lease) or rights over the land (by licence) on which the Grower's 'Table Grape Vines' are established;
- the Grower has a right to harvest and sell the 'Product';
- the cultivation of the 'Table Grape Vines' and harvesting of the 'Table Grapes' are carried out on the Growers' behalf;
- the activities of the Grower are typical of those associated with a business of cultivating table grape vines and harvesting the table grapes for commercial gain; and
- the weight and influence of general indicators point to the carrying on of a business.

80. In this Project, each Grower enters into a Grapelot Management Agreement and a Licence Agreement.

81. Under the Licence Agreement each individual Grower will have rights over one or more specific and identifiable areas of land, each known as a 'Grapelot'. The Licence Agreement provides the Grower with an ongoing interest in the specific 'Table Grape Vines' on the licenced area for the term of the Project from the commencement of the Licence Agreement. Under the Licence Agreement the Grower must use the land in question for the purpose of cultivating 'Table Grape Vines' and harvesting the 'Table Grapes', and for no other purpose. The Licence Agreement allows TSL to come onto the land to carry out its obligations under the Grapelot Management Agreement.

82. Under the Grapelot Management Agreement, TSL is engaged by the Grower to provide management services on the Grower's identifiable area of land during the term of the Project. Under the Management Agreement and Table Grape Vineyard Management Agreement, the management services are sub-contracted to Grape House Pty Ltd and Costa Management Group Pty Ltd.

83. TSL is also engaged to harvest and sell, on the Grower's behalf, the 'Table Grapes'.

84. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the Project's description for all the indicators.

85. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of the 'Table Grapes' that will return a before-tax profit, that is, a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

86. The pooling of the 'Table Grapes' grown on the Grower's Grapelot with the 'Table Grapes' of other Growers in the 2005 Timbercorp Table Grape Project is consistent with general horticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled 'Table Grapes' will reflect the proportion of the 'Table Grapes' contributed from their 'Grapelot'.

87. TSL's services are also consistent with general horticultural practices. They are of the type ordinarily found in grape growing ventures that would commonly be said to be businesses. While the size of an individual 'Grapelot' is relatively small, it is of a size and scale to allow it to be commercially viable.

88. The Grower's degree of control over TSL as evidenced by the Constitution and Grapelot Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, TSL is required to provide the Grower with regular progress reports on the Grower's 'Grapelot' and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with TSL in certain instances, such as cases of default or neglect.

89. The activities of the Grower are typical of those associated with a business of cultivating table grape vines and harvesting the table grapes for commercial gain, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. For the purposes of this Ruling, the Grower's activities of cultivating 'Table Grape Vines' and harvesting the 'Table Grapes' for eventual sale in the 2005 Timbercorp Table Grape Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

90. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

91. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductibility of Management Fees and Licence Fees

Section 8-1

92. Consideration of whether the Management and Licence Fees are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer is contractually committed to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

93. The Management and Licence Fees will relate to the gaining of income from the Grower's business of growing 'Table Grapes' (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of 'Table Grapes') is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. Subject to paragraphs 94 and 95, there is no capital component of the 'Management Fee' and 'Licence Fees'. The tests of deductibility under the first limb of section 8-1 are met. Subject to paragraphs 94 and 95, the exclusions do not apply.

94. One of the exclusions under section 8-1 relates to expenditure that is capital, or is capital in nature. Any part of the expenditure of a Grower entering into a horticulture business which is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and hence will not be deductible under section 8-1. The Commissioner is of the view that depending upon when they are accepted to participate in the Project, a portion of the initial 'Licence Fees' payable by a 2006 Grower will be capital expenditure. Therefore, the amount allowed as a deduction for 'Licence Fees' under section 8-1 will be allowed as follows.

95. If a 2006 Grower enters the Project on or before 31 July 2005 the 'Licence Fees' of \$500 payable on application for the period from the 'Commencement Date' to 30 June 2006 will be deductible in full. However, 2006 Growers' accepted to participate in the Project on or after 1 August 2006 and on or before 15 June 2005, will not be entitled to the full deduction. The deduction will be calculated on a pro-rata monthly basis of \$41.67 for each month or part month that the 2006 Grower has been licenced to use the Grapelot.

Interest deductibility

Section 8-1

(i) Growers who use Timbercorp Finance Pty Ltd as the finance provider

96. Some Growers may finance their participation in the Project through a loan facility with Timbercorp Finance Pty Ltd. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of Management Fees and Licence Fees.

