PR 2007/64 - Income tax: 2007 Timbercorp Avocado & Fruit Project - Post 30 June Growers

Product Ruling

Income tax: 2007 Timbercorp Avocado & Fruit Project – Post 30 June Growers

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This publication 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. 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.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product 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 Product Ruling.

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the 2007 Timbercorp Avocado & Fruit Project or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Growers.

3. The class of entities who can rely on those tax benefits consists of entities that are accepted to participate in the scheme specified below on or after 1 July 2007 and on or before 30 September 2007, and which execute relevant Project Agreements mentioned in paragraph 29 on or before 30 September 2007. They must 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.

4. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling 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 are accepted into this Project before 1 July 2007 or after 30 September 2007;
- entities who participate in the scheme through offers made other than through the Product Disclosure Statement;
- entities who enter into finance arrangements with Timbercorp Finance Pty Ltd (the Financier) other than those specified in paragraphs 85 to 87 of this Ruling; or
- Timbercorp Securities Limited (TSL) and its associates.

Superannuation Industry (Supervision) Act 1993

5. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product ruling as to whether investment in this product may contravene the provisions of SISA 1993.

Qualifications

6. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 29 to 90 of this Ruling.

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

- this Product 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 Product Ruling may be withdrawn or modified.

Date of effect

9. This Product Ruling applies prospectively from 20 June 2007, the date this Product Ruling is made. It applies to the specified class of entities that enter into the scheme during the period from 1 July 2007 to on or before 30 September 2007. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities up to 30 June 2010.

10. However the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;

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

11. 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)).

12. 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.

13. 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).

Changes in the law

14. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

15. Entities who are considering participating in the scheme 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

16. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes 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 Product Ruling is issued.

Goods and Services Tax

17. All fees and expenditure referred to in this Product 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.

Ruling

Application of this Ruling

18. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters into the scheme described at paragraphs 29 to 90 of this Ruling.

19. The Grower's participation in the Project must constitute the carrying on of a business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of the Promised Land Lot Licence Agreement and the Ten Mile Lot Licence Agreement (the Lot Licence Agreements), the Lot Management Agreement and the Grower PBR Sub-Licence and Marketing Deed.

20. 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

21. 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 depending on whether the Grower was an 'STS taxpayer' prior to 1 July 2005 and 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*.

22. 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

23. 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

Sections 6-5 and 17-5

24. 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.

Deduction for management fees, licence fees, operating costs, royalties, marketing and sale costs, interest, borrowing costs and capital expenditure

Section 8-1, section 25-25, Division 27 and Subdivision 40-F of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936

25. A Grower may claim tax deductions for the following fees and expenditure on a per Lot basis, as set out in the Table below.

Fee Type	Year ended 30 June 2008	Year ended 30 June 2009	Year ended 30 June 2010
Fixed management fees	$10,000 See Notes (i), (ii) & (iii)	$3,250 See Notes (i), (ii) & (iii)	Nil
Licence fees	Must be calculated – See Notes (i), (ii), (iii) & (iv)	$700 See Notes (i), (ii) & (iii)	$900 See Notes (i), (ii) & (iii)
Annual management fees, operating costs, royalties and marketing and sale costs	As incurred See Notes (i) & (ii)	As incurred See Notes (i) & (ii)	As incurred See Notes (i) & (ii)
Interest on loans with the Financier	As incurred See Notes (iii) & (v)	As incurred See Notes (iii) & (v)	As incurred See Notes (iii) & (v)
Loan Application Fee for loans with the Financier	Must be calculated – See Note (vi)	Must be calculated – See Note (vi)	Must be calculated – See Note (vi)
Establishment of Trees	See Note (vii)	See Note (vii)	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) Subject to Note (iv) in paragraph 25 of this Ruling the management and licence fees, operating costs (including picking costs), royalties and marketing and sale costs payable under the Project Agreements are deductible in full under section 8-1 in the income year that they are incurred.

(iii) This Ruling does not apply to a Grower who chooses to prepay the management and/or licence fees, or who is required to prepay interest under a loan agreement (see paragraphs 104 to 108 of this Ruling). Subject to certain exclusions, 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 *Income Tax Assessment Act 1936* (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 deduction for licence fees in the year ended 30 June 2008 is $58.33 per month for each month or part month during that year that the Grower is granted the licence to use the Lot. This means that the full $700 licence fee payable for the 2008 Financial Year will not be deductible if the Grower is accepted on or after 1 August 2007 (see paragraphs 99 and 100 of this Ruling).

(v) Interest on loans with the Financier is deductible in full under section 8-1 in the income year in which it is incurred. However, the deductibility or otherwise of interest arising from loan agreements entered into with financiers other than the Financier is outside the scope of this Ruling. Prepayments of interest to any lender, including the Financier, are not covered by this Product Ruling. A Grower who enters into an agreement with other financiers and/or prepay interest may request a private ruling on the deductibility of the interest incurred.

(vi) The Loan Application Fee payable to the Financier is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing money that is used or is 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 the Financier is outside the scope of this Ruling.

(vii) Avocado, mango and citrus trees are a 'horticultural plant' as defined in subsection 40-520(2). As a Grower holds the Lot under a licence, the condition in item 3 of subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the Trees is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. As the Avocado and Citrus Trees have an 'effective life' of greater than 13 but fewer than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. As the Mango Trees have an 'effective life' of 30 years or more for the purposes of section 40-545, this results in a straight-line write-off at a rate of 7%. The deduction is allowable in the income year that the relevant Trees enter their first commercial season (section 40-530, item 2). The Responsible Entity will notify the Grower when their Trees enter their first commercial season and the amount that may be claimed.

