



# ***PR 2006/74 - Income tax: 2006 Timbercorp Mango Project - Early Growers (to 15 June 2006)***

 This cover sheet is provided for information only. It does not form part of *PR 2006/74 - Income tax: 2006 Timbercorp Mango Project - Early Growers (to 15 June 2006)*

 This document has changed over time. This is a consolidated version of the ruling which was published on *10 May 2006*



## Product Ruling

### Income tax: 2006 Timbercorp Mango Project – Early Growers (to 15 June 2006)

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#### **ⓘ 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

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 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

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 Mango Project' or simply as 'the Project'.

### Relevant taxation provision(s)

2. The relevant 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;
- 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);
- sections 82KZME and 82KZMF of the ITAA 1936; and
- Part IVA of the ITAA 1936.

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 consists of the entities more specifically identified in the Ruling part of this Product Ruling 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 the Project agreements these entities are referred to as 'Participant Growers' but in this Ruling, they 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 are accepted to participate in the Project after 15 June 2006;
- entities who finance their participation in the Project through loans with Timbercorp Finance Pty Ltd other than those described at paragraphs 63 to 66 of this Product Ruling;
- entities who enter into an arrangement with Timbercorp Securities Limited to pay their 'Application Moneys' in instalments; 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 at paragraphs 17 to 69.

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 10 May 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 2008. The Ruling continues to apply, in respect of the relevant 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 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 received on 16 February 2006 and additional correspondence and emails dated 4, 19, 20 and 27 April 2006 and 1 May 2006;
- Draft Product Disclosure Statement for the 2006 Timbercorp Mango Project ('PDS'), received on 16 February 2006, prepared for Timbercorp Securities Limited ('TSL'), ('the Responsible Entity');
- The **Constitution** of the 2006 Timbercorp Mango Project, received on 16 February 2006;
- Drafts of Orchard 1 Head Lease, Orchard 2 Head Lease and Orchard 3 Head Lease between Mango Land Pty Ltd ('Land Owner') and TSL in respect of the Dimbulah Property, the Mataranka Property and the Katherine Property, received on 16 February 2006;
- Drafts **Orchard 1 Licence Agreements, Orchard 2 Licence Agreements and Orchard 3 Licence Agreements ('Licence Agreements')** between TSL, the Land Owner and each Participant Grower, received on 16 February 2006 and amended on 4 April 2006;
- Draft **Grower PBR Sub-licence & Marketing Deed** between each Participant Grower, Mangocorp Management Ltd ('Mangocorp Management') and TSL, received on 16 February 2006;

- Draft Compliance Plan of the 2006 Timbercorp Mango Project, received on 16 February 2006;
- Draft **Mangolot Management Agreement** between a Participant Grower and TSL, received on 16 February 2006;
- Draft Management Plan, received on 16 February 2006;
- Draft Management Agreement between TSL and Mangocorp Management, received on 16 February 2006;
- Draft Mango Orchard Management Agreement for the 2006 Timbercorp Mango Project between Mangocorp Management, Ooloo Farm Management Pty Ltd ('Ooloo Farm Management'), Harvest Markets Pty Ltd ('Harvest Markets') and Timbercorp Ltd, received on 16 February 2006;
- Draft Capital Works Agreement for the 2006 Timbercorp Mango Project between Ooloo Management, Harvest Markets, the Land Owner and Timbercorp Ltd, received on 16 February 2006;
- Draft Custody Agreement between TSL and the Trust Company of Australia Limited ('the Custodian'), received on 16 February 2006;
- Sub-Licence & Marketing Agreement between Harvest Markets, Mangocorp Management and Timbercorp Ltd, received 19 April 2006; and
- 2006 Timbercorp Projects Finance Package, which includes the **Loan Application Form**, and Loan Explanation and Loan Terms, received on 16 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 a Grower 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 below.

