



Product Ruling

Income tax: Olive Growers Australia Project 2007 – Applicant Group 2 (using finance from Olive Growers Australia Limited)

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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 provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. Unless otherwise indicated, all legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997). In this Product Ruling the scheme is referred to as the 'Olive Growers Australia Project 2007' or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities can rely on the taxation benefits set out in the Ruling section of this Product ruling and which entities cannot rely on those tax benefits.

3. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities that are accepted to participate in the scheme specified below on or after the date of this Product Ruling is made and who have executed the relevant Project agreements set out in paragraph 34 of this Ruling on or before 31 May 2008. They must have a purpose of staying in the scheme until it is completed (that is being party to the relevant agreements until their term expires), and deriving assessable income from this involvement.

4. **The class of entities to whom this Ruling applies are only entities who:**

- **enter into the finance arrangement with Olive Growers Australia Ltd (Responsible Entity) under the Loan Agreement for Terms Payment Option.**

5. 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:

- are accepted into this Project before 9 April 2008 or after 31 May 2008;
- participate in the scheme through offers made other than through the Prospectus & Product Disclosure Statement (PDS);
- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- have their application conditionally accepted by the Responsible Entity subject to finance for the payment of the Application Fee, where the funds have not been made available to the Responsible Entity by 15 June 2008; or

- have their Application Fee transferred by the Responsible Entity other than in accordance with paragraphs 54 and 55 of this Ruling.

6. A separate Product Ruling will issue that may apply to Growers who **do not** enter into the Loan Agreement for Terms Payment Option with the Responsible Entity.

Qualifications

7. 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 34 to 104 of this Ruling.

8. 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.

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Superannuation Industry (Supervision) Act 1993

10. 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.

Date of effect

11. This Product Ruling applies prospectively from 9 April 2008, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme after the date of this Ruling and on or before 31 May 2008, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to 30 June 2010.

12. 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.

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).

Changes in the law

16. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments to the law may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to the extent of those amendments this Product Ruling will be superseded.

17. 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

18. 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

19. 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

20. 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 34 to 104 of this Ruling.

21. The Grower's participation in the Project must constitute the carrying on of 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 their Licence Agreements and Management Agreement.

Minimum subscription

22. 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. Under the terms of the PDS, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 100 interests is achieved.

Concessions for 'small business entities'¹

23. From the 2007-08 income year, a range of concessions previously available under the simplified tax system (STS), will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

¹ The meaning of 'small business entity' is explained in section 328-110.

24. A 'small business entity' can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions the application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Ruling.

Assessable income

Sections 6-5 and 17-5

25. 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, Olive Orchard Operating Costs and Licence Fees

Section 8-1 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936

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

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
Management Fees	\$1,322 See Notes (i) & (ii)	Nil	Nil
Olive Orchard Operating Costs	Nil	\$627 See Notes (i), (ii) & (iii)	\$440 See Notes (i), (ii) & (iii)
Licence Fees	See Notes (i) & (ii)	\$137.50 See Notes (i), (ii) & (iii)	\$137.50 See Notes (i), (ii) & (iii)

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, Olive Orchard Operating Costs and Licence Fees are deductible under section 8-1 in the income year that the relevant fee is incurred. For the year ended 30 June 2008, the Licence Fee is \$11.45 per Lot, per month or part thereof, for the period from the date the Grower is accepted into the Project to 30 June 2008.

- (iii) This Ruling does not apply to Growers who choose to prepay fees (see paragraphs 112 to 116 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.

Deductions for capital expenditure

Division 40

27. A Grower may claim tax deductions for the following capital expenses on a per Lot basis:

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
Posts and protection	Must be calculated See Notes (i) & (iv)	Must be calculated See Notes (i) & (iv)	Must be calculated See Notes (i) & (iv)
Irrigation	\$46 See Notes (i) & (v)	\$46 See Notes (i) & (v)	\$45 See Notes (i) & (v)
Establishment of Olive Trees	Nil	Nil	Must be calculated See Notes (i) & (vi)

Notes:

- (iv) Each Grower's interest in the 'posts and protection' (posts) is a 'depreciating asset'. The 'cost' of the asset is the amount paid by the Grower. The decline in value of the asset is calculated using the formula in either subsection 40-70(1) (diminishing value method) or subsection 40-75(1) (prime cost method). Both formulas rely on the 'effective life' of the posts.