26. A Joint Venture Grower who is in Joint Venture with another entity may claim deductions, on a per Lot basis, for the following expenditure:

First Joint Venturer

- 100% of the fixed management fee and licence fee (subject to Note (iv) in paragraph 25 of this Ruling) as set out in subparagraphs 81(i) and (ii) of this Ruling payable for the Financial Year ended 30 June 2008;
- 43% of all of the annual management fees, deferred management fees, royalties, marketing and sale costs, and any incentive (performance) fee as set out in subparagraphs 81(v) and (vi) of this Ruling;
- 43% of the operating costs and licence fees as set out in subparagraphs 81(iii) and (iv) of this Ruling commencing on and from the 2013 Financial Year;
- interest and the Loan Application Fee incurred on and payable in respect of funds borrowed from the Financier; and
- 43% of the horticultural plant write-off.

Second Joint Venturer

- 100% of the fixed management fee as set out in subparagraph 82(vii) of this Ruling payable for the Financial Year ended 30 June 2009;
- 100% of the operating costs as set out in subparagraph 82(viii) of this Ruling during the 2008-2012 Financial Years;
- 100% of the licence fees as set out in subparagraph 82(ix) of this Ruling during the 2009-2012 Financial Years;
- 57% of all of the annual management fees, deferred management fees, royalties, marketing and sale costs, and any incentive (performance) fee as set out in subparagraphs 82(xii) and (xiii) of this Ruling;
- 57% of the operating costs and licence fees as set out in subparagraphs 82(x) and (xi) of this Ruling commencing on and from the 2013 Financial Year; and
- 57% of the horticultural plant write-off.

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

Section 35-55 – exercise of Commissioner's discretion

27. A Grower who is an individual entity accepted into the Project on or after 1 July 2007 and on or before 30 September 2007 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 below, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for Growers who are individual entities and:

- not Joint Venturers, and have taken a minimum allocation of 3 Lots, for the income years ending **30 June 2008 to 30 June 2009**; or
- Joint Venturers, and have taken a minimum allocation of 8 Lots, for the income year ending **30 June 2008**.

This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise. **This discretion does not apply to Growers who take less than the minimum allocation of 3 Lots in respect of individual entities not in joint venture, and 8 Lots in respect of individual entities in joint venture. These Growers should apply for a Private Ruling.**

Prepayment provisions and anti-avoidance provisions

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

28. For a Grower who commences participation in the Project and incurs expenditure as required by the Lot Licence Agreements, the Lot Management Agreement and the Grower PBR Sub-Licence and Marketing Deed, 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;
- 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.

Scheme

29. The scheme that is the subject of this Ruling is identified and described in the following documents:

- Application for a Product Ruling received on 15 February 2007 and additional correspondence from the applicant received on 16 March 2007, 20 March 2007, 28 March 2007, 29 March 2007, 3 April 2007, 4 April 2007, 24 May 2007 and 12 June 2007;
- Draft Product Disclosure Statement for the 2007 Timbercorp Avocado & Fruit Project (PDS), undated, to be issued by the Responsible Entity, TSL, received on 15 February 2007, 20 March 2007 and 29 March 2007;
- Draft **Constitution** of the 2007 Timbercorp Avocado & Fruit Project, received on 15 February 2007, 20 March 2007 and 29 March 2007;
- Draft Compliance Plan for the 2007 Timbercorp Avocado & Fruit Project, received on 15 February 2007 and 20 March 2007;
- Draft Lease between OIM #6 Pty Ltd as trustee for the Timbercorp Orchard Trust #6 (OIM #6) (as the Lessor), Timbercorp Limited (as the Lessee), and TSL in relation to the Promised Land Orchard, received on 15 February 2007, 20 March 2007 and 29 March 2007;

- Draft Lease between Mango Land Pty Ltd (as the Lessor) and TSL (as the Lessee) in relation to the Ten Mile Orchard, received on 15 February 2007, 20 March 2007 and 29 March 2007;
- Draft Sub-lease between Timbercorp Limited (as the Sub-lessor), and TSL (as the Sub-lessee) in relation to the Promised Land Orchard, received on 15 February 2007 and 20 March 2007;
- Draft **Promised Land Lot Licence Agreement** and the draft **Promised Land Lot Subsequent Licence Agreement** between each Grower (as the licensee), OIM #6 (as the land owner), TSL (as the licensor) and Timbercorp Limited, received on 15 February 2007 and 20 March 2007;
- Draft **Ten Mile Lot Licence Agreement** and the draft **Ten Mile Lot Subsequent Licence Agreement** between each Grower (as the licensee), Mango Land Pty Ltd (as the land owner) and TSL (as the licensor), received on 15 February 2007 and 20 March 2007;
- Draft **Lot Management Agreement** between each Grower and TSL, received on 15 February 2007, 20 March 2007 and 29 March 2007;
- Draft **Grower PBR Sub-Licence & Marketing Deed** between Mangocorp Management Pty Ltd (Mangocorp), TSL and each Grower, received on 15 February 2007 and 20 March 2007;
- Draft Promised Land Management Agreement between TSL and Avcorp Management Pty Ltd (Avcorp), received on 15 February 2007 and 20 March 2007;
- Draft Ten Mile Management Agreement between TSL and Mangocorp, received on 15 February 2007 and 20 March 2007;
- Draft Promised Land Orchard Management Deed between Avcorp, Simpson Farms Pty Ltd (Simpson Farms), Goodwood Holdings Pty Ltd (Goodwood Holdings), TSL and Timbercorp Limited, received on 15 February 2007 and 20 March 2007;
- Draft Ten Mile Orchard Management Agreement between Mangocorp, Oolloo Farm Management Pty Ltd (Oolloo Farm Management), Harvest Markets Pty Ltd (Harvest Markets) and Timbercorp Limited, received on 15 February 2007, 20 March 2007 and 29 March 2007;