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

**Overview**

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

Location	Dimbulah ('Dimbulah Property' or 'Orchard 1') in North Queensland; and Mataranka ('Mataranka Property' or 'Orchard 2') and Katherine ('Katherine Property' or 'Orchard 3') both in Northern Territory.
Type of business to be carried on by each participant	Commercial growing and cultivation of Mango trees for the purpose of harvesting Mangoes for sale.
Number of hectares offered for cultivation	303.25
Size of each Mangolot	0.25 hectares, of which consist of approximately 0.074 hectares of the Orchard 1, 0.084 hectares of the Orchard 2 and 0.092 hectares of the Orchard 3.
Minimum allocation	2 'Mangolots' (TSL may allocate less at its absolute discretion.)
Minimum subscription	None
Number of trees per hectare	A weighted average of 280 Mango Trees per hectare
Term of the Project	20 years
Initial cost per 'Mangolot'	\$8,000
Ongoing costs	Annual 'Licence Fees'; and Annual 'Management Fees'.
Other costs	Deferred management fees; Royalty Fees; The PBR & Marketing Fee; Incentive fees; and Marketing and sales costs.

21. The Project will be registered as a managed investment scheme under the *Corporations Act 2001*. Timbercorp Securities Limited ('TSL') has been issued with an Australian Financial Services Licence and will be the Responsible Entity for the Project.



22. An offer to participate in the Project will be made through a Product Disclosure Statement ('PDS'). The offer under the PDS is for 303.25 hectares in the Project. Participants will be invited to subscribe for at least two 'Mangolots'. The area of each 'Mangolot' is 0.25 hectares. However, TSL reserves the right to accept 'Applications' for less than two 'Mangolots'.

23. To participate in the Project 'Applicants' must complete the Application and Power of Attorney form at the back of the PDS, and lodge the completed Application Form together with the relevant 'Application Moneys' on or before 15 June 2006.

24. Under the Power of Attorney, TSL will execute the 'Grower Agreements' on behalf of 'Applicants' who are accepted to participate in the Project as Growers. TSL will allocate 'Mangolots' to the Grower and place the Grower's details in a 'Register'.

25. As an alternative to participation by a Grower as a single entity, the terms of the Constitution, the Mangolot Management Agreement, the Grower PBR Sub-Licence & Marketing Deed and the Licence Agreements provide that two entities may participate in the Project as Joint Venturers on the terms specified in the Constitution.

26. A Grower accepted on or before 15 June 2006, will commence participation as an 'Early Grower'. **This Ruling only applies in respect of 'Early Growers' who are accepted into the Project from the date this Product Ruling issued to 15 June 2006. Note that a separate Product Ruling PR 2006/75 will issue for Growers accepted into the Project from 1 July 2006 to 15 June 2007.**

## Constitution

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

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

29. Among other things, the Constitution sets out details of the following:

- the offer under the PDS (clause 2);
- irrevocable appointment of the 'Responsible Entity' as the Grower's agent, representative and attorney (clause 3);

- the 'Responsible Entity' is to hold property of the Grower (clause 5);
- procedures relating to 'Applications' (clause 6);
- the absolute discretion of the 'Responsible Entity' to refuse 'Applications' (clause 7);
- the effect of an 'Applicant's' 'Application' being accepted by the 'Responsible Entity' (clause 8);
- preparation and execution of the Licence Agreements, the Grower PBR Sub-Licence & Marketing Deed and the Mangolot Management Agreement by the 'Responsible Entity' and release of the 'Application Moneys' (clause 9);
- preparation and issuing of the 'Mangolot' Statements' to a Grower and the setting up and maintenance of a 'Register' of Growers (clause 10);
- the 'Responsible Entity'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 the 'Responsible Entity' may hold for the Grower (clause 12);
- procedures relating to processing and the sale of 'Crop' and distributions from the 'Agency Account' of 'Proceeds' and pooling of amounts (clause 13);
- the right of the 'Responsible Entity' 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 and the retention by the 'Responsible Entity' of the Licence Agreements, the Grower PBR Sub-Licence & Marketing Deed and the Mangolot Management Agreement (clause 18). This includes the right of Grower to obtain a copy of the above agreements by written request to the 'Responsible Entity' (clause 18.2);
- Termination of 'Agreements' and consequences of termination in the event of default and procedures relating to sale of 'Defaulting Growers' Mangolots (clauses 18.3 and 18.4);
- the right of a 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 'Mangolots' (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 the 'Responsible Entity' (clause 25); and
- termination of the Project (clause 26).

