



PR 2006/3 - Income tax: Palandri Winegrape Project 2005 - 2006 Growers (using finance from Palandri Finance Ltd)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *31 May 2006*



Product Ruling

Income tax: Palandri Winegrape Project 2005 – 2006 Growers (using finance from Palandri Finance Ltd)

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ⓘ This Ruling provides you with the following level of protection:

This publication (excluding appendices) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any under-paid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

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

No guarantee of commercial success

The 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 scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document.

If the scheme 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 scheme 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 scheme has been implemented as described below and to ensure that the participants in the scheme include in their income tax returns income derived in those future years.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the person(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'taxation provision(s)' identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Ruling, this scheme is referred to as the 'Palandri Winegrape Project 2005-2006 Growers' or just simply as 'the Project'.

Relevant taxation provision(s)

2. The taxation provisions 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;
 - Division 27 of the ITAA 1997;
 - Division 35 of the ITAA 1997;
 - Division 40 of the ITAA 1997;
 - Subdivision 61-J of the ITAA 1997;
 - Division 328 of the ITAA 1997;
 - section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 82KZL of the ITAA 1936;
 - sections 82KZME and 82KZMF of the ITAA 1936; and
 - Part IVA of the ITAA 1936.

Unless otherwise stated, all legislative references that follow are in relation to the 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. 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 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 entities

7. The class of entities to whom this Ruling applies is the entities who are more specifically identified in the Ruling part of this Product Ruling (refer to paragraphs 50 to 52) and who enter into the scheme specified below on or after the date this Ruling is made. They will have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant Agreements until their term expires) and deriving assessable income from this involvement. In this Ruling these persons are referred to as 'Growers'.

8. The class of entities to whom this Ruling applies only includes entities who:

- enter into finance arrangements with Palandri Finance Ltd.

9. The class of entities to whom this Ruling applies does not include entities who:

- are accepted to participate in the Project prior to the date of this Ruling or after 15 June 2006;
- intend to terminate their involvement in the scheme prior to its completion or who otherwise do not intend to derive assessable income from it.

Qualifications

10. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 16 to 49.

11. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

13. This Ruling applies prospectively from 15 February 2006, 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).

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

15. This Product Ruling is withdrawn and ceases to have effect after 30 June 2008. The Ruling continues to apply, in respect of the taxation provision(s) ruled upon, to all entities within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, who entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entities' involvement in the scheme.

Scheme

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

- Application for a Product Ruling dated 8 December 2005 as constituted by documents provided on 14 December 2005, and additional correspondence including emails received 6 January 2006, 13 January 2006 and 19 January 2006;
- Product Disclosure Statement (PDS) for the Palandri Winegrape Project 2005 and the Agricultural Property Holding Trust (the Property Trust) issued by Huntley Management Limited (the previous 'Responsible Entity'), received 14 December 2005;
- Draft Supplementary Product Disclosure Statement (SPDS) for the Palandri Winegrape Project 2005 dated 25 May 2005, issued by Huntley Management Limited (the previous 'Responsible Entity'), received 14 December 2005;
- Draft Supplementary Product Disclosure Statement (SPDS) for the Palandri Winegrape Project 2005 dated 30 August 2005, issued by Huntley Management Limited (the previous 'Responsible Entity'), received 14 December 2005;
- Draft Supplementary Product Disclosure Statement (SPDS) for the Palandri Winegrape Project 2005 dated 20 October 2005, issued by Huntley Management Limited (the previous 'Responsible Entity'), received 14 December 2005;
- Draft Supplementary Product Disclosure Statement (SPDS) for the Palandri Winegrape Project 2005 dated 28 November 2005, issued by Huntley Management Limited (the previous 'Responsible Entity'), received 14 December 2005;
- Draft Supplementary Product Disclosure Statement (SPDS) for the Palandri Winegrape Project 2005 received 19 January 2006;
- Constitution for the Palandri Winegrape Project, received 14 December 2005;
- Instrument modifying Constitution of Palandri Winegrape Project 2005, received 14 December 2005;
- Draft Instrument modifying Constitution of Palandri Winegrape Project 2005, received 13 January 2006;
- Draft Constitution for the Agricultural Property Holding Trust, received 18 January 2005;