- Draft Management Plans for the years ended 30 June 2007 and 2008, received on 15 February 2007 and 20 March 2007;
- Draft Planting Services Deed between OIM #6, TSL, Avcorp, Simpson Farms and Goodwood Holdings in relation to the Promised Land Orchard, received on 15 February 2007, 20 March 2007 and 29 March 2007;
- Draft Avocado Marketing Agreement between TradingExchange Pty Ltd (TradingExchange) (as joint marketer), Simpson Farms (as joint marketer), Goodwood Holdings, Avcorp, Mangocorp and TSL, received on 15 February 2007 and 20 March 2007;
- Draft Citrus Marketing Agreement between TradingExchange (as marketer), Avcorp and TSL, received on 15 February 2007 and 20 March 2007;
- Sub-Licence & Marketing Agreement between Harvest Markets (as marketer), Mangocorp and Timbercorp Limited, received on 15 February 2007;
- Draft Custody Agreement for the 2007 Timbercorp Avocado & Fruit Project between TSL and the Custodian, received on 15 February 2007; and
- 2007 Timbercorp Projects Finance Package, which includes the **Loan Application Form**, and Loan Explanation and Loan Terms, received on 15 February 2007.

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

30. 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 as follows.

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

Overview

32. Following is a summary of the scheme:

Location	Bundaberg region, south east Queensland
Type of business to be carried on by each Grower	Commercial growing and cultivation of Avocado, Mango and Citrus Trees for the purpose of harvesting Avocados, Mangoes and Citrus for sale
Term of the Project	Approximately 20 years with provision for extension by 2 years if certain cash flow benchmarks are not achieved
Number of hectares offered for cultivation	Approximately 482
Size of each interest (Lot)	0.25 hectares
Minimum allocation per Grower	• for natural persons – 3 Lots • for companies and trusts – 2 Lots • for Joint Venture Growers where the First Joint Venturer is a natural person – 8 Lots (TSL may allocate less at its absolute discretion)
Minimum subscription	None
Number of trees per hectare	Approximately 240
Initial cost per Lot	$10,700
Ongoing costs	• annual licence fees • management fees (including fixed management fees for year ending 30 June 2009, annual management fees and deferred management fees) • operating costs • marketing and sale costs, and • royalties.
Other costs	Incentive (performance) fees

33. The Project will be registered as a Managed Investment Scheme under the *Corporations Act 2001*. TSL has been issued with an Australian Financial Services Licence (Number 235653) and will be the Responsible Entity for the Project.

34. An offer to participate in the Project will be made through the PDS. The offer under the PDS is for approximately 482 hectares which corresponds to 1,928 Lots in the Project. Applicants will be invited to subscribe for the number of Lots described in the table in paragraph 32 of this Ruling which will vary depending on the nature of the Applicant. There is no minimum amount that must be raised under the PDS and TSL will not be accepting oversubscriptions.

35. To participate in the Project Applicants must complete the Application and Power of Attorney Form Booklet attached to the PDS and lodge the completed Booklet together with the relevant Application Moneys on or before 30 September 2007. The Custodian will be appointed under the Custody Agreement to protect the interests of a Grower in their dealings with TSL.

36. 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 also allocate Lots to the Grower and place the Grower's details in a Register.

37. An Applicant accepted to participate in the Project on or after 1 July 2007 and on or before 30 September 2007 will commence participation as a Post 30 June Grower. **This Ruling only applies in respect of Post 30 June Growers. Note that a separate Product Ruling PR 2007/54 has issued for Growers accepted into the Project on or before 15 June 2007.**

38. The land on which a Grower will be growing and cultivating the Trees for the production of Avocados, Mangoes and Citrus (Crop) consists of two properties known as the Promised Land Orchard and the Ten Mile Orchard (together comprising the 'Project Land'), both located in the Bundaberg region in south east Queensland.

39. Each Lot will be approximately 0.25 hectares in size, consisting of approximately 0.16 hectares on the Promised Land Avocado Orchard, 0.02 hectares on the Promised Land Citrus Orchard, 0.03 hectares on the Ten Mile Avocado Orchard, and 0.04 hectares on the Ten Mile Mango Orchard.

40. TSL will grant each Grower a licence pursuant to the Lot Licence Agreements to use identifiable Lots for the Term of the Project.

41. A Grower will also enter into a Lot Management Agreement with TSL to engage TSL to cultivate and maintain the Trees on the Grower's Lots, and be responsible for harvesting the Crop, procuring the processing of the Grower's Crop and selling the Crop.