There has not been a determination of the 'effective life' of posts by the Commissioner. Therefore, Growers must self-assess the effective life of this asset (section 40-105). For Growers who are accepted into the Project on or after 9 April 2008, the posts will be installed and first used during the year ended 30 June 2008. The Responsible Entity will advise Growers when this occurs to enable Growers to calculate the deduction for the decline in value.

If the combined cost of the posts for a Grower is less than \$1,000, their interest in the posts will be a 'low cost asset'. A low-cost asset can be allocated to a 'low-value pool'. Once any low-cost asset of a Grower is allocated to a low-value pool, all other low-cost assets the Grower starts to hold in that year or a later year must be allocated to that pool. If the Grower has already allocated an asset to a low-value pool, the posts would also have to be allocated to that pool. Otherwise, the Grower must decide whether to create a low-value pool.

If the asset is allocated to a low-value pool, the capital expenditure on the posts will be deducted under the diminishing value methodology of the pool based on a rate of 18.75% in the year the posts are first used and a rate of 37.5% in subsequent years (section 40-440). If the posts are not allocated to a low-value pool, it can be written off based on the effective life of the asset.

- (v) An irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. A deduction for water facilities is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure of \$137 per Lot incurred by each Grower on the installation of the water facility in the year in which it is incurred and one-third in each of the next two years of income (section 40-540).
- (vi) The Olive Trees meet the definition of 'horticultural plant' in subsection 40-525(2). As Growers hold the land under a licence, the condition in item 3 of subsection 40-525(2) is met and a deduction for the decline in value of horticultural plants is available under paragraph 40-515(1)(b).

The deduction for the Olive Trees is determined using the formula in section 40-545 and is based on the capital expenditure of \$299 per Lot incurred by the Grower that is attributable to their establishment. If the Olive 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% per annum. The deduction is allowable when the Olive Trees enter their first commercial season (section 40-530, item 2). The Project Manager will inform Growers of when the Olive Trees enter their first commercial season.

Shares

28. The shares in Carcuma Land Holdings Ltd are CGT assets (section 108-5) and the amounts paid by a Grower to acquire the shares are an outgoing of capital and not allowable as a deduction.

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

Trading stock

Section 70-35

30. A Grower in some years may hold Olives and or Olive Oil that will constitute trading stock on hand. Where, in an income year, the value of trading stock on hand at the *end* of an income year exceeds the value of trading stock on hand at the *start* of an income year a Grower must include the amount of that excess in assessable income.

31. Alternatively, where the value of trading stock on hand at the *start* of an income year exceeds the value of trading stock on hand at the *end* of an income year, a Grower may claim the amount of that excess as an allowable deduction.

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

Section 35-55 – exercise of Commissioner's discretion

32. A Grower who is an individual accepted into the Project in the year ended 30 June 2008 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for Growers for the income years ended **30 June 2008 to 30 June 2012**. 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.

Prepayment provisions and anti-avoidance provisions

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

33. For a Grower who commences participation in the Project and incurs expenditure as required by the Licence Agreements and Management Agreement, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 112 to 116 of this Ruling);
- 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

34. 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 19 February 2008 as constituted by the following documents and additional correspondence, including emails, received on 26, 27 and 29 September 2006, 22 December 2006, 20 and 29 February 2007, 13, 16, 23 and 30 March 2007, 19 and 28 February 2008 and 18, 20 and 25 March 2008;
- Draft Prospectus and Product Disclosure Statement of the Olive Growers Australia Project 2007 (Project), received 25 March 2008;
- Draft **Management Agreement** of the Project between Olive Growers Australia Ltd (Responsible Entity) and the Grower, received 18 March 2008;
- Draft **Constitution of Olive Growers Australia Project 2007**, received 20 March 2008;
- Draft **Licence Agreement No. 1** (Commencement Date to 30 June 2013) of the Project, between the Responsible Entity and the Grower, received 20 March 2008;
- Draft **Licence Agreement No. 2** (1 July 2013 to 30 June 2018) of the Project, between the Responsible Entity and the Grower, received 20 March 2008;