- Draft **Lease and Management Agreement** between Huntley Management Ltd (as 'Lessor' and previous 'Responsible Entity') and the Grower, received 14 December 2005;
- Draft Operations Agreement between Palandri Investment Management Ltd (the 'Manager and Responsible Entity' for the Project) and Palandri Wine Production Ltd (the 'Subcontractor'), received 14 December 2005;
- Draft Operations Agreement – Establishment Services (Harvey Vineyard) between Palandri Investment Management Ltd (the 'Manager and Responsible Entity' for the Project) and Palandri Wine Production Ltd, received 14 December 2005;
- Draft Operations Agreement – Establishment Services (Palandri Reserve, Frankland 1 and Frankland 2 Vineyards) between Palandri Investment Management Ltd (the 'Manager and Responsible Entity' for the Project) and Palandri Wine Production Ltd, received 14 December 2005;
- Grape Supply Agreement between Palandri Investment Management Ltd (the 'Manager and Responsible Entity' for the Project) and Palandri Wine Production, received 14 December 2005;
- Draft Compliance Plan for Palandri Winegrape Project 2005, received 14 December 2005;
- Draft Option Agreement for the purchase of Harvey Vineyard between the owner and Palandri Wine Production Ltd received 18 January 2005;
- Draft Head Lease (Harvey Vineyard) between the owner and Palandri Investment Management Ltd received 6 January 2006;
- Draft Sub Lease (Harvey Vineyard) between Palandri Investment Management and Huntley Management Ltd (in its capacity as the previous 'Responsible Entity' for the Property Trust) received 14 December 2005;
- Draft Sub Lease (Harvey Vineyard) between Huntley Management Ltd (the previous 'Responsible Entity' for the Property Trust) and Huntley Management Ltd (in its capacity as the previous 'Responsible Entity' for the Project) received 14 December 2005;
- Draft Sub Lease (Palandri Bros, Frankland 1 and Frankland 2) between Palandri Investment Management Ltd (the 'Sub-Lessor') and Huntley Management Ltd (the 'Sub-Lessee' and previous 'Responsible Entity' for the Project), received 14 December 2005; and

- **Draft Loan Deed** between Palandri Finance Ltd, the Grower and the Grower's Guarantor and draft loan application documents received 6 January 2006.
- Additional correspondence, received 16 May 2006;
- Draft Supplementary Product Disclosure Statement, received 16 May 2006;
- Draft Option Agreement between the Vendors (Vendor 1) and Palandri Investment Management Ltd as Trustee for the Palandri Agricultural Property Trust, received 16 May 2006;
- Draft Option Agreement between the Vendor (Vendor 2) and Palandri Investment Management Ltd as Trustee for the Palandri Agricultural Property Trust, received 16 May 2006;
- Draft Lease (Property 1) between the Palandri Agricultural Property Trust and Palandri Investment Management Ltd (as Responsible Entity), received 16 May 2006;
- Draft Lease (Property 2) between the Palandri Agricultural Property Trust and Palandri Investment Management Ltd (as Responsible Entity), received 16 May 2006.

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

17. The documents highlighted (in bold) are those that the Growers may enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or an associate of the Grower will be a party to that are part of the scheme 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 the agreements may be summarised as follows.

Overview

19. This scheme is called the Palandri Winegrape Project 2005-2006 Growers. The salient features are as follows:

Location	The South West wine region of Western Australia
Type of business to be carried on by each participant	Commercial growing of wine grapes
Number of hectares	256 hectares

offered for cultivation	
Size of each Vineyard Lot	0.05 hectares comprising 0.025 hectares of reworked vineyard and 0.025 hectares of new vineyard
Number of vines per hectare	1,667
Term of the Project	18 years
Initial Cost per Vineyard Lot	\$3,960 (this includes an amount for prepaid fees)
Ongoing and other costs	<ul style="list-style-type: none"> • Annual rent, partly deferred; • Annual Maintenance Fee; • Harvest costs; • Optional Insurance of vines; and • Contingency fee as required.