42. As an alternative to participation by a Grower as a single entity, the terms of the Constitution provide that two entities may participate in the Project as a Joint Venture Grower on the terms specified in the Constitution.

Constitution

43. The Constitution establishes the Project and operates as a deed binding all of the Growers and TSL, as Responsible Entity. The Constitution sets out the terms and conditions under which the Responsible Entity agrees to act and thereby manage the Project. Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project (clause 8.6).

44. The Responsible Entity must hold the Application Money as a bare trustee for the Applicant. The Application Money paid by any Applicant must be accounted for by the Responsible Entity in a special trust account and such amounts must be placed in one or more bank accounts solely for the purposes of depositing the Application Money for this Project (clause 4). Once the Responsible Entity is satisfied that all documents have been executed and the required finance has been approved for an Applicant, the Application Money is released and applied against the fees payable by the Applicant (clause 9.3).

45. Among other things, the Constitution also sets out provisions relating to:

- invitations and offers under the PDS (clause 2);
- the irrevocable appointment of the Responsible Entity as the Grower's agent, representative and attorney (clause 3);
- how the Responsible Entity is to hold property of the Grower (clause 5);
- procedures for processing 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);
- the preparation and execution of the Lot Licence Agreements, Lot Management Agreement and Grower PBR Sub-Licence & Marketing Deed by the Responsible Entity (clause 9);
- the preparation and issuing of Lot 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 for processing and the sale of Crop, 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);
- the Responsible Entity's 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 Lot Licence Agreements, Lot Management Agreement and Grower PBR Sub-Licence & Marketing Deed. This includes the right of a Grower to obtain a copy of the above agreements by written request to the Responsible Entity (clauses 18.1 and 18.2);
- the termination of the Lot Licence Agreements, Lot Management Agreement and Grower PBR Sub-Licence & Marketing Deed, consequences of termination in the event of default, and procedures for the sale of a Defaulting Grower's Lots (clauses 18.3 and 18.4);
- the right of a Grower to inspect certain documents related to their participation in the Project and to give opinions to the Responsible Entity (clause 19.1);
- the assignment and transmission of Lots and restrictions on such assignments and transmissions (clauses 20 and 21);
- procedures for calling a meeting of Growers (clause 22);
- the resolution of complaints made by the Grower in relation to the Project or the Responsible Entity (clause 25); and
- the termination of the Project (clause 26).

46. Clause 6.4 of the Constitution provides that, in certain circumstances, Application Moneys may be paid by instalments. TSL have stated that clause 6.4 will not be invoked. However, for the sake of certainty, this Product Ruling will not apply to any Applicant who enters into an arrangement with TSL to pay their Application Moneys by instalments.

Joint Venture

47. The Constitution also provides for two entities to participate in the Project as Joint Venturers in an unincorporated joint venture (clause 29). Each of the Joint Venturers will be entitled to a Prescribed Proportion of the Joint Venture Assets and any losses realised will be as tenants in common in their Prescribed Proportions. The First Joint Venturer will have a Prescribed Proportion of 43% and the Second Joint Venturer will have a Prescribed Proportion of 57%.

48. A default on the part of one Joint Venturer will constitute a default of both Joint Venturers that comprise the Participant Grower in respect of the Joint Venture Lots. However, the Responsible Entity acknowledges that a Joint Venturer is not liable for any amount or liability exceeding the Joint Venturer's respective Prescribed Portion by reason of any joint liability incurred or joint loss sustained in connection with any contract or arrangement entered into by the Joint Venturer (clause 18.3A).

49. This Ruling will not apply to Joint Ventures comprised of more than two entities.

Compliance Plan

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

Leases and Sub-lease

51. The Project Land and Water Licences for the Project are owned or will be owned by the land owners, namely OIM #6 (Promised Land Orchard) and Mango Land Pty Ltd (Ten Mile Orchard).

52. The Promised Land Orchard will be leased by OIM #6 to Timbercorp Limited and the Ten Mile Orchard will be leased by Mango Land Pty Ltd to TSL. The Leases set out the terms and conditions under which the land owners, as Lessors, will lease the Project Land, the Capital Works and the Water Licences to the respective Lessees, to use and occupy for the Term of the Project.

53. OIM #6 consents to Timbercorp Limited entering into a sub-lease with TSL (clause 11.2 of the Promised Land Lease). Timbercorp Limited will grant to TSL a sub-lease of the Promised Land Orchard, the Capital Works and the Water Licences to use and occupy in accordance with the Sub-lease for the Term of the Project.

54. The land owners consent and authorise TSL to grant licences to the Growers over the Project Land, the Water Licences and the Capital Works (clauses 11.2 of the Promised Land Lease and 9.2 of the Ten Mile Lease).

Lot Licence Agreements

55. The Grower will enter into a Lot Licence Agreement and a Subsequent Lot Licence Agreement with TSL and Mango Land Pty Ltd in respect of the Ten Mile Orchard, and a separate Lot Licence Agreement and Subsequent Lot Licence Agreement with TSL, Timbercorp Limited and OIM #6 in respect of the Promised Land Orchard, to use and occupy their Lots for growing and cultivating the Avocado, Mango and Citrus Trees for the production of Crop for commercial gain. The Lot Licence Agreements and Subsequent Lot Licence Agreements, combined, will have a Term of approximately 20 years but, pursuant to Second Subsequent Licence Agreements, may be extended by TSL for a further 2 years on the same terms and conditions if certain threshold conditions are not met over the period from the Commencement Date of the Lot Licence Agreements until 29 June 2026, and TSL is reasonably satisfied that it is in the best interests of the Grower to extend the Term (clauses 4.1 and 4.2).