- Draft **Licence Agreement No. 3** (1 July 2018 to 30 June 2023) of the Project, between the Responsible Entity and the Grower, received 20 March 2008;
- Draft **Licence Agreement No. 4** (1 July 2023 to 30 June 2028) of the Project, between the Responsible Entity and the Grower, received 20 March 2008;
- Draft Memorandum Of lease between Carcuma Land Holdings Ltd (Landholder) and the Responsible Entity, received 26 September 2006;
- Contract for the Sale and Purchase of Land between the Vendor and Carcuma Land Holdings Ltd, dated 3 December 2004;
- Deed of Variation of Contract between the Vendor and Carcuma Land Holdings Ltd, dated 29 June 2005;
- Draft Compliance Plan for the Project, received 26 September 2006;
- Horticultural Report for the Project, received 26 September 2006;
- Draft Olive Orchard Management Agreement of the Project, between the Responsible Entity and Olive Grove Management Pty Ltd (Olive Orchard Manager), received 26 September 2006;
- Assignment of Management Agreement of the Project, received 26 September 2006;
- Assignment of Licence Agreements of the Project, received 26 September 2006;
- Australian Financial Services Licence No. 288838, received 29 February 2007; and
- Draft **Application for Term Finance** for MIPF, the Preferred Financier, received 29 September 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.

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

36. 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.

Overview

37. The main features of the Project are as follows:

Location	Coonalpyn, South East of South Australia
Type of business to be carried on by each Grower	Establish and maintain an olive grove to produce olive oil for sale
Term of the Project	21 years
Number of hectares offered for cultivation	218 hectares
Size of each Lot	0.05 hectares
Minimum allocation per Grower	Two Lots
Minimum subscription	100 Lots
Initial cost	\$3,586 (Management Fee for minimum of two lots)
Subscription for one 'C' class share in Landholder	\$1 of the cost of \$1,000 for one share in Carcuma Land Holdings Ltd paid on application, the balance of \$999 payable 1 July 2013 (a minimum of two shares must be acquired)
Ongoing costs	Annual Management Fees, annual Licence fees, Olive Orchard Operating Costs, insurance costs, Harvesting Costs and Processing Costs

38. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Olive Growers Australia Ltd has been issued with an Australian Financial Service Licence No. 288838 and will be the Responsible Entity for the Project.

39. The Project will involve the 'Growers', establishing and maintaining an olive grove, for the purpose of producing olive oil for sale.

40. An offer to participate in the Project will be made through a combined Prospectus & PDS. The offer under the PDS is for 218 hectares, which corresponds to 4,351 Lots in the Project. In addition, the offer is for shares in the 'Landholder', Carcuma Land Holdings Ltd.

41. A Grower that participates in the Project will do so by acquiring an interest in the Project, which will consist of a minimum of two Lots, each of 0.05 hectares in size. The Grower must also subscribe for one 'C' class share in the Landholder, for each Lot they acquire.

42. Applicants execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints Responsible Entity to enter into, on behalf of the Grower, the Management Agreement, Licence Agreements and the application for shares in the Landholder.

43. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the relevant agreements on or before 31 May 2008 will become 'Applicant Group 2' Growers.

44. Under terms of the PDS, the interests in the Growers' Lots will be issued after a minimum subscription of 100 Lots has been achieved.

45. The Responsible Entity is currently leasing Land for the Project that is located about 12 km north of Coonalpyn in South Australia. Specifically, it is described as:

- Certificate of Title Register Book, Volume 5915, Folio 281, being Allotment 52, Deposited plan 62735, in the area named Coonalpyn Hundred of Lewis. This land comprises of 888.2 hectares, of which 218 hectares will be available for the Project's Applicant Group 2 Growers.

46. This Land will be divided into 0.05 hectare Lots and licensed to the Growers accepted in the Project. Therefore, 4,351 Lots are available for the Project.

47. The Responsible Entity may secure additional land and accept oversubscriptions to the extent of the additional land available. However, this will only occur if the land has similar characteristics to the land already secured for the Project and meets the requirements set out in the Horticultural Report. This Ruling will not apply to this additional land, unless the Responsible Entity obtains an addendum to this Ruling to include the land.

48. Water for the Project will come from underground aquifers and the relevant water licences have been obtained to access a sufficient volume of water for the purposes of the Project.

49. The Project Term is to 30 June 2028.

50. This Ruling only applies to Growers who fund their participation in the Project using finance provided by the Responsible Entity under the Loan Agreement for Terms Payment Option.