20. The Project has been registered as a Managed Investment Scheme under the *Corporations Act 2001*. As at the date of this Ruling, Palandri Investment Management Ltd is the Responsible Entity for the Project. Palandri Investment Management Ltd has been issued with Financial Services Licence Number 247359 by ASIC. The previous Responsible Entity for the Project was Huntley Management Ltd. At a meeting of Growers held on 20 December 2005, Huntley Management Ltd retired as Responsible Entity and Palandri Investment Management Ltd was appointed as Responsible Entity.

21. This offer pertains to 5,122 Vineyard Lots of 0.05 hectares each. There is no minimum subscription for the Project. The Project will be conducted on land located in Harvey, Margaret River, Frankland River and Cookernup in the South West region of Western Australia.

22. The Harvey property is currently leased by Palandri Investment Management Ltd and sub-leased to the Property Trust which in turn has sub-leased the property to the Responsible Entity for the Project. There is currently an option to purchase between the owner and Palandri Wine Production Ltd (or nominee) in respect of this property. The Responsible Entity for the Project has leases over the Margaret River and Frankland River properties. The Cookernup property is comprised of two adjacent properties (Property 1 and Property 2) in the Shire of Harvey, Western Australia. There are currently options to purchase the land between the vendors (Vendor 1 and Vendor 2) and Palandri Investment Management Ltd (as Trustee for the Property Trust). The Property Trust will lease the properties to the Responsible Entity for the term of the Project.

23. Some of the land contains vines which will either be radically pruned or grafted, while other land requires vines to be planted. Under the lease agreements, Palandri Investment Management Ltd

agrees to carry out the installation of trellising, and planting and grafting of the vines as necessary.

24. Growers participating in the scheme will enter into a Lease and Management Agreement. Under this Agreement, Growers lease an area of land called a 'Vineyard Lot' for a term of approximately 18 years for the purpose of growing wine grapes. Each Vineyard Lot consists of two separate parcels of land of 0.025 hectares each. One parcel will contain an established vineyard which will require either radical pruning or grafting, while the other parcel has not been established. The Vineyard Lots will be planted at the rate of approximately 1667 vines per hectare.

25. Under the Lease and Management Agreement, the Growers appoint Palandri Investment Management Ltd (the 'Responsible Entity') to manage their Vineyard Lot. The Responsible Entity will install the irrigation system, manage and cultivate the vines, and be responsible for harvesting and selling the grapes on the Growers behalf. Harvests are expected to take place annually starting in the third year after planting and full production is anticipated in the fifth year after planting. As an incentive to achieve high yields, Palandri Wine Production (the 'subcontractor'), will be entitled to retain all produce in excess of the target of 12 tonnes per hectare.

26. This Ruling only applies to Growers who are:

- accepted into the project between the date of this Ruling and 15 June 2006; and
- fund their participation in the Project using finance provided by Palandri Finance Ltd.

Product Ruling PR 2005/83 may apply to Growers who enter the Project between 25 May 2005 and 15 June 2005, Product Ruling PR 2005/107 may apply to Growers who enter the Project between 31 August 2005 and 30 September 2005 and Product Ruling PR 2005/109 may apply to Growers who enter the project between 19 October 2005 and 15 June 2006 and do not enter into finance arrangements with Palandri Finance Ltd. Growers will only be accepted by paying the Application Fee to the Responsible Entity. Growers will execute a Power of Attorney enabling the Responsible Entity to act on their behalf as required when they make an application for a Vineyard Lot.

Constitution

27. The Constitution establishes the Project and operates as a deed binding on all of the Project's Growers and the Responsible Entity. The Constitution sets out the terms and conditions under which Palandri Investment Management Ltd agrees to act as Responsible Entity and thereby manage the Project. The Lease and Management Agreement will be executed on behalf of a Grower following acceptance of the application by the Responsible Entity. Growers are bound by the Constitution by virtue of their participation

in the Project. Pursuant to clause 8 of the Constitution, the Responsible Entity will keep a register of Growers.

28. Under the terms of the Constitution, all moneys received from applications shall be paid to the Responsible Entity. The Responsible Entity shall deposit those moneys into an Application Fund in the name of the Responsible Entity. The Application Money will be released by the Responsible Entity when certain specified criteria in the Constitution have been met (clause 14).