30. Clause 6.4 of the Constitution outlines that an 'Applicant' may be able to pay their 'Application Moneys' by instalments. **This Product Ruling does not apply to any 'Applicant' who enters into an arrangement to pay their 'Application Moneys' by instalments.**

## Joint Venture

31. The Constitution also provides for two entities to participate in the Project as 'Joint Venturers' (clause 29).

32. The 'First Joint Venturer' will be solely responsible for paying the following fees and other amounts:

- (i) 100% of the management fees payable for the 'Financial Year' ended 30 June 2006 (which fees are included in the 'Application Money');
- (ii) 51% of the management costs payable (other than the deferred management fees) under the Mangolot Management Agreement in respect of management services provided in all 'Financial Years' commencing on and from the 2010 'Financial Year';
- (iii) 51% of all Licence Fees payable under the Licence Agreements in all 'Financial Years', commencing on and from the 2010 'Financial Year';
- (iv) 51% of the deferred management fees; and
- (v) 51% of all fees and costs payable under the Grower PBR Sub-Licence & Marketing Deed including the 'PBR & Marketing Fee' and the 'Royalty Fees'.

33. The 'Second Joint Venturer' will be solely responsible for paying the following fees and other amounts:

- (i) 100% of the management fees (other than the deferred management fees) payable in respect of management services provided in the 2007-2009 'Financial Years';
- (ii) 100% of Licence Fees payable under the Licence Agreements in the 2007-2009 'Financial Years';

- (iii) 49% of the management costs and the Licence Fees payable in respect of management services provided in all 'Financial Years', commencing on and from the 2010 'Financial Year';
- (iv) 49% of all deferred management fees; and
- (v) 49% of all fees and costs payable under the Grower PBR Sub-Licence & Marketing Deed including the 'PBR & Marketing Fee' and the 'Royalty Fees'.

34. The 'Joint Venturers' will be responsible for paying their 'Prescribed Proportion' of any incentive fees payable by the 'Joint Venture' under the Mangolot Management Agreement.

35. Each 'Joint Venturer' indemnifies the other against any losses or liability exceeding its respective 'Prescribed Proportion' by reason of any joint liability incurred or joint loss sustained in connection with any contract or arrangement entered into by the Joint Venture, subject to the terms and conditions set out in clause 29.5(a).

36. Clause 29.5 and clause 29.6 also set out certain obligations and rights of the 'Joint Venturers'.

### **Compliance Plan**

37. As required by the *Corporations Act 2001*, the 'Responsible Entity' has prepared a Compliance Plan. The purpose of the Compliance Plan 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 a Grower are protected.

### **Leases**

38. The Leases which consist of the Orchard 1 Head Lease, the Orchard 2 Head Lease and the Orchard 3 Head Lease (the 'Head Leases'), set out the terms and conditions under which the Land Owner will lease the 'Land' and 'Water Licences' to TSL (the 'Lessee') for the 'Term' of the Project. The 'Land' and 'Water Licences' for the Project are owned or acquired by the Land Owner.

39. The 'Land' consists of 3 distinct areas: 'Dimbulah Property' also known as 'Orchard 1' (a mango orchard of approximately 90 hectares in Dimbulah in Queensland, established on or about 30 September 2005), 'Mataranka Property' also known as 'Orchard 2' (a mango orchard of approximately 101.25 hectares in Mataranka in Northern Territory, established on or about 28 February 2005) and 'Katherine Property' also known as 'Orchard 3' (an area of approximately 122 hectares in Katherine in Northern Territory, will be established as a mango orchard on or about 31 October 2006).

40. Under the terms and conditions contained in the Head Leases, the Lessee must only use the 'Land' in accordance with the Constitution, the Mangolot Management Agreement, the Grower PBR Sub-Licence & Marketing Deed and the Licence Agreements (clause 5.1). The Lessor consents and authorises the Lessee to enter into Licence Agreements with the Growers (clause 9.2).

## **Licence Agreements**

41. TSL will divide the 'Land' into allotments, known as 'Mangolots'. Each 'Mangolot' is defined as a stapled lot consisting of a separately identifiable area of 0.25 hectares and will be located partly on 'Dimbulah Property' (approximately 0.074 hectares), partly on 'Mataranka property' (approximately 0.084 hectares) and partly on 'Katherine Property' (approximately 0.092 hectares). A 'Mangolot' includes the 'Mango Trees' planted or to be planted, the 'Capital Works' and the 'Water Licences' attributed to the Project. A Grower is required to enter into separate Licence Agreements with TSL and the Land Owner in respect of each of the above properties.

42. Effective from the 'Commencement Date' TSL grants the Licence Agreements to the Grower to use and occupy their Mangolots for growing, cultivating and harvesting 'Mangoes' for sale.