51. A separate Product Ruling will issue that may apply to Growers who do not enter into the Loan Agreement for Terms Payment Option with the Responsible Entity.

Constitution

52. The Constitution establishes the Project and operates as a deed binding all Growers and the Responsible Entity. The Constitution sets out the terms and conditions under which Olive Growers Australia Ltd agrees to act as Responsible Entity and thereby manage the Project. Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

53. In order to acquire an interest in the Project, the Grower must make an Application for Lots in accordance with clause 7. Among other things, the Application must be completed in a form approved by the Responsible Entity, signed by or on behalf of the applicant, lodged at the registered office and accompanied by payment of the Application Fee in a form acceptable to the Responsible Entity.

54. The Responsible Entity will deposit all Application Fees paid on behalf of the Growers under the Loan Agreement for Terms Payment Option into the Project trust account on or before 15 June 2008.

55. Once the Responsible Entity has accepted the Applications and all of the Project documents have been executed and remain in force, the Application Fees must be transferred from the Project trust account to the Responsible Entity for conduct of the Project. This transfer must occur on or before 15 June 2008 (clauses 7.14 and 7.15).

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

- Period and termination of Project (clause 10);
- fees and expenses (clause 4);
- Gross Proceeds (clause 13);
- Register of Growers (clause 14); and
- insurance (clause 17).

Compliance Plan

57. The Responsible Entity has prepared a Compliance Plan in accordance with the Corporations Law. Under the Compliance Plan, a Compliance Committee will monitor to what extent the Responsible Entity meets its obligations as the Responsible Entity of the Project and if the rights of the Growers are protected.

Leases

58. Under the Memorandum of Lease, Carcuma Land Holdings Ltd (Lessor) leases the Project Land to the Responsible Entity. The Lessor agrees that the Responsible Entity may licence the land or portions of the land without the consent of the Lessor.

59. In addition, the Lessor agrees to provide, at the Lessor's cost, an adequate water supply to enable the Responsible Entity to irrigate the Growers Lots on the leased land (clause 21.2 of the Memorandum of Lease).

Licence Agreements

60. The Responsible Entity, as Licensor, grants a licence to the Grower for a portion of the Project land (the Grower's Lots), for the purpose of establishing and maintaining an olive grove for the production of Olive Oil for sale.

61. Each Grower will enter into four consecutive Licence Agreements with the Licensor. The first Licence Agreement takes effect from the Commencement Date until 30 June 2013, the second Licence Agreement will be in effect from 1 July 2013 to 30 June 2018, the third Licence Agreement will be in effect from 1 July 2018 to 30 June 2023 and the fourth Licence Agreement will be in effect from 1 July 2023 to 30 June 2028. The Commencement Date being the date the Grower is accepted into the Project.

Management Agreement

62. Each Grower enters into a Management Agreement with the Responsible Entity, contracting the Responsible Entity to establish, manage and maintain the Grower's Lots in accordance with good horticultural practices.

63. Specific activities must be carried out during the 'Establishment Period'. The Establishment Period, for Growers in Applicant Group 2, is defined in clause 30, as being from the Commencement Date to 30 June 2008. The Commencement Date is the date the Grower is accepted into the Project.

64. During the Establishment Period, the Responsible Entity will carry out the following activities to establish the Lots on behalf of the Grower:

- preparing that part of the Lot, which can be used to satisfactorily grow Olive Trees, obtaining healthy Olive Trees for planting and planting them on the Grower's Lot (the PDS states that the Responsible Entity will plant approximately 21 trees per Lot, that is, 420 per hectare);
- spacing, posting and protecting each Olive Tree on the Grower's Lot in accordance with good horticultural practices so that Olives can be harvested commercially; and
- installing the appropriate irrigation equipment (clause 2).

65. The Responsible Entity will also provide initial management services during the Establishment Period. These services include:

- eradicating vermin;
- protecting the Olive Trees from insect infestation;

- ridding the Lots of any vegetation re-growth, which might compete for growth with the Olive Trees;
- fertilising; and
- providing any other services incidental to conduct of the Grower's business (clause 3 of the Management Agreement and clause 1.1 of the Olive Orchard Management Agreement).