56. A Lot is a stapled lot consisting of separately identifiable parts of the Orchard located on two separate properties. The Grower's interest in the Project includes their interests in, and rights in relation to, each stapled and separately identifiable area in the Project Land. Each Lot is approximately 0.25 hectares and consists of approximately 0.18 hectares of the Promised Land Orchard (including Avocado and Citrus Trees) and approximately 0.07 hectares of the Ten Mile Orchard (including Avocado and Mango Trees). Each Grower's Lot also includes their interest in and rights over the Trees, the Capital Works and the Water Licences or Allocations attributed to the Project.

57. The relevant land owners warrant to the Grower that the Orchard on its land has been established and that the necessary infrastructure and other Capital Works have been or will be constructed and carried out (Clause 2.1). OIM #6 must, at its cost, establish or procure the establishment on the Promised Land Orchard of the New Citrus Orchard to be established on approximately 10.3 hectares on or about 31 July 2007, and the New Avocado Orchard to be established on approximately 45.75 hectares on or about 30 September 2007, and construct the necessary infrastructure and carry out the necessary Capital Works to the extent that such works are not already established (clause 2.2 of the Promised Land Lot Licence Agreement).

58. In accordance with the provisions of the Lot Management Agreement, the land owners must also fully exploit their Water Licences to enable water to be supplied to the Lots by TSL for the benefit of all the Growers during the Term of the Project (clause 3.2).

59. The Grower acknowledges that the Capital Works, Trees and the Water Licences on and attaching to the Grower's Lot(s) will at all times remain the property of the relevant land owner (clause 2.3 of the Promised Land Lot Licence Agreement and clause 2.2 of the Ten Mile Lot Licence Agreement).

60. The Lot Licence Agreements also set out provisions relating to:

- the obligations and rights of TSL (clause 5), the obligations of the Grower (clause 8), and the rights of the land owners (clause 9);
- the requirement that the Grower enters into the Lot Management Agreement (clause 6.1);
- the licence fees payable by a Grower (clause 7);
- events which may trigger early termination of the licence by the Grower or TSL (clauses 10.1 and 10.2); and
- the damage to or reduction of the viability of the Grower's Lots (clauses 10.3 and 10.4).

Lot Management Agreement

61. Each Grower separately engages TSL as an independent contractor for the Term of the Project to manage their Lots, conduct the Project Operations on their behalf and perform the Orchard Services in accordance with the Management Plans and Best Horticultural Practices.

62. TSL will carry out a range of Orchard Services in the period from the Commencement Date until 30 June 2008 and in each subsequent Financial Year of the Project TSL will provide the Orchard Services listed in clause 5.2A, test the maturity of the Crop and, where they are ready for harvesting, harvest the mature Crop and deliver the harvested Crop to a delivery point(s) for processing, packaging, ripening and sale (clauses 6, 7, 8 and 9).

63. TSL will cause Avcorp and Mangocorp to procure the sale of the Grower's Participating Interest in the Crop and using its reasonable endeavours to seek to maximise returns, will enter into a Project Document for the sale of the Grower's Participating Interest in the Crop as agent and attorney for the Grower (clause 10.1).

64. The Grower agrees that the Crop and the proceeds of sale of all of the Crop will be divided pro rata according to the Participating Interest of each of the Growers in the Project in the Crop (clause 10.2(a)). TSL will pay to the Grower the amount of Proceeds standing to the credit of the Grower in the Agency Account in accordance with the Constitution (clause 17).

65. TSL will be responsible for obtaining and keeping policies of insurance on behalf of the Growers in the Project 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 15).

66. Among other things, the Lot Management Agreement also sets out details of the following:

- its Term (clause 2);
- certain administrative services to be provided to the Growers during the Term of the Project (clause 11);
- the fees and charges payable by a Grower (clause 14);
- the provision of a report to Growers each Financial Year which sets out the results of the harvest, the condition of the Orchard and the Grower's Lots and Trees (clause 16.5);
- the provision of an annual statement of income and expenses relating to the Grower's Lots and the sale of the Crop (clause 16.6); and
- the events that may trigger early termination of this Agreement (clause 18).

Grower PBR Sub-Licence & Marketing Deed

67. Under this Deed, Mangocorp grants to a Grower for the term of the Project a non-exclusive sub-licence of its rights to cultivate, maintain, harvest, ripen, pack, maintain and market and sell the Mangoes through Harvest Markets as the exclusive marketer of the Mangoes (clause 2.1).

68. TSL covenants that during the currency of the Grower's participation in the Project it will cause Mangocorp to carry out and perform its obligations under the Grower PBR Sub-Licence & Marketing Deed, and it will carry out and perform the Grower's obligations under this Deed to the extent that those obligations are not required to be carried out by Mangocorp (clause 5.15).

Planting Agreement

69. TSL and Avcorp, as managers, and OIM #6, as the land owner, engage Simpson Farms as an independent contractor to carry out the Planting Services in relation to the New Orchard. This includes, but is not limited to, the responsibility to receive, accept delivery of and plant the Avocado Trees on the New Avocado Orchard and the Citrus Trees on the New Citrus Orchard (clause 5.2(a)).