97. The interest incurred for the year ended 30 June 2005 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations – the cultivation and growing 'Table Grape Vines' and the licence of the land on which the 'Table Grape Vines' will have been planted – that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

(ii) Growers who DO NOT use Timbercorp Finance Pty Ltd as the finance provider

98. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

Prepayment provisions***Sections 82KZL to 82KZMF***

99. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (for example, the performance of management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

Application of the prepayment provisions to this Project

100. Under the Arrangement to which this Product Ruling applies Management Fees and Licence Fees are incurred annually and interest payable to Timbercorp Finance Pty Ltd is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF have no application to this Arrangement.

101. A Grower who is an 'STS taxpayer' can, therefore, claim a deduction for each of the relevant amounts in the income year in which the amount is paid, or paid on their behalf. A Grower who is not an 'STS taxpayer' can claim a deduction for each of the relevant amounts in the income year in which the fee is incurred.

102. However, sections 82KZME and 82KZMF may have relevance if a Grower in this Project chooses to prepay all or some of the expenditure payable under the Grapelot Management Agreement and/or the Licence Agreement or chooses or is required to prepay interest under a loan agreement (including loan agreements with lenders other than Timbercorp Finance Pty Ltd). Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

103. As noted in the Ruling section above, Growers who prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

Expenditure of a capital nature***Division 40***

104. Any part of the expenditure of a Grower that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, expenditure attributable to the establishment of the 'Table Grape Vines' is of a capital nature. This expenditure falls for consideration under Division 40 of the ITAA 1997.

Division 35 – deferral of losses from non-commercial business activities***Section 35-55 – exercise of Commissioner's discretion***

105. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2006 to 30 June 2008** the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years ended 30 June 2006 up to and including 30 June 2008:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the table grape industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

106. Therefore, a Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income for those income years ended 30 June 2006 to 30 June 2008.

107. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Section 82KL – recouped expenditure

108. The operation of section 82KL depends, among other things, on the identification of a certain quantum of ‘additional benefits(s)’. Insufficient ‘additional benefits’ will be provided to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1.

Part IVA – general tax avoidance provisions

109. For Part IVA to apply there must be a ‘scheme’ (section 177A), a ‘tax benefit’ (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

110. The 2005 Timbercorp Table Grape Project will be a ‘scheme’. A Grower will obtain a ‘tax benefit’ from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 67 to 73 that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

111. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the ‘Table Grapes’. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm’s length or, if any parties are not dealing at arm’s length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Example

Entitlement to GST input tax credits

112. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her viticulture business. Her manager is registered for GST and charges her a management fee payable every six months in advance. On 1 December 2003, Susan receives a valid tax invoice from her manager requesting payment of a management fee in advance, and also requesting payment for an improvement in the connection of electricity for her vineyard that she contracted him to carry out. The tax invoice includes the following details:

Management fee for period 1/1/2004 to 30/6/2004	\$4,400*
Carrying out of upgrade of power for your vineyard as quoted	<u>\$2,200*</u>
Total due and payable by 1 January 2004 (includes GST of \$600)	<u>\$6,600</u>

*Taxable supply

Susan pays the invoice by the due date and calculates her input tax credit on the management fee (to be claimed through her Business Activity Statement) as:

$$\frac{1}{11} \times \$4,400 = \$400.$$

Hence her outgoing for the management fee is effectively \$4,400 less \$400, or \$4,000.

Similarly, Susan calculates her input tax credit on the connection of electricity as:

$$\frac{1}{11} \times \$2,200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2,200 less \$200, or \$2,000.

In preparing her income tax return for the year ended 30 June 2004, Susan is aware that the management fee is deductible in the year incurred. She calculates her management fee deduction as \$4,000 (not \$4,400).

Susan is aware that the electricity upgrade is deductible 10% per year over a 10 year period. She calculates her deduction for the power upgrade as \$200 (one tenth of \$2,000 only, not one tenth of \$2,200).

Detailed contents list

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Commissioner of Taxation

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Related Rulings/Determinations:

PR 1999/95; PR 2005/33;
 TR 92/1; TR 92/20; TR 97/11;
 TR 97/16; TR 98/22; TR 2000/8;
 TR 2001/14; TR 2002/6;
 TR 2002/11; TD 93/34

Subject references:

- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 25-25(1)
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55

PR 2005/34

- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 40
- ITAA 1997 40-515(1)(b)
- ITAA 1997 40-520(2)
- ITAA 1997 40-525(2)
- ITAA 1997 40-530
- ITAA 1997 40-545
- ITAA 1997 Div 328
- ITAA 1997 328-105
- ITAA 1997 328-105(1)(a)
- ITAA 1997 328-105(1)(b)
- ITAA 1997 Subdiv 328-F

- ITAA 1997 Subdiv 328-G
- TAA 1953 Pt IVAAA
- Copyright Act 1968
- Corporations Act 2001

Case references:

- Commissioner of Taxation v. Lau
(1984) 6 FCR 202; 84 ATC 4929;
(1984) 16 ATR 55

ATO references

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