



# ***PR 2006/58 - Income tax: 2006 Timbercorp Avocado Project - Post 30-June Growers***

 This cover sheet is provided for information only. It does not form part of *PR 2006/58 - Income tax: 2006 Timbercorp Avocado Project - Post 30-June Growers*

 This document has changed over time. This is a consolidated version of the ruling which was published on *26 April 2006*



## Product Ruling

### Income tax: 2006 Timbercorp Avocado Project – Post 30-June Growers

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#### **❶ This Ruling provides you with the following level of protection:**

This publication (excluding appendixes) 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 underpaid 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.

### **No guarantee of commercial success**

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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**

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This Product Ruling has been given on the basis that the entity(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

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant 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 '2006 Timbercorp Avocado Project' or simply as 'the Project'.

### Relevant Taxation provision(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;
- Subdivision 61-J of the ITAA 1997;
- Division 328 of the ITAA 1997;
- Division 328 of the *Income Tax (Transitional Provisions) Act 1997*;
- section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 82KZL of the ITAA 1936;
- section 82KZME and 82KZMF of the ITAA 1936;
- Division 3 of Part III of the ITAA 1936;
- Part IVA of the ITAA 1936; and
- section 357-75 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

**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 entities**

7. The class of entities to whom this Ruling applies is the entities more specifically identified in the Ruling part of this Product Ruling 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 as set out in the description of the scheme. In this Ruling, these entities are referred to as 'Growers'.

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

- entities who intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- entities who participate in the Project through offers made other than through the Product Disclosure Statement;
- entities who enter into this scheme before 1 July 2006 and after 30 September 2006;
- entities who elect to manage their Avolots;

- entities who finance their participation in the Project through loans with Timbercorp Finance Pty Ltd other than those described at paragraphs 55 to 62 of this Product Ruling; and
- Timbercorp Securities Limited and its associates.

## Qualifications

9. 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 17 to 62.

10. 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

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12. This Ruling applies prospectively from 26 April 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

13. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## Withdrawal

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16. This Product Ruling is withdrawn and ceases to have effect after 30 June 2009. The Ruling continues to apply, in respect of the tax law(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 entity's involvement in the scheme.

## Scheme

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

- Application for a Product Ruling dated 29 November 2005 as constituted by documents received on 29 November 2005, 8 December 2005, 17 January 2006, 1, and 14 February 2006, 14 March 2006, 11 April 2006 and additional correspondence dated 23 January 2006, 6, 8, 14, 24 February 2006, 14, 21, 22, 23, 24, 31 March 2006 and 11 April 2006;
- Draft Product Disclosure Statement for the 2006 Timbercorp Avocado Project (PDS), received on 17 January 2006;
- Draft **Constitution** of the 2006 Timbercorp Avocado Project, as amended, received on 6 February 2006;
- Draft Compliance Plan for the 2006 Timbercorp Avocado Project, received on 29 November 2005;
- Drafts of the Goodwood East, Goodwood West and Jasper Head Leases between the relevant Land Owners and Timbercorp Ltd (Timbercorp), received on 29 November 2005;

- Drafts of the Goodwood East, Goodwood West and Jasper Subleases between Timbercorp and TSL, received on 29 November 2005;
- Drafts of the **Goodwood East, Goodwood West and Jasper Licence Agreements and Subsequent Licence Agreement (for Goodwood East and Goodwood West only)** between a Grower and TSL, received on 29 November 2005;
- Draft **Avolot Management Agreement** between a Grower and TSL, as amended, received on 14 March 2006;
- Draft Avocado Marketing Agreement between Avcorp Management Pty Ltd (Avcorp Management), TSL, Simpson Farms Pty Ltd (Simpson Farms), Goodwood Holdings Pty Ltd and Chiquita Foods Pty Ltd, received on 29 November 2005;
- Draft Management Agreement between TSL and Avcorp Management, received on 29 November 2005;
- Draft Avocado Orchard Management Deed (Queensland Orchard) between TSL, Avcorp Management and related entities, and Simpson Farms and related persons, received on 29 November 2005;
- Draft Avocado Orchard Management Deed (WA Orchard) between TSL, Avcorp Management and related entities and Primary Growth Pty Ltd (Primary Growth) and related persons, received on 29 November 2005;
- Draft Capital Works Agreement between Jasper Farms, Primary Growth and Timbercorp and other parties, received on 29 November 2005;
- Draft Custody Agreement between TSL and Trust Company of Australia Limited (Custodian), received on 29 November 2005; and
- **2006 Timbercorp Projects Finance Package** and Special Finance Offer (finance documents), received on 14 February 2006.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

18. The documents highlighted are those that Growers may enter into. For the purposes of describing the scheme 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 scheme. The effect of these agreements is summarised as follows.