70. Simpson Farms will replace and replant, at its cost, any Avocado and/or Citrus Trees which fail in the first 6 months after planting due to or caused by any breach or default by Simpson Farms (clause 5.2(c)).

Management Agreements

71. TSL engages Avcorp as an independent contractor to manage and administer the Project on the Promised Land Orchard and Mangocorp as an independent contractor to manage and administer the Project on the Ten Mile Orchard. Each will manage, direct and conduct the Project Operations on behalf of the Growers, and perform the Orchard Services on the orchards respectively.

Contractor Management Agreements

72. Avcorp engages Simpson Farms and Mangocorp engages Oolloo Farm Management as an independent contractor to provide the Orchard Services (set out in clause 4), Harvest or Harvesting Services (set out in clause 5), Sorting and Packing Services (set out in clause 6) and other services. Each of Simpson Farms and Oolloo Farm Management must carry out the provision of these services in accordance with the relevant Management Plans.

Marketing Agreements

73. Under the Avocado Marketing Agreement Avcorp engages Simpson Farms and TradingExchange, severally, to market and sell the Avocados to their respective relevant Customer Group, in order to maximise the returns received by Growers.

74. Under the Citrus Marketing Agreement Avcorp engages TradingExchange to market and sell the Citrus in a manner that will maximise returns to Growers.

75. Under the Sub-Licence & Marketing Agreement Harvest Markets grants to Mangocorp a non-exclusive sub-licence to propagate, plant, cultivate, ripen, pack, maintain and market and sell through Harvest Markets the Mangoes.

Pooling of Crops and Grower's Entitlement to Net Proceeds

76. Both the Constitution (clause 13) and the Lot Management Agreement (clauses 10.2 and 17.1) set out provisions relating to the Grower's entitlement to Proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed Crop or insurance proceeds are entitled to benefit from distributions of Proceeds from the pool; and
- any pool of Crop must consist only of Crop contributed by Growers in the 2007 Timbercorp Avocado & Fruit Project.

Fees

77. Under the terms of the Lot Licence Agreements, the Lot Management Agreement and the Grower PBR Sub-Licence and Marketing Deed, the fees payable by a Grower on a **per Lot** basis are as follows:

Fees payable under the Lot Management Agreement

- for Orchard Services and all other services to be provided in the period from the Commencement Date to 30 June 2008 a fee comprised of two components is payable. The first component of **$10,000** is payable upon Application. The second component is an annual management fee of **2% of the Net Sales Proceeds** of the sale of Crop payable out of and at the time that Proceeds are received by TSL;
- for services to be provided in the period from 1 July 2008 to 30 June 2009, a fee comprised of three components is payable. The first component of **$3,250** is payable on 31 October 2008. The second component is a **deferred fee** calculated by multiplying the DMF Rate (between 1% and 15% depending on the level of proceeds received during a year in which the fees are payable) by the Grower's Participating Interest of the Net Sales Proceeds from the sale of Crop. The deferred component is payable in each Financial Year of the Project out of and at the time that proceeds are received by TSL commencing in the 2013 Financial Year. The third component is an annual management fee of **2% of the Net Sales Proceeds** of the sale of Crop payable out of and at the time that Proceeds are received by TSL;
- for additional **picking costs** attributed to any excess Crop harvested where the weighted average yield of Crop harvested in the Financial Years ending 30 June 2008 and 30 June 2009 exceeds the yield thresholds set out in clause 14.3(b), costs calculated at the rates set out in clause 14.3(b), payable out of and at the time Proceeds are received by TSL for the Crop harvested in those years;
- for services to be provided in each subsequent Financial Year after 30 June 2009 a fee based on the **estimated costs** of operating the relevant Lot is payable on 31 October 2009 and 31 October each year thereafter (see paragraph 78 of this Ruling for further explanation) and an annual management fee of **2% of the Net Sales Proceeds** of the sale of Crop payable out of and at the time that Proceeds are received by TSL;

- for each Financial Year in which Crop is sold on behalf of the Grower, the Grower's prescribed proportion of **marketing and sale costs**, payable out of and at the time the Proceeds are received by TSL before accounting to the Grower; and
- an **incentive (performance) fee of 27.5% of the annual Net Proceeds** received by the Grower in excess of the Incentive Fee Threshold is payable prior to any distribution of Net Proceeds received by a Grower in each Financial Year.

Fees payable under the Lot Licence Agreements

- for the Financial Year ending 30 June 2008, a **$700** licence fee is payable upon Application;
- for the Financial Year ending 30 June 2009, a **$700** licence fee is payable on 31 October 2008;
- for the Financial Years ending 30 June 2010 and 2011, a **$900** licence fee is payable on 31 October 2009 and 2010 respectively;
- for the Financial Year ending 30 June 2012, a **$1,500** licence fee is payable on 31 October 2011;
- for the Financial Year ending 30 June 2013, a **$1,564** licence fee is payable on 31 October 2012; and
- for each subsequent Financial Year during the term of the Project, an amount equal to the licence fee payable on the immediately preceding 31 October, Indexed, is payable on 31 October of the relevant Financial Year.

Fees payable under the Grower PBR Sub-Licence & Marketing Deed

- in consideration of the PBR rights granted, **royalties of 3.3% of the Wholesale Price** of the Mangoes in each Financial Year in which there are Proceeds from the sale of Mangoes, payable out of and at the time the Proceeds are received by TSL before accounting to the Grower.