66. After the Establishment period, the Responsible Entity will provide ongoing olive orchard maintenance and management services for the Term of the Project. These services include:

- pruning the Olive Trees by such methods as the Responsible Entity reasonably determines;
- as permitted by Law, eradicate vermin which have or may cause damage to the Olive Trees or the Grower's Lot and put in place measures to control such vermin;
- operating the irrigation system in order to irrigate the Grower's Lot;
- fertilising the Grower's Lot as required to maintain satisfactory rates of growth and productivity of the Olive Trees;
- destroy any of the Olive Trees, or the Olives, that have contracted an exotic, noxious or incurable disease;
- protecting the Olive Trees from insect infestation and competition from competing growth using good horticultural practices, including but not limited to applying herbicides to the Grower's Olive Trees and spraying under the Olive Trees;
- monitor the condition of and if necessary repair the tree support, tree protection and irrigation equipment on the Grower's Lots;
- regularly inspect the Olive Trees;
- replace and replant any of the Olive Trees which dies at any time during the first 12 months following planting (clause 2.5); and
- any other service or thing, which, in the reasonable opinion of the Responsible Entity, is incidental and/or ancillary to the conduct of the Grower's business.

67. The Responsible Entity will send a report to the Grower within 90 days of the end of each financial year containing information on matters considered material to the Grower's business, including harvest and sales results, the proceeds of sale and the condition of the Grower's Lots (clause 4).

68. In addition, the Responsible Entity must ensure that insurance policies are taken out to cover the destruction or loss of the Olive Trees, the Olives and the Olive Oil, as well as a public liability insurance policy. This is provided cost of insuring the risk is reasonable. Each Grower will pay the Grower's Proportion of the insurance premiums or the premiums will be reimbursed to the Responsible Entity from the Gross Proceeds of the Project (clause 11 of the Management Agreement and clauses 9.7 and 13.3 of the Constitution).

Harvesting

69. Under the Management Agreement, the Responsible Entity must harvest all of the mature Olives grown on the Grower's Lots (clause 5). The Responsible Entity will determine when the harvest will commence by assessing the maturity of the Olives in accordance with good viticultural practices.

70. Harvesting may be done mechanically or by hand or a combination of both. Until sold, the Responsible Entity will use reasonable endeavours to store the Olives so as to maintain their quality.

71. The costs of providing the harvesting services will be met from the Grower's payment of Harvesting Costs (clauses 9 and 12), which will be deducted from the Gross Proceeds.

Processing

72. Under the Management Agreement, the Responsible Entity will crush and process the Olives that have been harvested to extract Olive Oil (clause 5).

73. The Responsible Entity may process the Olives itself or engage a contractor or other person to do so on its behalf.

74. Until sold, the Responsible Entity will use reasonable endeavours to store the Olive Oil extracted from the Olives during processing in such a manner that its quality is maintained.

Sale of Olive Oil

75. The Grower unconditionally appoints the Responsible Entity as its sole and exclusive agent to market and sell the Olive Oil, for the term of the Project (clause 6). The Olives from each Lot in the Project will be pooled and sold, by the Responsible Entity on behalf of the Growers. The Responsible Entity will use all reasonable endeavours to sell the Olive Oil at a price equivalent to the price likely to be paid for Olive Oil of the same type and quality at time of sale.

Olive Orchard Management Agreement

76. Under the Olive Orchard Management Agreement, the Responsible Entity will engage the Olive Orchard Manager, Olive Grove Management Pty Ltd, to establish the Growers' Lots and to manage and maintain the Lots on the terms and conditions contained in the Agreement. The Olive Orchard Manager will be subject to the direction of the Responsible Entity in all matters relating to the Olive Orchard Management Agreement.

77. The Olive Grove Manager will perform services including planting and the installation of irrigation during the Establishment Period. After the Establishment Period the Olive Grove Manager will provide Ongoing Services and Harvesting Services in relation to the Grower's Lots.

Pooling of Crops and Grower's entitlement to proceeds

78. The Constitution sets out the circumstances relating to the pooling of Growers' produce and the distribution of proceeds from the sale of the produce. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed produce from a harvest to a pool are entitled to benefit from distributions from the proceeds of sale; and
- produce can only be pooled with the produce of Growers who are accepted to participate in the Project.

79. The Grower's share of the pool or Gross Proceeds is based on the proportion of the Lots they licence in relation to total number of the Lots licensed under the Project.

80. However, before distribution, the proceeds will be reduced by any of the Grower's fees or costs payable under the Licence Agreements, Management Agreement or amounts payable by the Grower under the Constitution (clause 13.3 of the Constitution).