29. The Gross Harvest Proceeds from sale of the Growers' Produce will be paid directly to the Responsible Entity who must deposit them into a Proceeds Fund and pay to each Grower their Proportionate Interest in the surplus after all deductions have been made. The terms 'Gross Harvest Proceeds', 'Growers' Produce', 'Proceeds Fund' and 'Proportional Interest' are defined in Schedule 1 of the Constitution

Compliance Plan

30. As required by the Corporations Act, a Compliance Plan has been prepared for the Project. Its purpose is to ensure that the Responsible Entity manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

Lease and Management Agreement

31. Growers participating in the scheme will enter into a Lease and Management Agreement with Palandri Investment Management Ltd in its capacity as Responsible Entity of the Palandri Winegrape Project 2005. Growers are granted an interest in the Vineyard in the form of a sub-lease to use their Vineyard Lot for the purpose of conducting their viticultural business upon the terms and conditions as set out in the agreement.

32. The Lease will commence on the date Vineyard Lots are allotted to Growers and will continue for a period of approximately 18 years or until the Project is terminated.

33. The Lease and Management Agreement provides that each Grower appoints the Responsible Entity to perform services under the agreement.

34. Schedule 3 Item A (Initial Maintenance Services) and Schedule 3 Item B (Ongoing Maintenance Services) of the Lease and Management Agreement specify the services to be performed by the Responsible Entity.

35. The Initial Maintenance Services will be performed during the Initial Maintenance Period, from the date of acceptance until 30 June 2006.

36. Initial Maintenance Services include:

- tend, fertilise and care for the Vineyard Lots, including pruning of any vines thereon, in accordance with good viticultural practice;
- manage soil quality;
- control weeds, pests, vermin, and diseases;
- maintain plant and equipment;
- maintain roads, fences, irrigation equipment, entryways, firebreaks, drainage and water catchment systems;
- undertake marketing activities;
- arrange for insurance of the vineyard;
- prepare documents and agreements; and
- mark out and assign each Grower's Vineyard Lot.

37. The Ongoing Maintenance Services will be performed during each subsequent year beginning 1 July 2006.

38. Ongoing Maintenance Services include:

- inspect all completed planting and pruning to ensure the Vineyard Lot is of the quality required by the Manager;
- cultivate, tend, prune, fertilise and otherwise care for the Vines as required in accordance with good viticultural practice;
- supervise and inspect any Maintenance activities undertaken by subcontractors appointed by the Manager;
- manage soil quality;
- control weeds, pests, vermin, and diseases;
- maintain plant and equipment;
- maintain roads, fences, irrigation equipment, entryways, firebreaks, drainage and water catchment systems; and
- maintain insurance of the vineyard produce.

Fees

39. The fees payable under the Lease and Management Agreement per Vineyard Lot are as follows:

- an Application Fee of \$3,960 payable to the Responsible Entity on application. This comprises the fee for Initial Services, Irrigation fee and Ongoing Maintenance Services for Years one and two;

- ongoing Maintenance Fees equal to the sum incurred by the Responsible Entity plus 10%, from Year three onward, deducted from harvest proceeds;
- rent of \$220 payable annually from Year three and increased by CPI each year, is deducted from harvest proceeds. Rent for years one and two is paid in arrears out of harvest proceeds at the rate of 2% of Gross Harvest Proceeds over the life of the project;
- harvest costs deducted from harvest proceeds; and
- insurance costs.

Operations Agreement – Establishment Services

40. Under the lease agreements, the Manager is responsible for establishing the Vineyard, at its own expense.

41. The Operations Agreement – Establishment Services, is between Palandri Investment Management Ltd ('Responsible Entity') and Palandri Wine Production as subcontractor. Under this agreement the Responsible Entity appoints the subcontractor to establish the Vineyards, including land preparation, soil testing and fertilising, construction of trellising, and planting or grafting vines.

Harvesting and sale

42. The Grower has a right to the grapes grown on the vines and is entitled to the proceeds from the sale of those grapes. The Responsible Entity will determine when there is a commercially harvestable crop and arrange for the grapes to be harvested. The vines are expected to reach full production in the fifth year after planting.