43. TSL must fully exploit the 'Water Licences' to enable water to be supplied to the 'Mangolots' for the benefit of all the Growers during the 'Term' of the Project (clause 3.2).

44. In summary, the Licence Agreements also set out provisions relating to:

- the 'Term' (clause 4.1);
- condition precedents that the Grower enters into certain other agreements including the Mangolot Management Agreement with TSL and the Grower PBR Sub-licence & Marketing Deed (clause 6.1);
- the 'Licence Fees' payable by a Grower (clause 7);
- the obligations and rights of TSL (clause 5) the Grower's obligations (clause 8), and the Land Owner's obligations and rights (clause 9);
- events which may trigger early termination of the 'Agreements' by the Grower or TSL (clauses 10 and 12); and
- provisions dealing with damage to or reduction in the viability of the Grower's 'Mangolot' (clauses 10.3 and 10.4).

**Mangolot Management Agreement**

45. Under the Agreement, a Grower will engage TSL as an independent contractor to cultivate the Grower's 'Mangolots' and carry out the 'Orchard Services' in accordance with the 'Management Plan' and 'Best Horticultural Practice' (clause 4).

46. TSL will carry out the following 'Orchard Services' in the period ending 30 June 2006:

- Infrastructure Management Services, to be carried out from the 'Commencement Date' in respect of 'Orchard 1' and 'Orchard 2' to the extent that the 'Pre-Plant Capital Works' have been completed (clauses 5.2(a) to 5.2(f)(iii));
- Administrative and other Management Services, commencing from the 'Commencement Date' (clauses 5.2(g) to 5.2(m)); and
- Mango Tree Management Services. These services are related to the maintenance of established Mango trees on the 'Mangolots' situated on 'Orchard 1' and 'Orchard 2' from the 'Commencement Date' (clauses 5.2(n) to 5.2(bb)(iii)).

47. During each subsequent 'Financial Year' of the Project TSL will carry out the services, listed in clauses 5.2A(a) to 5.2A(dd). TSL will test the 'Mangoes' and, where they are ready for harvesting, harvest the 'Mangoes' and transfer the harvested 'Mangoes' to a 'Sorting and Packing Facility' nearest to the 'Orchard' for processing and storing for sale (clause 6).

48. The Grower agrees that the 'Mangoes' and 'Crop' and the proceeds of sale of all the 'Crop' derived under the Grower PBR Sub-Licence & Marketing Deed will be divided pro rata according to the 'Participating Interest' of each of the Growers in the Project in the 'Crop' (clause 9.1(a)).

49. Under the Agreement, the Grower authorises TSL to cause Mangocorp Management to market and sell the Growers' interest in the 'Crop' in accordance with its obligations under the Grower PBR Sub-Licence & Marketing Deed (clause 9.1(b)).

50. On behalf of the Growers in the Project, TSL will be responsible for obtaining and keeping policies of insurance with a reputable insurer against damage to the 'Orchard' provided that the cost of any such insurance is economically justified. Insurance over the 'Orchard' does not include crop insurance unless specifically agreed between TSL and the Grower from year to year (clause 14).

51. Among other things, the Mangolot Management Agreement also sets out details of the following:

- certain administrative services to be provided to the Growers during the 'Term' of the Project (clause 10);

- the requirement for TSL to provide an annual report to Growers no later than 4 months after the end of each financial year of the Project (clause 15);
- events that may trigger early termination of this Agreement (clause 17); and
- dispute resolution procedures (clause 20).

## **Grower PBR Sub-Licence & Marketing Deed**

52. Under this Deed, a Grower is granted a non-exclusive sub-licence to cultivate, maintain, harvest, ripen, pack, maintain and market and sell the Mangoes through Mangocorp Management which engages Harvest Markets as the exclusive marketer of the Mangoes.

53. In consideration for the PBR rights granted, the Grower will pay royalty fees (3.3%) of the 'Wholesale Price', and other marketing and sale costs and a 'PBR & Marketing Fee' of (1.65%) of the 'Proceeds of Sale' of the 'Crop' in each 'Financial Year' of the Project payable out of and at the time the 'Proceeds' are received by TSL, before accounting to the Grower (clauses 3.2 and 3.3).