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

### Overview

20. The salient features of the 2006 Timbercorp Avocado Project are as follows:

Location	Childers in Queensland and near Busselton in south-west Western Australia
Type of business to be carried on by each Grower	Commercial growing and cultivation of Avocado trees for the purpose of harvesting Avocados for sale
Number of hectares offered for cultivation	840 hectares
Size of each Avolot	0.25 hectares
Minimum allocation	Individuals – 3 Avolots Joint Venture Growers – 7 Avolots Companies/Trusts – 2 Avolots (TSL may allocate less at its absolute discretion.)
Minimum subscription	None
Number of trees per hectare	An average of 231 trees per hectare
Term of the Project	20 years
Initial cost per 'Avolot'	\$12,250
Ongoing costs	Annual licence fees and management costs
Other fees and costs	Deferred management fees, marketing and sale costs, and incentive fees

21. 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 2006, the period commencing from date of issue of the PDS to 15 June 2006; and
- for 'Applications' received on or after 1 July 2006, the period commencing from 1 July 2006 to 30 September 2006.



22. For the purposes of this Ruling, Growers whose 'Applications' are accepted during the period on or after 1 July 2006 and on or before 30 September 2006 will become Post 30 June Growers. **This Ruling only applies to 'Post 30 June Growers'. In this Ruling 'Post 30 June Growers' are referred to as 'Growers'. Note that a separate Product Ruling PR 2006/57 will issue for 'Early Growers' who are accepted into the Project on or before 15 June 2006.**

23. The offer to participate in the Project must be made through an 'Application' on 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.

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

## Constitution

25. 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.

26. TSL holds the 'Application Money' as a bare trustee (clause 4). 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).

27. 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 Agreements and Avolot Management Agreement by TSL and release of the 'Application Money' (clause 9);

- issuing of 'Avolot 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);
- authorising TSL to deal with the processing and sale of the 'Avocados' 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 Avolot 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 'Avolots' (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).

### **Joint Venture**

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

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

- the First Joint Venturer – 55%; and
- the Second Joint Venturer – 45% (clause 29.4).

### **Compliance Plan**

30. 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.

### **Head Leases**

31. The Land, Water Licences and/or Water Allocations for the Project are owned by the Land Owners and will be leased to Timbercorp under Head Leases for each of the respective orchards. The Head Leases set out the terms and conditions under which the Lessors will lease the Land, Water Licences and/or Water Allocations to Timbercorp to use and exploit during the Term of the Project.

### **Subleases**

32. The Subleases set out the terms and conditions under which Timbercorp will sublease the Land, Water Licences and/or Water Allocations for the Project to TSL for the Term of the Project.

### **Licence Agreements**

33. A Grower will enter into 7 Licence Agreements in respect of an Avolot(s). An Avolot is a parcel of approximately 0.25 hectares of 9 stapled, separately identifiable areas of land at Childers in Queensland and near Busselton in Western Australia as set out in the table below.

	<b>Property/ Orchard name</b>	<b>Approximate size (hectares)</b>
1	Goodwood East (Goodwood East Orchard) QLD	0.044
2	Goodwood Home (Goodwood Home Orchard) QLD	0.013
3	Goodwood West (Goodwood West Orchard) QLD	0.039
4	Claytons (Claytons Orchard) QLD	0.015

5	Farnsfield (Farnsfield Orchard) QLD	0.055
6	Lynwood (Lynwood Orchard) QLD	0.019
7	Jasper Stage 1 (Jasper Orchard) WA	0.025
8	Jasper Stage 2 (Jasper Orchard) WA	0.015
9	Jasper Stage 3 (Jasper Orchard) WA	0.025
	<b>Total per Avolot</b>	<b>0.25</b>

34. An 'Avolot' is defined to include the 'Avocado Trees', the 'Capital Works' and the 'Required Water Licences'. Under clause 3.2 TSL must fully exploit its Water Licences to maximise the use and enjoyment of them by all Growers during the Term of the Project.