43. The proceeds from the sale of the Grower's grapes will be paid direct to the Responsible Entity who must deposit them into a Proceeds Fund. The Responsible Entity will pay out of the Grower's Proportional Interest, any outstanding fees or other amounts owing by the Grower, plus the costs of harvest and sale. The balance will then be distributed to the Growers on a proportionate basis. The terms 'Proceeds Fund' and 'Proportional Interest' are defined in the Constitution.

44. As an incentive to achieve high yields, Palandri Wine Production (the 'subcontractor'), will be entitled to retain all produce in excess of the target of 12 tonnes per hectare.

The Land Trust (optional)

45. A Grower **may** also purchase units in the Agricultural Property Holding Trust. The Constitution establishes the Trust and operates as a deed under which the Responsible Entity holds assets on Trust for the unit holders.

Finance

46. Growers may fund their participation in the Project themselves or borrow from an independent lender. Growers may also choose to borrow from Palandri Finance Ltd (a lender associated with the Project).

47. Palandri Finance Ltd will lend on a full-recourse commercial basis under the following arrangement:

- a term of up to 10 years commencing on the Date of Advance of the Principal Sum;
- Interest Rate of 11.75% per annum – variable;
- monthly repayments of principal and interest commencing on the 10th day of the month following the Date of Advance with all outstanding amounts to be paid at the end of the Term of the loan;
- the loan is secured by a mortgage over the Grower's leased area and Project interest;
- application fee of \$275 plus 1% of amount financed; and
- stamp duty at the rate of \$0.40 per \$100 or part thereof.

48. Loans will only be provided by Palandri Finance Ltd to Growers if Palandri Finance Ltd has sufficient monies to provide loans to Growers.

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

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

- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

Ruling

Application of this Ruling

50. This Ruling applies only to Growers who:
- are accepted to participate in the Project during the period from the date of this Ruling and on or before 15 June 2006;
 - have executed a Lease and Management Agreement on or before that date;
 - have paid the Application Fee by 30 June 2006; and
 - enter into finance arrangements with Palandri Finance Ltd.
51. The Grower's participation in the Project must constitute the carrying on of a business of primary production.
52. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced.

The Simplified Tax System (STS)

Division 328

53. To be an 'STS taxpayer' a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer'. For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different under the STS where the Grower uses the cash accounting method.

Qualification

54. 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.

25% entrepreneurs tax offset***Subdivision 61-J***

55. For the first income year starting on or after 1 July 2005, Subdivision 61-J of the ITAA 1997 provides a 25% tax offset of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

Assessable income***Section 6-5***

56. 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.

57. A Grower will recognise ordinary income from carrying on the business of viticulture at the time that income is derived when they are:

- not an 'STS taxpayer'; or
- an 'STS taxpayer' using the accruals accounting method for the 2005-06 and later income years.

58. A Grower who is an 'STS taxpayer' using the cash accounting method will be assessable on ordinary income from carrying on their business of viticulture in the income year in which that income is received.

Deductions for Maintenance Fees, rent, interest and borrowing expenses***Sections 8-1, 25-25 and 328-105***

59. A Grower may claim tax deductions under section 8-1 for the revenue expenses listed below, on a 'per Vineyard Lot' basis.

60. However, if for any reason, an amount shown or referred to below is not fully paid in the year in which it is incurred by a Grower who is an 'STS taxpayer' using the cash accounting method, then the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower. Any amount or part of an amount shown below which is not paid in the year in which it is incurred will be deductible in the year in which it is actually paid.

61. 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.

Maintenance Fee

62. The Lease and Management Agreement requires Growers to prepay Maintenance Fees for years one and two. A Grower may claim tax deductions for Maintenance Fees as shown in the Table below.

63. A Grower who acquires one Vineyard Lot will incur prepaid Maintenance Fees of \$990. This amount will be deductible in full in the year paid as it is 'excluded expenditure'. Refer to paragraphs 93 to 103 for a discussion of the prepayment provisions. However if more than one Vineyard Lot is acquired then the amounts will be apportioned, according to the formula in subsection 82KZMF(1) at paragraph 98. This section operates to apportion expenditure over the eligible service period or 10 years, whichever is the lesser. The 'eligible service period' commences on 1 July 2006 and ends on 30 June 2008. Accordingly, for each vineyard lot, an amount of \$495 is deductible in each of the years ending 30 June 2007 and 30 June 2008.