## **Management Agreement**

54. TSL engages Mangocorp Management as an independent contractor to manage and administer the Project and, to manage, direct and conduct the 'Project Operations' on behalf of the Grower and to perform the 'Orchard Services'.

## **Mango Orchard Management Agreement**

55. Mangocorp Management engages Oolloo Farm Management, a subsidiary of Harvest Markets as an independent contractor to provide management and cultivation services including the 'Orchard Services' (set out in clause 4), 'Harvesting Services' (set out in clause 5) and 'Sorting & Packing Services' (set out in clause 6). Oolloo Farm Management must carry out the provision of these services in accordance with a 'Management Plan'.

56. Under the Part 4 of the Agreement, Mangocorp Management also engages Harvest Markets as an independent contractor to provide 'Ripening Services' for the 'Mangoes' as soon as reasonably practicable following delivery of them to the 'Ripening Facilities' (clause 7).

## **Sub-Licence & Marketing Agreement**

57. Mangocorp Management is granted a non-exclusive sub-licence to propagate, plant, cultivate, ripen, pack, maintain and market and sell through Harvest Market the 'Calypso' 'Mangoes' for the benefit of, and to provide management services to, the Project.

**Capital Works Agreement**

58. Mango Land Pty Ltd (the Land Owner) engages Oolloo Farm Management as an independent contractor to undertake the 'Capital Works' necessary to establish 'Orchard 3' on the 'Land' associated with the establishment of the 'New Orchard' including preparation of the 'Land', assistance with the installation of the irrigation infrastructure and planting the 'Trees'.

59. Oolloo Farm Management will replace and replant, at its cost, any 'Mango Trees' which fail in the first 6 months after planting and where such failure is due to any breach or default by Oolloo Farm Management under the agreement, or caused by Oolloo Farm Management; but not those 'Mango Trees' that fail due to an event of 'Force Majeure' (clause 4.2(c)).

**Pooling of amounts and distribution of 'Proceeds'**

60. Both the Constitution (clause 13) and the Mangolot Management Agreement (clause 9.1) set out provisions relating to the pooling of amounts from the sale of the Grower's 'Mangoes' or 'Crop' and the distribution of 'Proceeds' from that sale or from insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only a Grower who has contributed 'Mangoes' or 'Crop' or insurance proceeds to the pool making up the 'Proceeds' is entitled to benefit from distribution from those 'Proceeds'; and
- any pool of 'Mangoes' or 'Crop' or insurance proceeds must consist only of 'Mangoes' or 'Crop' or insurance proceeds contributed by a Grower in the 2006 Timbercorp Mango Project.

**Fees**

61. A Grower will pay the annual fees and charges **per Mangolot** including, the management fees set out in clause 13 of the Mangolot Management Agreement, the commission and expenses set out in clause 3 of the Grower PBR Sub-Licence & Marketing Deed and the 'Licence Fee', set out in clause 7 of the Licence Agreements. These are as follows:

*Mangolot Management Agreement*

- for services to be provided in the period from the Commencement Date to 30 June 2006 a fee of **\$8,000** is payable upon 'Application';



- for services to be provided in the period from 1 July 2006 to 30 June 2007 a fee comprised of two components is payable. The first component of **\$2,200** is payable on 31 October 2006. The second component is a deferred fee calculated as **1.375% of the 'Proceeds of Sale'** of the 'Crop'. The deferred component is payable in every 'Financial Year' of the Project and at any time that 'Proceeds' are received by TSL;
- for services to be provided in the period from 1 July 2007 to 30 June 2008 a fee comprised of two components is payable. The first component is **\$2,800** payable on 31 October 2007. The second component is a deferred fee calculated as **1.375% of the 'Proceeds of Sale'** of the 'Crop'. The deferred component is payable in every 'Financial Year' of the Project and at any time that 'Proceeds' are received by TSL and is additional to the 1.375% of the 'Proceeds of Sales' payable for the period from 1 July 2006 to 30 June 2007;
- for services to be provided in each subsequent 'Financial Year' after 30 June 2008 a fee based on the **estimated costs** of operating the relevant 'Manglot' is payable on 31 October 2008 and 31 October each year thereafter; and
- an **incentive fee of 27.5%** of 'Net Proceeds' in excess of the 'Incentive Fee Threshold', payable out of 'Net Proceeds' prior to any distribution.