35. The Licence Agreements grant to the Grower licences effective from the Commencement Date to use the identifiable areas which form part of the Avolot for the sole purpose of conducting the Avolot Operations (clause 3.1).

36. Under clause 6 the Licence Agreements are subject to and conditional upon the:

- Grower's execution of the Avolot Management Agreement with TSL; and
- Grower's contemporaneous execution of the Stapled Licence Agreements and Subsequent Licence Agreements.

37. The Licence Agreements also set out:

- the Term (clause 4.1);
- the Licence Fees payable by Growers (clause 7);
- the obligations and rights of the Grower (clauses 8), TSL (clause 5), and the Land Owner and Timbercorp (clause 9); and
- provisions relating to early termination of the Licence Agreements by the Grower or TSL (clause 10) and the effects of such termination (clause 10).

## **Avolot Management Agreement**

38. The Grower engages TSL to cultivate the Grower Avolots and to carry out the management services subject to the terms and conditions of this Agreement which shall commence on the Commencement Date and shall continue until 30 June 2026 or until termination under clause 15 of this Agreement. The grounds for termination include default by one party in the performance of its obligations.

39. TSL can delegate its obligations under this Agreement (clause 1.5).

40. TSL will manage and cultivate the 'Avolots' on behalf of the Grower in accordance with the Management Plans and Best Horticultural Practice (clause 5.1).

41. In the period ending 30 June 2006, TSL will carry out and complete the following services:

- Infrastructure Management Services, commencing from the Commencement Date and carried out in respect of Grower's interest in the Queensland Avolots and Jasper Stage 1 Avolots (clause 5.2(a) to (f));
- Administrative and other Management Services, commencing from the Commencement Date (clause 5.2(g) to (m)); and
- Avocado Tree Management Services, in respect of the Grower's interest in the Queensland Orchard and Jasper Stage 1 Orchard (clause 5.2(n) to (bb)).

42. The Agreement also stipulates the services to be provided after 30 June 2006 and each subsequent 'Financial Year' (clause 5.2A).

43. During the Project Term TSL will test the Avocados and, where they are ready for harvesting, harvest the mature Avocado Trees (clause 6). TSL will cause Avcorp Management to procure the marketing and sale of Avocados and use reasonable endeavours to maximise returns (clause 7.2). Growers are entitled to receive a proportion of the proceeds of sale of Avocados according to their interest in the Project (clause 7.3(a)).

44. The Avolot Management Agreement also sets out the requirement for TSL to provide an annual report to Growers within 4 months after the end of each financial year of the Project (clause 13).

**Pooling of amounts and distribution of Proceeds**

45. Both the Constitution (clause 13) and the Avolot Management Agreement (clause 7) 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 the pooling and distribution schemes:

- only Growers who have contributed Avocados or insurance proceeds to a pool are entitled to benefit from distributions of Proceeds from the pool; and
- Grower's that do not contribute to a pool will not have any interest in the Proceeds from the pool.

**Management Agreement**

46. TSL engages Avcorp Management as an independent contractor to manage and administer the Project, and to manage, direct and conduct the Project Operations on behalf of the Growers and perform the Orchard Services in accordance with the management plan and Best Horticultural Practice.

**Avocado Orchard Management Deeds**

47. Avcorp Management engages Simpson Farms and Primary Growth as independent contractors to provide management and cultivation services, including the Orchard Services (clause 4), Harvest Services (clause 5) and Packing Services (clause 6) in respect of the Queensland Orchard and the WA Orchard, respectively. Simpson Farms and Primary Growth must carry out the services on the respective orchards in accordance with the Management Plans prepared for each orchard.

**Capital Works Agreement**

48. Timbercorp engages Primary Growth as an independent contractor to provide Development Services on Jasper Stage 1, Jasper Stage 2 and Jasper Stage 3. These include land selection, orchard design, land preparation, irrigation system installation and planting of Avocado Trees (clause 5).

49. Primary Growth will replace and replant, at its cost, any Avocado Trees that fail within the first 6 months after planting where the failure is caused by Primary Growth (clause 5.2(c)).

**Avocado Marketing Agreement**

50. Avcorp Management engages Simpson Farms and Chiquita Foods Pty Ltd (Chiquita) to market and sell the Avocados to their relevant customer groups so as to maximise the returns for the Growers. The Marketing Fees for the services provided under this Agreement will be deducted by Simpson Farms and Chiquita from the Proceeds of Sale and where applicable paid directly to relevant third parties prior to accounting to Avcorp Management for the Net Proceeds.