81. In the event that a Grower's Lots are destroyed or partially destroyed, the Grower's sale proceeds will be reduced in accordance with the terms of clause 13.3.6 of the Constitution.

Fees

82. Under the Constitution, Management Agreement and the Licence Agreements the Grower is required to pay the following:

- Application Fees;
- Olive Orchard Operating Costs;
- annual Management Fees;
- annual Licence Fees;
- reimbursement of insurance costs;

- Harvesting Costs; and
- Processing Costs.

Application Fees

83. For each Grower, an Application Fee of \$1,793 per Lot, is payable on application (each Grower must subscribe for two Lots). The fee for each Lot consists of:

- \$299 for initial planting and preparation, to be provided by 30 June 2008;
- \$35 for posts and protection, to be provided by 30 June 2008;
- \$137 for installing irrigation, to be provided by 30 June 2008; and
- \$1,322 for all other maintenance and management services to be provided by 30 June 2008 (clause 4.5 of the Constitution).

84. In addition, on application a Licence Fee is payable of \$11.45 per Lot, per month or part thereof, for the period from the Commencement Date to 30 June 2008 (item 6 of Schedule 1 to the Licence Agreement No. 1).

Olive Orchard Operating Costs

85. The Olive Orchard Operating Costs for the financial year ending 30 June 2009 is \$627 payable on 1 July 2008 (clause 12.3 of the Management Agreement).

86. The Olive Orchard Operating Costs for the financial years ending 30 June 2010 and 30 June 2011 are \$440 per year. These amounts are payable by the Grower on 1 July in each financial year.

87. From 1 July 2011, Olive Orchard Operating Costs will be the actual direct costs incurred by the Olive Orchard Manager (on behalf of the Responsible Entity) in maintaining and managing the Grower's Lot. These costs will be payable from the Grower's Gross Proceeds derived from the Project (item 6 of Schedule 1 to the Management Agreement and clauses 9.7 and 13.3 of the Constitution).

Annual Management Fees

88. From 1 July 2011 until the end of the Project, the Management Fee will be an amount equal to 8.25% of the Grower's Proportion of the Gross Proceeds and will be deducted from these proceeds (item 5 of Schedule 1 to the Management Agreement and clauses 9.7 and 13.3 of the Constitution).

Annual Licence Fees

89. For the financial year beginning 1 July 2008 and the following four financial years, a Licence Fee of \$137.50 is payable in advance on 1 July of each financial year (item 6 of Schedule 1 to the Licence Agreement No. 1 and clauses 9.7 and 13.3 of the Constitution).

90. For the financial year beginning 1 July 2013 and each succeeding financial year, the Licence Fee payable by all Growers will be an amount equal to 4.95% of the Grower's Proportion of the Gross Proceeds for the period commencing on 1 July of each financial year (item 6 of Schedule 1 to the Licence Agreements No. 2, No. 3 and No. 4 and clauses 9.7 and 13.3 of the Constitution).

Reimbursement of Insurance Costs

91. The Grower's Proportion of the cost of insurance taken out by the Responsible Entity on behalf of the Growers will be reimbursable to the Responsible Entity from the Grower's Gross Proceeds (clause 11 of the Management Agreement and clauses 9.7 and 13.3 of the Constitution).

Harvesting Costs

92. Harvesting Costs will be deducted from the Grower's Proportion of the Gross Proceeds commencing on 1 July immediately following the first harvest and thereafter on 1 July immediately following each succeeding harvest (item 7 of Schedule 1 to the Management Agreement and clauses 9.7 and 13.3 of the Constitution).

Processing Costs

93. Processing Costs will be deducted from the Grower's Proportion of the Gross Proceeds commencing on 1 July immediately following the first harvest and thereafter on 1 July immediately following each succeeding harvest (item 7 of Schedule 1 to the Management Agreement and clauses 9.7 and 13.3 of the Constitution).

Fees and costs that are deducted from Gross Proceeds

94. The Gross Proceeds from the sale of the Olive Oil will be paid into a Gross Proceeds Account to be established by the Responsible Entity. From 1 July 2011 Olive Orchard Operating Costs, annual Management Fees, insurance costs, Harvesting Costs and Processing Costs will be deducted from the Gross Proceeds before the proceeds are distributed to the Grower. From 1 July 2013, Licence Fees will also be deducted from these proceeds.