Maintenance Fees on a Per Vineyard Lot basis				
Number of Vineyard Lots	ITAA 1997 section	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
One	8-1	\$3,547.50	Nil	Nil
Multiple	8-1	\$2,557.50	\$495.00	\$495.00

Rent

64. Rent for Years one and two is deferred and taken as 2% of Gross Harvest Proceeds, over the life of the Project. Rent payable for the third year and each subsequent year is \$220, increased annually for CPI. Rent is fully deductible in the year in which it is incurred by Growers who are not 'STS taxpayers', or are 'STS taxpayers' who use the accruals accounting method.

65. For a Grower who is an 'STS taxpayer' using the cash accounting method, the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower.

Interest

66. The deductibility or otherwise of interest arising from agreements entered into with financiers other than Palandri Finance Ltd is outside the scope of this Ruling. However, all Growers who finance their participation in the Project other than with Palandri Finance Ltd should carefully read the discussion of the prepayment rules in paragraphs 93 to 103 as those rules may be applicable if interest is prepaid.

67. Interest paid to Palandri Finance Ltd is deductible in the year in which it is incurred where the Grower is not an 'STS taxpayer' or is an 'STS taxpayer' using the accruals accounting method. For a Grower who is an 'STS taxpayer' using the cash accounting method, the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower.

Borrowing expenses

68. The Loan Application Fee and Stamp duty are borrowing costs and are deductible under section 25-25. They are incurred for borrowing funds that 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 Palandri Finance Ltd is outside the scope of this Ruling.

Deductions for capital expenditure

Division 40 and Division 328

69. A Grower will also be entitled to tax deductions relating to water facilities (for example irrigation) and grapevines. Deductions shown in the following Table are determined under Division 40 and Division 328. STS taxpayers may choose to calculate the deduction for water facilities under Division 328.

Fee type	ITAA 1997 section	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Water facility (e.g. irrigation, dam, bore, etc)	40-515	\$137.50 – see Notes (i) & (ii)	\$137.50 – see Notes (i) & (ii)	\$137.50 – see Notes (i) & (ii)
Establishment of horticultural plants (grapevines)	40-515	Nil – see Note (iii)	Nil – see Note (iii)	Nil – see Note (iii)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of capital expenditure would need to be adjusted as relevant for GST (for example input tax credits): Division 27.
- (ii) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. A deduction is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one third of the capital

expenditure incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one third in each of the next two years of income (section 40-540). STS taxpayers may choose to calculate their deduction under Division 40 or under Division 328. A deduction is available under Section 328-180 in the year in which an 'STS taxpayer' started to hold the asset if it was a low cost asset. A low cost asset is one whose cost is less than \$1,000.

- (iii) As grapevines are affixed to land which the Grower does not own, they are not owned by the Grower, the conditions in subsection 40-525(3) cannot be met, and the grapevines are not eligible for the four year write-off under section 40-550. However, grapevines are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a lease, 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. The deduction for the grapevines is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. If the grapevines have an 'effective life' of greater than 13 but fewer than 30 years 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 grapevines enter their first commercial season (section 40-530, item 2). The Responsible Entity will inform Growers of when the grapevines enter their first commercial season.

Units in the Land Trust

70. The units in the Trust are CGT Assets (section 108-5) and the amounts payable by the investor are outgoings of a capital nature and not allowable deductions.

71. The amounts paid for each unit will represent the first element of the cost base of the unit (subsection 110-25(2)). Any disposal of the units by a unitholder will be a CGT event and may give rise to a capital gain or loss.

72. Distributions from the Trust are included in the assessable income of a unitholder, in accordance with Division 6 of Part III of the ITAA 1936.

73. The deductibility of expenses which may be incurred by unitholders is beyond the scope of this Ruling.

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

74. A Grower who is an individual accepted into the Project by 15 June 2006 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 2010**. 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.

Section 82KL and Part IVA of the ITAA 1936

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

- 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.

Commissioner of Taxation15 February 2006

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Is the Grower carrying on a business?