78. As noted above, from the 2010 Financial Year the annual fee payable by a Grower will consist of an amount for the estimated costs of operating the Lot. The estimated costs of operating the Lot for a Financial Year will include an adjustment for the difference between the actual costs and the estimated costs of managing the Lot during the preceding Financial Year (clause 14.3(c) of the Lot Management Agreement).

79. The PDS provides that the ultimate cost to the Grower will depend on the fees the Grower negotiates with TSL or a financial adviser. This Product Ruling does not apply to any Grower who does not pay the fees set out in paragraph 77 of this Ruling. Growers who negotiate fees that are different to those set out in paragraph 77 may request a private ruling on the tax consequences of their participation in the Project.

Fees payable under the Constitution by Growers as Joint Venturers

80. The fees payable per Lot by a Grower who is in Joint Venture with another entity are stipulated in clause 29.5 of the Constitution. Under this clause, the fees for which a Joint Venture Grower will be solely responsible for are expressed as percentages of the fees outlined in paragraph 77 of this Ruling.

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

(i) 100% of the management fee payable under the Lot Management Agreement for the year ended 30 June 2008;

(ii) 100% of the licence fee payable under the Lot Licence Agreements in respect of licence rights granted for the year ended 30 June 2008;

(iii) 43% of the operating costs payable under the Lot Management Agreement in respect of management services provided in all Financial Years commencing on and from the 2013 Financial Year;

(iv) 43% of the licence fees payable under the Lot Licence Agreements in respect of licence rights granted in all Financial Years commencing on and from the 2013 Financial Year;

(v) 43% of all annual management fees, deferred management fees, marketing and sale costs and any incentive (performance) fee payable under the Lot Management Agreement; and

(vi) 43% of royalties payable under the Grower PBR Sub-Licence & Marketing Deed.

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

(vii) 100% of the fixed management fee payable under the Lot Management Agreement in respect of management services provided in the year ended 30 June 2009;

(viii) 100% of the operating costs payable under the Lot Management Agreement in respect of management services provided in the Financial Years from 2008 to 2012;

(ix) 100% of the licence fees payable under the Lot Licence Agreements in respect of licence rights granted in the Financial Years from 2009 to 2012;

(x) 57% of the operating costs payable under the Lot Management Agreement in respect of management services provided in all Financial Years commencing on and from the 2013 Financial Year;

(xi) 57% of the licence fees payable under the Lot Licence Agreements in respect of licence rights granted in all Financial Years commencing on and from the 2013 Financial Year;

(xii) 57% of all of the annual management fees, deferred management fees, marketing and sale costs and any incentive (performance) fee payable under the Lot Management Agreement; and

(xiii) 57% of royalties payable under the Grower PBR Sub-Licence & Marketing Deed.

Finance

83. A Grower who does not pay the Application Moneys in full upon application can fund their involvement in the Project by borrowing from the Financier, a lender associated with TSL, or from an independent lender external to the Project.

84. Subject to the Financier accepting the Grower's application for finance, the Grower will be bound by the terms and conditions of the Loan Application Form and Loan Explanation and Loan Terms.

85. The Financier will offer Loan Terms on a commercial basis and approve Loan Amounts up to 90% of the Application Money, as well as 90% of the fixed management fees and licence fees payable by the Grower in the Financial Year ending 30 June 2009. A Grower is required to complete a separate Loan Application Form for each year in which they wish to borrow from the Financier. The Financier will provide a Grower with the loan(s) on a full recourse basis and will pursue legal action against any defaulting borrowers.

86. 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 Lots, or as payment of fixed management and licence fees, as the case may be;

- a Loan Application Fee of $250 will comprise part of the Loan Amount;
- other than for loans with a term of one year, equal monthly principal and interest instalments over the term of the loan are payable, commencing on the last business day of the month in which the loan term commences;
- for loans with a term of one year, equal monthly principal instalments over the term of the loan are payable, commencing on the last business day of the month in which the loan term commences;
- interest rates, where applicable, will be fixed for the term of the loan;
- the Grower is entitled to repay the whole or part of the Total Amount Owing without penalty for early repayment;
- in the event that any amount is overdue, the Financier may charge interest at the Higher Interest Rate; and
- for the purpose of securing payment of the Total Amount Owing, the Grower will assign to the Financier all its rights, title, and interest in any debt or other monetary obligations owed to the Grower by TSL under or in relation to the Grower's investment in the Project.

87. The terms specific to the Loan Terms offered by the Financier are summarised below. Rates shown are indicative.

- 1 year term with an interest rate of 0.00% pa;
- 3 year term with an interest rate of 9.00% pa;
- 4 year term with an interest rate of 9.95% pa;
- 5 year term with an interest rate of 10.50% pa;
- 7 year term with an interest rate of 10.50% pa;
- 8 year term with an interest rate of 10.50% pa;
- 9 year term with an interest rate of 10.50% pa; or
- 10 year term with an interest rate of 10.50% pa.

88. Only the finance arrangements set out above are covered by this Product Ruling. 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 documentation provided to the Tax Office by TSL with the application for this Product Ruling.