95. If Gross Proceeds are insufficient to pay any fees in any financial year, the Grower will either be required to pay the amount of the excess, or if the Responsible Entity chooses, the amount will be carried forward to be deducted in a later financial year. The maximum period that such amounts will be carried over is two years, after which Growers will be required to pay any amounts outstanding. No amount may be carried forward beyond the final year of the Project (clause 13.3 of the Constitution).

Shares

96. Each Grower must also subscribe for a share in the Landholder, Carcuma Land Holdings Ltd, for each Lot. The cost of each share is \$1,000 of which \$1 is payable on application and \$999 on 1 July 2013.

Finance

97. A Grower who does not pay the Application Fee in full upon application can enter into the Loan Agreement for Terms Payment Option with the Responsible Entity, borrow from MI Professional Funding Pty Ltd as the Preferred Financier, or borrow from an independent lender external to the Project.

98. This Ruling only applies to Growers who enter into the Loan Agreement for Terms Payment Option with the Responsible Entity, as set out below. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with the Responsible Entity that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling.

99. Growers cannot rely on any part of this Ruling if the Application Fee is financed by the Responsible Entity and written evidence of that approval has not been provided by 31 May 2008 and the Application Fee is not paid in full on or before 15 June 2008.

Loan Agreement for Terms Payment Option

100. Where the Responsible Entity accepts an application from a Grower to pay the Application Fee under the 'Loan Agreement for Terms Payment Option', the amount, after the payment of a deposit, is payable by **twelve equal monthly instalments**.

101. The deposit of between 10% and 90% of the Application Fee is due and payable on or before 31 May 2008.

102. If a Grower does not pay the required instalments under the terms payment option, the Responsible Entity will undertake action to recover the debt. The Responsible Entity may take legal proceedings to recover the amount due, including, resuming all rights and interest which the Grower has in their Lots.

103. The Responsible Entity will offer loans on a full-recourse commercial basis only to the extent it has funds available to lend to Growers.

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

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?

105. For the amounts set out in paragraphs 26 and 27 of this Ruling to constitute allowable deductions the Grower's horticultural activities as a participant in the Project must amount to the carrying on of a business of primary production.

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

107. 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?

108. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the 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.

109. Having applied these principles to the arrangement set out above, a Grower in the Project is accepted to be carrying on a business of cultivating Olive Trees and processing the Olives for sale.

Deductions for Management Fees, Olive Orchard Operating Costs and Licence Fees

Section 8-1

110. The Management Fees, Olive Orchard Operating Costs and Licence Fees 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 arrangement and there is no capital component evident in the Management Fees, Olive Orchard Operating Costs and Licence Fees (see paragraphs 49 to 51 of TR 2000/8).

111. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Provided that the prepayment provisions do not apply (see paragraphs 112 to 116 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred. (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7.)

Prepayment provisions

Sections 82KZL to 82KZMF

112. 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.

113. 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

Sections 82KZME and 82KZMF

114. Under the scheme to which this Product Ruling applies Management Fees, Olive Orchard Operating Costs and Licence Fees are incurred annually. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

115. 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 Management Agreement and/or Licence Agreements.

116. As noted in the Ruling section above, Growers who prepay fees 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

117. 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 posts, irrigation and the establishment of the Olive Trees is of a capital nature. This expenditure falls for consideration under Division 40.

118. The tax treatment of capital expenditure has been dealt with in a representative way in paragraph 27 of this Ruling.

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

119. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the years ending **30 June 2008 to 30 June 2012**, 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 Olive cultivation and processing industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

120. 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.

121. 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

122. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefits(s)'. Insufficient additional benefits will be provided to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1.

Part IVA – general tax avoidance provisions

123. 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).

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124. The 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 26 and 27 of this Ruling 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.

125. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the sale of Olive Oil. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/7; TR 97/11; TR 98/22;
TR 2000/8;

Subject references:

- carrying on a business
- commencement of business
- fee expenses
- irrigation expenses
- management fees expenses
- non-commercial losses
- primary production
- primary production expenses
- primary production income
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- tax administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
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- ITAA 1936 Pt IVA
- ITAA 1936 177A

- ITAA 1936 177C
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- ITAA 1997 40-515(1)(a)
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