**Project Fees**

51. Fees payable per Avolot by a Grower who is not in a Joint Venture are as follows. These fees are specified in the Avolot Management Agreement (clause 11), Licence Agreements (clause 7) and Avocado Marketing Agreement (clause 5).

*Management Fees*

- (i) for the period from Commencement Date until 30 June 2007, **\$11,550**, payable on or before the Commencement Date;
- (ii) for the period 1 July 2007 to 30 June 2008, fixed management fees of **\$3,000**, payable on 31 October 2007, 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' in which there are sales proceeds, and is **2.2% of the Grower's Participating Interest of the Net Sales Proceeds (Net Sales Proceeds)** payable at the time any Proceeds are received by TSL;
- (iii) from and including the Financial Year ending 30 June 2009, the management fee for services in each Financial Year is the **estimated operating costs** payable on 31 October each year;
- (iv) an **incentive fee of 27.5%** of so much of the annual Net Proceeds in a Financial Year as exceeds the Incentive Fee Threshold; and
- (v) Marketing and Sale Costs for the services as incurred under the Avocado Marketing Agreement will be deducted from the Proceeds of Sale and where applicable paid directly to relevant third parties prior to accounting to Avcorp Management for the Net Sales Proceeds.

*Licence Fees*

- (vi) for the period from the Commencement date to 30 June 2007, **\$700**;
- (vii) for each of the financial years ending 30 June 2008 to 30 June 2010, **\$700**, payable on 31 October in the financial year;
- (viii) for the Financial Year ending 30 June 2011, **\$1,650**, payable on 31 October 2010;
- (ix) for the 'Financial Year' ending 30 June 2012, **\$1,796**, payable on 31 October 2011;
- (x) for subsequent 'Financial Years', the annual 'Licence Fees' will be the annual 'Licence Fee' payable on the immediately preceding 31 October, 'Indexed' and payable on 31 October each year.

52. The **estimated operating costs** of the Avolot for a 'Financial Year' will include an adjustment for the difference between the actual costs and the estimated costs of managing the Avolot during the preceding Financial Year.

53. Fees payable per Avolot by a Grower who is in Joint Venture (Joint Venturer) are stipulated in clause 29.5 of the Constitution. Under this clause, the amount of fees for which a Joint Venturer will be solely responsible for are expressed as percentages of the fees outlined in **paragraph 51**. These percentages are as follows.

*First Joint Venture Grower*

- 100% of the management fees set out in subparagraph 51(i);
- 55% of the deferred management fees set out in subparagraph 51(ii);
- 55% of the management costs set out in subparagraph 51(iii) from and including the 'Financial Year' ending 30 June 2011;
- 55% of the Marketing and Sale Costs set out in subparagraph 51(v);
- 100% of the licence fees set out in subparagraph 51(vi) for the 'Financial Year' ending 30 June 2007.
- 55% of the licence fees set out in subparagraphs 51(viii), 51(ix) and 51(x) from and including the 'Financial Year' ending 30 June 2011.



## *Second Joint Venture Grower*

- 100% of the fixed management costs set out in subparagraphs 51(ii);
- 100% of the management fees set out in subparagraph 51(iii) for the financial years ending 30 June 2009 and 2010;
- 100% of the licence fees set out in subparagraph 51(vii) for the financial years ending 30 June 2008 to 30 June 2010;
- 45% of the deferred management fees set out in subparagraph 51(ii);
- 45% of the management costs set out in subparagraph 51(iii) from and including the Financial Year ending 30 June 2011;
- 45% of the Marketing and Sale Costs set out in subparagraph 51(v);
- 45% of the licence fees set out in subparagraphs 51(viii), 51(ix) and 51(x) from and including the Financial Years ending 30 June 2011.

54. Joint Venture Growers will be responsible for any incentive fees set out in subparagraph 51(iv) in their respective 'Prescribed Proportions'.

## **Finance**

55. 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.

56. 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 Avolots after deducting the Loan Amount.