76. For the amounts set out in the Ruling above to constitute allowable deductions the Grower's viticulture activities as a participant in the Palandri Winegrape Project 2005 must amount to the carrying on of a business of primary production. These viticulture activities will fall within the definitions of 'horticulture' and 'commercial horticulture' in section 40-535.

77. For schemes such as that of the Palandri Winegrape Project 2005, 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.

78. Generally, a Grower will be carrying on a business of viticulture, and hence primary production, if:

- the Grower has an identifiable interest (by lease or by licence) in the land on which the Grower's grapevines are established;
- the Grower has a right to harvest and sell the grapes each year from those grapevines;
- the viticulture activities are carried out on the Grower's behalf;
- the viticulture activities of the Grower are typical of those associated with a viticulture business; and
- the weight and influence of general indicators point to the carrying on of a business.

79. In this Project, each Grower enters into a Lease and Management Agreement.

80. Under the Lease and Management Agreement each individual Grower will have rights over a specific and identifiable area of land. The Lease and Management Agreement provides the Grower with an ongoing interest in the specific grapevines on the leased area for the term of the Project. Under the lease the Grower must use the land in question for the purpose of carrying out viticultural activities and for no other purpose. The lease allows the Responsible Entity to come onto the land to carry out its obligations under the Lease and Management Agreement.

81. Under the Lease and Management Agreement the Responsible Entity is engaged by the Grower to establish and maintain a Vineyard Lot on the Grower's identifiable area of land during the term of the Project. The Responsible Entity has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the Vineyard Lot on the Grower's behalf.

82. In establishing the Vineyard Lot, the Grower engages the Responsible Entity to maintain the grapevines, trellising and irrigation equipment on the Grower's Vineyard Lot. During the term of the Project, these assets will be used wholly to carry out the Grower's viticulture activities. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the grapes grown on the Grower's Vineyard Lot.

83. 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.

84. 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 its 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.

85. The pooling of grapes grown on the Grower's Vineyard Lot with the grapes of other Growers is consistent with general viticulture practices. Each Grower's proportionate share of the sale proceeds of the pooled grapes will reflect the proportion of the grapes contributed from their Vineyard Lot.

86. The Responsible Entity's services on the Grower's behalf are also consistent with general viticulture practices. The assets are of the type ordinarily used in carrying on a business of viticulture. While the size of a Vineyard Lot is relatively small, it is of a size and scale to allow it to be commercially viable (see Taxation Ruling IT 360).

87. The Grower's degree of control over the Responsible Entity as evidenced by the Lease and Management Agreement, and supplemented by the Corporations Act, is sufficient. During the term of the Project, the Responsible Entity will provide the Grower with regular progress reports on the Grower's Vineyard Lot and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Responsible Entity in certain instances, such as cases of default or neglect.

88. The viticulture activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. For the purposes of this Ruling, the Growers' viticulture activities in the Palandri Winegrape Project 2005 will constitute the carrying on of a business.

The Simplified Tax System

Division 328

89. 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.

90. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. 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 Maintenance Fees and rent

Section 8-1

91. Consideration of whether the Maintenance Fees and rent 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.

92. The Maintenance Fees and rent associated with the viticulture activities will relate to the gaining of income from the Grower's business of viticulture (see above), and hence have a sufficient connection to the operations by which income (from the regular sale of 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 scheme. The fee appears to be reasonable. There is no capital component of the Maintenance Fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Prepayment provisions***Sections 82KZL to 82KZMF of the ITAA 1936***

93. 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.

94. For this Project, only section 82KZL (an interpretive provision) and sections 82KZME and 82KZMF are relevant. Where the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for prepaid expenditure under section 82KZMF using the formula in subsection 82KZMF(1). These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

Sections 82KZME and 82KZMF of the ITAA 1936

95. Where the requirements of subsections 82KZME(2) and (3) are met, the formula in subsection 82KZMF(1) (see below) will apply to apportion expenditure that is otherwise deductible under section 8-1 of the ITAA 1997. The requirements of subsection 82KZME(2) will be met if expenditure is incurred by a taxpayer in return for the doing of a thing that is not to be wholly done within the year the expenditure is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1)).