#### *Grower PBR Sub-Licence & Marketing Deed*

- **'Royalty Fee' of 3.3%** of the 'Wholesale Price' and other marketing and sales costs associated with the sale of the 'Crop', deducted by Harvest Markets before accounting for the 'Proceeds of Sale'; and
- a **'PBR & Marketing Fee' of 1.65%** of the 'Proceeds of Sale' of the 'Crop' in each 'Financial Year' of the Project, payable out of and at the time they are received by TSL.

#### *Licence Agreements*

- for the period from the 'Commencement Date' until 30 June 2006, nil;
- for the 'Financial Year' ending 30 June 2007 and 2008, **\$400** is payable on 31 October 2006 and 2007 respectively;
- for the 'Financial Year' ending 30 June 2009 and 2010, **\$600** is payable on 31 October 2008 and 2009 respectively;

- for the 'Financial Year' ending 30 June 2011, **\$700** is payable on 31 October 2010;
- for the 'Financial Year' ending 30 June 2012, **\$1,056** is payable on 31 October 2011; and
- for each subsequent 'Financial Year' during the Term an amount equal to the 'Licence Fees' payable on the immediately proceeding 31 October, 'Indexed' is payable on 31 October of the relevant 'Financial Year'.

62. As noted above, from the 2009 'Financial Year', the annual fee will consist of an amount for the estimated costs of operating the 'Mangolot'. The estimated costs of operating the 'Mangolot' for a 'Financial Year' will include an adjustment for the difference between the actual costs and the estimated costs of managing the 'Mangolot' during the preceding 'Financial Year'.

### **Finance**

63. A Grower can fund their involvement in the Project by borrowing from independent sources or borrowing from Timbercorp Finance Pty Ltd ('the Financier'), a lender associated with the Responsible Entity.

64. The Financier will offer 'Loan Terms' on a commercial basis and approve 'Loan Amounts' up to 90% of the 'Application Money'. The Financier will provide a Grower with loans on a full recourse basis and will pursue legal action against any defaulting borrowers. Details of the loans that will be offered to a Grower by the Financier are set out in the 'Loan Application Form' and 'Loan Explanation and Loan Terms'.

65. Common features contained in the 'Loan Terms' are:

- the Financier will lend to the Grower the 'Loan Amount' by paying it to TSL as payment of the Grower's balance of the 'Application Money' for 'Mangolots' and the 'Loan Application Fee' as described in the 'Application Form';
- the Grower is entitled to repay the whole or part of the 'Total Amount Owning' without penalty for early repayment;
- in the event that any amount is overdue, the Financier may charge interest at the 'Higher Interest Rate'; and
- 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 in the Project, including the 'Mangolots' and the 'Project Agreements'.

66. The terms specific to the 'Loan Term' offered by the Financier are summarised below. Rates shown are indicative.

**Type A – loans with equal monthly instalments of principal and interest**

- 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; and
- an application and administration fee of \$250 is payable plus stamp duty, if any, on the 'Loan Amount'.

**Type B – principal repayments over 12 months, interest free**

- these loans are for a term of 12 months repayable by 12 equal monthly instalments of principal; and
- an application and administration fee of \$250 is payable plus stamp duty, if any, on the 'Loan Amount'.

67. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with the Financier that materially differs from that set out in the 'Loan Application Form' and 'Loan Explanation and Loan Terms' provided to the Tax Office by TSL with the application for this Product Ruling.

68. Growers cannot rely on any part of this Ruling if the 'Application Money', is not paid in full on or before 15 June 2006 by the Grower or, on the Grower's behalf, by any lending institution, including the 'Financier'. Where an application is accepted by TSL, and that application is 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 TSL by the relevant lending institution on or before 15 June 2006.

69. 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 of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 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 the 'Financier', are involved or become involved in the provision of finance to a Grower for the Project.

## **Ruling**

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### **Application of this Ruling**

70. Subject to paragraph 7, this Ruling applies only to a Grower who is accepted to participate in the Project and who has executed a Mangolot Management Agreement, a Grower PBR Sub-Licence & Marketing Deed and Licence Agreements on or before 15 June 2006.

71. The Grower's participation in the Project must constitute the carrying on of a business of primary production.

72. 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***

73. To be an 'STS taxpayer' a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328 of the ITAA 1997). 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*.

74. For such a Grower, 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***

75. 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***

76. 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 and 'Loan Application Fee'*****Section 8-1, section 328-105 and section 25-25***

77. On a per Mangolot basis, a Grower who is accepted to participate in the Project on or before 15 June 2006 may claim the deductions set out in the Table below.