57. The Financier will offer a 'Type A' or a 'Type B' loan on the following terms. The rates shown are indicative.

**Type A – Principal and Interest Loans with equal monthly repayments over the term of the loan**

- 3 year term with an interest rate of 9.0%p.a.
- 4 year term with an interest rate of 9.95%p.a.
- 5 year term with an interest rate of 10.50%p.a.
- 7 year term with an interest rate of 10.95%p.a.
- 8 year term with an interest rate of 11.00%p.a.
- 9 year term with an interest rate of 11.25%p.a.
- 10 year term with an interest rate of 11.50%p.a.

**Type B – Principal Only Loan with equal repayments**

- loans are for a term of 12 months repayable by 12 equal monthly instalments of principal.

58. 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 Avolots 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.

59. 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.

60. 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.

61. Growers also cannot rely on this Product Ruling if Application Moneys are not paid in full on or before 30 September 2006 by the Grower or, on the Grower's behalf, by any lending institution, including the 'Financier'. 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 30 September 2006.

62. This Ruling also does not apply if the finance scheme 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 schemes 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 schemes 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

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### Application of this Ruling

63. Subject to exclusions set out in paragraph 8, this Ruling applies only to Growers who are accepted to participate in the Project and who have executed an Avolot Management Agreement and Licence Agreements on or after 1 July 2006 and on or before 30 September 2006.

64. The Grower's 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 Grower's application to enter the Project is accepted and the Project has commenced.

### **The Simplified Tax System (STS)**

#### ***Division 328***

65. 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 a Grower who was an 'STS taxpayer' prior to the 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method' – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*).

66. For such Growers, a reference in this Ruling to an amount being deductible when 'incurred' will mean that amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

### **25% Entrepreneurs tax offset**

#### ***Subdivision 61-J***

67. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides for a tax offset of up to 25% 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***

68. 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.

**Deductions for Management Fees, Licence Fees, Interest, Loan Application Fee and Marketing Costs****Section 8-1 and section 25-25**

69. A Grower (not a Joint Venturer) who is accepted into the Project on or after 1 July 2006 and on or before 30 September 2006 may claim deductions, on a per Avolot basis, for the following expenditure set out in the table below.

<b>Allowable Deductions</b>	<b>Year ended 30 June 2007</b>	<b>Year ended 30 June 2008</b>	<b>Year ended 30 June 2009</b>
<b>Management Fees</b>	\$11,550 See Notes (i), (ii) & (v)	Amount incurred See Notes (i), (ii) & (v)	Amount incurred See Notes (i), (ii) & (v)
<b>Licence Fees</b>	\$700 See Notes (i), (ii) (iii) & (v)	\$700 See Notes (i), (ii) & (v)	\$700 See Notes (i), (ii) & (v)
<b>Marketing and Sale Costs</b>	Amount incurred See Notes (i), (iv) & (v)	Amount incurred See Notes (i), (iv) & (v)	Amount incurred See Notes (i), (iv) & (v)
<b>Interest on loans with Timbercorp Finance Pty Ltd</b>	As incurred See Notes (v) & (vi)	As incurred See Notes (v) & (vi)	As incurred See Notes (v) & (vi)
<b>Loan Application Fee for loans with Timbercorp Finance Pty Ltd</b>	Must be calculated See Note (vii)	Must be calculated See Note (vii)	Must be calculated See Note (vii)

**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.
- (ii) The Management Fees and the Licence Fees shown in the Avolot Management Agreement and the Licence Agreements are deductible in full in the year incurred. The amount deductible for the Management Fee in the 2008 and the 2009 years is uncertain. For the 2008 year it will consist of a fixed amount of \$3,000 plus a contingent amount based on a percentage of 'Net Sales Proceeds'. For the 2009 year it will consist of the estimated operating cost plus a contingent amount based on a percentage of 'Net Sales Proceeds'. TSL

- will inform Growers of the Management Fee payable for these years.
- (iii) For a Grower accepted on or after 1 July 2006 and on or before 30 September 2006, the deduction for the licence fee is \$58.34 per month for each month or part month that the Grower is licensed to use the land. This will mean that only Growers accepted during July 2006 can claim the full \$700 payable for the year ended 30 June 2007. See paragraphs 96 and 97.
  - (iv) These costs which are uncertain, include Marketing Fees, Commissions, Promotional Levy and other Costs. TSL will inform Growers of the amount and composition of the marketing costs payable for these years.
  - (v) 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 101). 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.
  - (vi) 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.
  - (vii) 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.