89. A Grower cannot rely on this Product Ruling if the Application Moneys, including all loan moneys, are not paid in full to TSL on or before 30 September 2007 by the Grower or, on the Grower's behalf by a lending institution. Where an application is accepted subject to finance approval by any lending institution other than the Financier, Growers cannot rely on this Ruling if written evidence of that approval has not been given to TSL by the lending institution on or before 30 September 2007.

90. 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.

Commissioner of Taxation
20 June 2007

Appendix 1 – Explanation

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?

91. For the amounts set out in paragraphs 25 and 26 of this Ruling to constitute allowable deductions, the Grower's horticultural activities as a participant in the 2007 Timbercorp Avocado & Fruit Project must amount to the carrying on of a business of primary production.

92. Two Taxation Rulings are relevant in determining whether a Grower will be carrying on a business of primary production.

93. The general indicators used by the Courts are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

94. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the 2007 Timbercorp Avocado & Fruit Project. As Taxation Ruling TR 2000/8 sets out, the relevant principles have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

95. Having applied these principles to the arrangement set out above, a Grower in the 2007 Timbercorp Avocado & Fruit Project is accepted to be carrying on a business of growing and harvesting Avocados, Mangoes and Citrus for sale.

The Simplified Tax System

Division 328

96. 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.

97. 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, licence fees, operating costs, royalties, marketing and sale costs and interest on loans with the Financier

Section 8-1

98. Other than part of the licence fee in the initial year, the management fees, operating costs (including picking costs), royalties and marketing and sale costs are deductible under section 8-1 (see paragraphs 43 and 44 of TR 2000/8). A 'non-income producing' purpose (see paragraphs 47 and 48 of TR 2000/8) is not identifiable in the scheme and, other than part of the licence fee in the initial year, there is no capital component evident in these fees or costs (see paragraphs 49 to 51 of TR 2000/8).

99. Subject to paragraph 100 of this Ruling the tests of deductibility under the first limb of section 8-1 are met and the exclusions do not apply. 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 horticultural business which is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and hence will not be deductible under section 8-1. The Commissioner is of the view that depending upon when they are accepted to participate in the Project, a portion of the initial licence fee payable by a Grower will be capital expenditure. Therefore, the amount allowed as a deduction for the licence fee under section 8-1 will be allowed as follows.

100. If a Grower enters the Project on or before 31 July 2007 the licence fee of $700 payable on application for the period from the Commencement Date to 30 June 2008 will be deductible in full. However, Growers accepted to participate in the Project on or after 1 August 2007 and on or before 30 September 2007, will not be entitled to the full deduction. The deduction will be calculated on a pro-rata monthly basis of $58.33 for each month or part month that the Grower is granted the licence to use the Lots from TSL.

101. Subject to this qualification and provided that the prepayment provisions do not apply (see paragraphs 104 to 108 of this Ruling) a deduction for the management and licence fees, operating costs (including picking costs), royalties and marketing and sale costs can be claimed in the year in which they are incurred. (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7.)

102. Some Growers may finance their participation in the Project through a Loan Agreement with the Financier. Applying the same principles as that used for the management and licence fees, operating costs, royalties and marketing and sale costs, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

103. Other than where the prepayment provisions apply (see paragraphs 104 to 108 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

Prepayment provisions

Sections 82KZL to 82KZMF

104. 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.

105. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 (operative provisions).

Application of the prepayment provisions to this Project

106. Under the scheme to which this Product Ruling applies management and licence fees, royalties and marketing and sale costs are incurred annually and interest payable to the Financier is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

107. 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 Lot Management Agreement and/or the Lot Licence Agreements and/or the Grower PBR Sub-Licence & Marketing Deed, or prepays interest under a loan agreement (including loan agreements with lenders other than the Financier). 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.

108. 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

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

Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion

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

- not in Joint Venture, and have taken a minimum allocation of 3 Lots, for the income years ending **30 June 2008 to 30 June 2009**; or
- Joint Venturers, and have taken a minimum allocation of 8 Lots, for the income year ending **30 June 2008**;

the Commissioner has determined that for those 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; and
- there is an objective expectation that within a period that is commercially viable for the avocado, mango and citrus industries, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

111. 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.

112. 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.

113. Growers are expected to satisfy the assessable income test in section 35-30 of Division 35 in each income year during the term of the Project subsequent to the income years set out in paragraph 110 of this Ruling. The assessable income test requires that a Grower derives at least $20,000 of assessable income from their business in an income year. Where a Grower satisfies the assessable income test in an income year the Grower will not be required to defer any loss attributable to their business activity to a later year. Instead, this loss can be offset against other assessable income of the Grower for the year in which the loss arises. Accordingly, it is not necessary to consider the application or otherwise of the Commissioner's discretion in paragraph 35-55(1)(b). However, if a Grower fails to pass the assessable income test in an income year, or fails to pass one of the other tests in Division 35, they should seek a private ruling on how Division 35 will apply to their business activity for that income year.

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 benefit(s)'. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL of the ITAA 1936. It will not apply to deny the deductions 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 2007 Timbercorp Avocado & Fruit 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 25 and 26 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

117. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the Crop. 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 are 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 Growers will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Appendix 2 – Detailed contents list

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- commencement of business
- fee expenses
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- non-commercial business activities
- primary production
- primary production expenses
- producing assessable income
- product rulings
- public rulings
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

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NO: 2007/2657
ISSN: 1441-1172
ATOlaw topic: Income Tax ~~ Product ~~ orchards