<b>Fee Type</b>	<b>Year ended 30 June 2006</b>	<b>Year ended 30 June 2007</b>	<b>Year ended 30 June 2008</b>
'Management Fee'	\$8,000 See Notes (i), (ii) & (iii)	Amount incurred See Notes (i), (ii) & (iii)	Amount incurred See Notes (i), (ii) & (iii)
'Licence Fee'	Nil	\$400 See Notes (i), (ii) & (iii)	\$400 See Notes (i), (ii) & (iii)
Interest on loans with Timbercorp Finance Pty Ltd	As incurred See Notes (iii) & (iv)	As incurred See Notes (iii) & (iv)	As incurred See Notes (iii) & (iv)
'Loan Application Fee' for loans with Timbercorp Finance Pty Ltd	Must be calculated – See Note (v)	Must be calculated – See Note (v)	Must be calculated – See Note (v)

**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 Mangolot Management Agreement and the Licence Agreements are deductible in full in the year that they are incurred.
- (iii) This Ruling does not apply to a Grower who chooses to prepay 'Management Fees' or 'Licence Fees' or who chooses, or who is required to prepay interest under a loan agreement (see paragraphs 107 to 110). Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.
- (iv) 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. A Grower who borrows from a lender other than Timbercorp Finance Pty Ltd may request a private binding ruling on the deductibility of the interest incurred.
- (v) The 'Loan Application Fee' payable to Timbercorp Finance Pty Ltd is a borrowing expense and is deductible under section 25-25. 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.

78. A 'Joint Venturer' may claim deductions, on a per Mangolot basis, for the following expenditure set out in the Table and the Notes in paragraph 77:

*First Joint Venturer*

- 100% of the management fee payable for the 'Financial Year' ended 30 June 2006, which is described in subparagraph 32(i);

- 51% of the management fees and the Licence Fees described in subparagraphs 32(ii) and (iii) commencing on and from the 2010 'Financial Year';
- 51% of all of the deferred management fees described in subparagraph 32(iv);
- 51% of the 'Royalty Fee' and 'PBR & Marketing Fee' under the Grower PBR Sub-Licence & Marketing Deed; and
- any interest incurred on funds borrowed from Timbercorp Finance Pty Ltd.

## *Second Joint Venturer*

- 100% of the management fees and the Licence Fees described in subparagraphs 33(i) and (ii) during the 2007-2009 'Financial Years';
- 49% of the management fee and Licence Fees described in subparagraph 33(iii) commencing on and from the 2010 'Financial Year';
- 49% of all of the deferred management fees described in subparagraph 33(iv); and
- 49% of the 'Royalty Fee' and 'PBR & Marketing Fee' under the Grower PBR Sub-Licence & Marketing Deed.

79. A 'First Joint Venturer' can also claim under subsection 25-25(1), in the income years ending 30 June 2006, 2007 and 2008, the 'Loan Application Fee' payable to Timbercorp Finance Pty Ltd.

80. Each 'Joint Venturer' can claim deductions for its proportional share of the incentive fees and all fees and costs payable under the Grower PBR Sub-Licence & Marketing Deed.

## **Deductions for capital expenditure**

### ***Division 40***

81. Each Grower will also be entitled to tax deductions relating to the 'Mango Trees' planted on the 'Mangolot'. 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) under Division 27.

82. A 'Mango Tree' is considered to be a 'horticultural plant' as defined in subsection 40-520(2). A Grower holds a licence to cultivate the 'Mango Trees' on a designated area of land called a 'Mangolot' for the growing of 'Mangoes' for commercial gain. As a Grower holds the 'Mangolot' 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.

83. The deduction is determined using the formula in section 40-545. 'Mango Trees' have an 'effective life' of 30 years and for the purposes of section 40-545, the result is a straight-line write-off at a rate of 7%. The deduction is allowable when the 'Mango Trees' enter their first commercial season (section 40-530, item 2). TSL will notify Growers when their 'Mango Trees' enter their first commercial season and the amount that may be claimed.