### **Joint Venturers**

70. If a Joint Venturer 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.

71. A Joint Venturer may claim deductions under section 8-1 for the expenditures, set out in the table and Notes in paragraph 69, as follows:

*First Joint Venturer*

- for the year ending 30 June 2007, \$11,550 incurred in respect of Management Fees;
- for the year ending 30 June 2008, 55% of the amount incurred in respect of deferred management fees set out in subparagraphs 51(ii);
- for each of the years ending 30 June 2007, 2008 and 2009, 55% of the amount incurred on Marketing and Sale Costs set out in subparagraph 51(v);
- for the year ending 30 June 2007, licence fees set out in subparagraph 51(v), however, see note (iii) under paragraph 67;
- for the years ending 30 June 2007, 2008 and 2009, any interest incurred on funds borrowed from Timbercorp Finance Pty Ltd.

*Second Joint Venturer*

- for the years ending 30 June 2008 \$3,000 incurred in respect of fixed management Fees, and 45% of the amount incurred in respect of deferred management fees set out in subparagraph 51(ii);
- for the year ending 30 June 2009, 100% of the amount incurred in respect of management fees set out in subparagraph 51(iii);
- for each of the years ending 30 June 2008 and 2009, \$700 incurred in respect of Licence Fees set out in subparagraph 51(vii);
- for each of the years ending 30 June 2007, 2008 and 2009, 45% of the amount incurred on Marketing and Sale Costs set out in subparagraph 51(v);

72. First Joint Venturer can also claim a deduction for the years ending 30 June 2007, 2008 and 2009 in respect of the Loan Application Fee, payable to Timbercorp Finance Pty Ltd, under subsection 25-25(1) (see Note (vi) above). Each Joint Venturer can also claim deductions for its proportional share of the horticultural plant write-off as explained in paragraphs 73 to 75.

**Deductions for capital expenditure**

***Division 40***

73. Each Grower will also be entitled to tax deductions relating to the Avocado Trees planted on the Avolot. If the Grower is registered

or required to be registered for GST, amounts of outgoings would need to be adjusted as relevant for GST (for example input tax credits): Division 27.

74. An Avocado Tree is considered to be a 'horticultural plant' as defined in subsection 40-520(2). A Grower holds a licence to cultivate the Avocado Trees on a designated area of land called an Avolot for the growing of Avocados for commercial gain. As a Grower holds the Avolot 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.

75. The deduction is determined using the formula in section 40-545. Avocado Trees have an 'effective life' of 20 years and for the purposes of section 40-545, the result is a straight-line write-off at a rate of 13%. The deduction is allowable when the Avocado Trees enter their first commercial season (section 40-530, item 2). TSL will advise Growers about the amount of tax deduction that they are entitled to each year in relation to the establishment of Avocado Trees.

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

#### ***Section 35-55 – exercise of Commissioner's discretion***

76. A Grower, who is an individual accepted into the Project by **30 September 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 Growers who are individuals and:

- not Joint Venturers, and have taken a minimum allocation of 3 Avolots, for the income years ending **30 June 2007 to 30 June 2008**;
- Joint Venturers, and have taken a minimum allocation of 7 Avolots, for the income year ending **30 June 2007**.

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. **This discretion does not apply to Growers who take less than the minimum allocation of 3 Avolots in respect of individuals not in joint venture, and 7 Avolots in respect of individuals in Joint Venture, and therefore, should apply for a Private Ruling.**

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

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



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- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF;
- 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.

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**Commissioner of Taxation**

26 April 2006

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## 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?

78. For the amounts set out in the Ruling section above to constitute allowable deductions the Grower's horticulture activities of cultivating and harvesting Avocados for eventual sale as a participant in the 2006 Timbercorp Avocado Project must amount to the carrying on of a business of primary production.

79. Where there is a business, or a future business, the gross proceeds from the sale of the Avocados 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.

80. For schemes such as the 2006 Timbercorp Avocado 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 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.

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

- the Grower has an identifiable interest in land (by lease) or rights over the land (by licence) on which the Grower's Avocado Trees are established;
- the Grower has a right to harvest and sell the harvested Avocados from the licensed Avolots;
- the horticulture activities are carried out on the Grower's behalf;
- the horticulture activities of the Grower are typical of those associated with a horticulture business; and
- the weight and influence of general indicators point to the carrying on of a business.