96. The requirements of subsection 82KZME(3) will be met where the agreement (or scheme) has the following characteristics:

- the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year;
- the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the scheme are managed by someone other than the taxpayer; and
- either:
 - a) there is more than one participant in the agreement in the same capacity as the taxpayer; or

- b) the person who promotes, arranges or manages the agreement (or an associate of that person) promotes similar agreements for other taxpayers.

97. There are a number of exceptions to these rules, but for Growers participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1). For the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the scheme that is less than \$1,000. Such expenditure is immediately deductible.

98. Where the requirements of section 82KZME are met, section 82KZMF applies to apportion relevant prepaid expenditure. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

99. In the formula 'eligible service period' (defined in subsection 82KZL(1)) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

Application of the prepayment provisions to this Project

100. The expenditure incurred by a Grower in the Project for the Maintenance Fees meets the requirements of subsections 82KZME(1) and (2) and is incurred under an 'agreement' as described in subsection 82KZME(3). Therefore, unless one of the exceptions to section 82KZME applies, the amount and timing of tax deductions for those fees are determined under section 82KZMF.

101. If the prepaid Maintenance Fees incurred by Growers in the initial year are less than \$1,000, those fees will be 'excluded expenditure' as defined in subsection 82KZL(1). Under Exception 3 (subsection 82KZME(7)) 'excluded expenditure' is specifically excluded from the operation of section 82KZMF, and therefore deductible in the year incurred. A Grower who is an 'STS taxpayer' using the cash accounting method can claim an immediate deduction for Maintenance Fees in the income year in which it is paid.

102. If the Grower is not an 'STS taxpayer', or is an 'STS taxpayer' using the accruals accounting method, the Maintenance Fee is deductible in the year in which it is incurred.

103. Growers who acquire more than one Vineyard Lot may incur prepaid Maintenance Fee exceeding \$1,000. Those Growers will need to calculate the deduction for each year using the formula in subsection 82KZMF(1). Section 82KZMF will apportion the deduction for prepaid Maintenance Fees over the eligible service period which commences on 1 July 2006 and ends on 30 June 2008.

Interest deductibility

Section 8-1

Interest paid to Palandri Finance Ltd

104. Whether the interest paid to Palandri Finance Ltd is deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of the Maintenance fees.

105. The interest incurred for the first year of participation and subsequent years of income will be in respect of a loan to finance the Grower's business operations – the cultivation and growing of grapes and the lease of the land on which the grapevines 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.

106. As with the Maintenance fees, in the absence of any application of the prepayment provisions (see paragraphs 93 to 103), the timing of deductions for interest will again depend upon whether a Grower is an 'STS taxpayer' using the cash accounting method or is not an 'STS taxpayer' or is an 'STS taxpayer' using the accruals accounting method.

107. If the Grower is not an 'STS taxpayer' or is an 'STS taxpayer' using the accruals accounting method, interest is deductible in the year in which it is incurred.

108. If the Grower is an 'STS taxpayer' using the cash accounting method, interest is not deductible until it has been both incurred and paid, or is paid for the Grower. If interest that is properly incurred in an income year remains unpaid at the end of that income year, the unpaid amount is deductible in the income year in which it is actually paid, or is paid for the Grower.

Expenditure of a capital nature

Division 40 and Division 328

109. 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 water facilities, and the establishment of the grapevines is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328.

110. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is an 'STS taxpayer'.

111. The tax treatment of capital expenditure has been dealt with in a representative way in paragraph 69 in the Table and the accompanying Notes.

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

Section 35-55 – exercise of Commissioner's discretion

112. 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 2010 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 2010:

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

113. 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 of the ITAA 1936 – recouped expenditure

114. 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 of the ITAA 1936 – general tax avoidance provisions

115. 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).

116. The Palandri Winegrape Project 2005 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 59 to 69 that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

117. 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 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.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

IT 360; PR 2005/83;
PR 2005/107; PR 2005/109;
TD 93/34; TR 92/20; TR 97/11;
TR 98/22; TR 2000/8;
TR 2001/14

Subject references:

- borrowing expenses
- 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
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
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- ITAA 1936 82KZME
- ITAA 1936 82KZME(1)
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