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

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

84. 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 a Grower for the income years ending **30 June 2006 to 30 June 2011**. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

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

85. For a Grower who participates in the Project and incurs expenditure as required by the Mangolot Management Agreement and the Sub-lease, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraph 104);
- 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**

10 May 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?

86. For the amounts set out in the Tables above to constitute allowable deductions the Grower's horticultural activities as a participant in the 2006 Timbercorp Mango Project must amount to the carrying on of a business of primary production.

87. Where there is a business, or a future business, the gross proceeds from the sale of the 'Mangoes' or 'Crop' 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.

88. For schemes such as that of the 2006 Timbercorp Mango Project, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As Taxation Ruling TR 2000/8 sets out, these circumstances have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

89. 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 'Mango Trees' are established;
- the Grower has a right to harvest and sell the 'Product';
- the horticultural activities are carried out on the Grower's behalf;
- the horticultural 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.

90. In this Project, each Grower enters into a Mangolot Management Agreement and the Licence Agreements.

91. Under the Licence Agreements each individual Grower will have rights to use one or more homogenous, separately identifiable and stapled areas of land, each known as a 'Mangolot'. The Licence Agreements provide the Grower with an ongoing interest in the specific 'Mango Trees' 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 Agreement allows TSL to come onto the land to carry out its obligations under the Mangolot Management Agreement.

92. Under the Mangolot Management Agreement the Responsible Entity is engaged by the Grower to cultivate and maintain the 'Mango Trees' on the Grower's identifiable area of land during the 'Term' of the Project. Under the Management Agreement and Mango Orchard Management Agreement the management services are sub-contracted to Oolloo Farm Management which has provided evidence that it holds the appropriate professional skills and credentials to provide the services to establish and maintain the 'Mangolot' on the Grower's behalf during the 'Term' of the Project.

93. The Responsible Entity is also engaged to harvest and sell, on the Grower behalf, the 'Mangoes' grown on the Grower's 'Mango Trees', through Harvest Markets.

94. 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.

95. 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 'Mangoes' or 'Crop' 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.

96. The pooling of 'Mangoes' or 'Crop' grown on the Grower's 'Mangolot' with the 'Mangoes' or 'Crop' of other Growers is consistent with general horticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled 'Mangoes' or 'Crop' will reflect the proportion of the 'Mangoes' or 'Crop' contributed from their 'Mangolot'.

97. The Responsible Entity's services are also consistent with general horticultural practices. They are of the type ordinarily found in horticulture ventures that would commonly be said to be businesses. While the size of a 'Mangolot' is relatively small, it is of a size and scale to allow it to be commercially viable.

98. The Grower's degree of control over TSL as evidenced by the Mangolot 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 the Grower's 'Mangolot' and the activities carried out on the Grower's behalf. A Grower is able to terminate arrangements with TSL in certain instances, such as cases of default or neglect.

99. 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 Grower's horticultural activities in the 2006 Mango Timbercorp Project will constitute the carrying on of a business.

## **The Simplified Tax System**

### ***Division 328***

100. 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.

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

## **Deductibility of 'Management Fees' and 'Licence Fees'**

### ***Section 8-1***

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

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

103. The 'Management Fees' and 'Licence Fees' associated with the horticulture activities will relate to the gaining of income from the Grower's business of horticulture (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of 'Mangoes' or 'Crop') 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 'Management Fee'. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

**Interest deductibility****Section 8-1**

*(i) A Grower who uses Timbercorp Finance Pty Ltd as the finance provider*

104. A Grower 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'.

105. The interest incurred for the year ended 30 June 2006 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations – the cultivation and growing 'Mango Trees' and the licence of the land on which the 'Mango 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) A Grower who does NOT use Timbercorp Finance Pty Ltd as the finance provider*

106. The deductibility of interest incurred by a Grower 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**

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

*Application of the prepayment provisions to this Project*

108. 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 of the ITAA 1936 have no application to this Scheme.

109. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Mangolot Management Agreement and/or 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.

110. As noted in the Ruling section above, a Grower who prepays fees or interest is 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***

111. 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 'Mango Trees' is of a capital nature. This expenditure falls for consideration under Division 40.

**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 2011** 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 2011:

- 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 Mango 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 – recouped expenditure**

114. 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 of the ITAA 1997.

#### **Part IVA – general tax avoidance provisions**

115. 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).

116. The 2006 Timbercorp Mango 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 77 to 85 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. A Grower to whom this Ruling applies intends to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the 'Mangoes'. There are no facts that would suggest that a Grower has 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

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

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- 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
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- taxation administration

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