82. In this Project, each Grower enters into an Avolot Management Agreement and Licence Agreements.

83. Under the Licence Agreements (licence) each individual Grower will have rights over 3 or more specific and identifiable areas of 0.25 hectares of land. The licence provides the Grower with an ongoing interest in the specific Avocado crop on the licensed area for the term of the Project. Under the licence the Grower must use the land in question for the purpose of carrying out horticulture activities, and for no other purpose. The licence allows TSL to come onto the land to carry out its obligations under the Avolot Management Agreement.

84. Under the Avolot Management Agreement TSL is engaged by the Grower to establish and maintain the Grower's Avolots on the Grower's identifiable areas of land during the term of the Project. TSL has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the Avolots on the Grower's behalf.

85. TSL is also engaged to harvest and sell, on the Grower's behalf, the harvested Avocados grown on the Grower's Avolots.

86. 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.

87. 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 harvested Avocados 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.

88. The pooling of harvested Avocados grown on the Grower's Avolots with the harvested Avocados of other Growers is consistent with general agricultural practices. Each Grower's proportionate share of the Proceeds of the pooled Avocados will reflect the proportion of the Avocados harvested from their Avolots and contributed to the pool.

89. TSL's services are also consistent with general horticultural practices. They are of the type that would be found in horticulture ventures and be said to be businesses. The 3 or more Avolots that a Grower is required to subscribe for is of a size and scale to allow it to be commercially viable.

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

91. The horticulture 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 horticulture activities in the 2006 Timbercorp Avocado Project will constitute the carrying on of a business.

## **The Simplified Tax System**

### ***Division 328***

92. 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.

93. 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 Rulings TR 2002/6 and 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***

94. Consideration of whether the fees and expenses payable under the Avolot Management Agreement, Avocado Marketing Agreement and the Licence Agreements 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.

95. The fees payable under the Avolot Management Agreement, Avocado Marketing Agreement and the Licence Agreements will relate to the gaining of income from the Grower's horticulture business (see above), and hence have a sufficient connection to the operations by which income (from the sale of harvested Avocados) 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 fees is identifiable from the scheme. The fees appear to be reasonable and, other than as discussed in paragraphs 96 and 97, the fees have no capital component. The tests of deductibility under the first limb of section 8-1 are met and, subject to paragraphs 96 and 97, the exclusions do not apply.

96. 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 Licence fee payable by a Grower for the year ended 30 June 2007 will be capital expenditure.

97. Therefore, if a Grower enters the Project on or before 31 July 2006 the 'Licence Fee' of \$700 payable on application for the period to 30 June 2007 will be deductible in full. However, Growers' accepted to participate in the Project on or after 1 August 2006 and on or before 30 September 2006, will not be entitled to the full deduction. The deduction will be calculated on a pro-rata monthly basis of \$58.34 for each month or part month that the Grower is licensed to use the land.

## **Interest deductibility**

### **Section 8-1**

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

98. 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.

99. The interest incurred for the year ended 30 June 2007 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations – the cultivation and growing of Avocado Trees and the licence of the land on which the Avocado Trees 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*

100. 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 schemes where all details and documentation have been provided to, and examined by the Tax Office.

### **Prepayment provisions**

#### ***Sections 82KZL to 82KZMF***

101. 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 services under the Avolot Management Agreement or the licensing of land under the Licence Agreements) 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***

102. Under the Scheme 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 Scheme.

103. However, sections 82KZME and 82KZMF may have relevance if a Grower in this Project prepays some or all of the expenditure payable under the Avolot Management Agreement and the Licence Agreements or prepays 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.

104. 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***

105. 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 Avocado Trees 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***

106. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for Growers who are individuals and:

- not in Joint Venture, and have taken a minimum allocation of 3 Avolots, for the income years ending **30 June 2007 to 30 June 2008**;
- in Joint Venture, and have taken a minimum allocation of 7 Avolots, for the income year ending **30 June 2007**;

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 these income years:

- 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 horticulture 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.

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 of the ITAA 1936 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 of the ITAA 1936 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 2006 Timbercorp Avocado 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 69 to 75 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.

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 Avocados. 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) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.



## Appendix 2 – Detailed contents list

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

PR 2006/57; TR 97/11; TR 98/22;  
TR 2000/8; TR 2001/14;  
TR 2002/6; TR 2002/11;

*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
- 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
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 40
- ITAA 1997 40-515(1)(b)
- ITAA 1997 40-520(2)
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