Product Ruling

Income tax: 2004 Swan Hill Almond Grower Project (2004 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives 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. The Commissioner recommends 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.

2. In this Product Ruling this scheme is referred to as the 2004 Swan Hill Almond Grower Project or simply as 'the Project'.

Class of entities

3. 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 a Grower.

4. The class of entities which can rely on those tax benefits consists of those entities that were specifically identified in paragraph 44 of Product Ruling PR 2004/40 and who entered into the specific scheme that is set out in paragraphs 14 to 43 of that Product Ruling between 7 April 2004 and 15 June 2004. The class of entities are recorded in Product Ruling PR 2004/40 as '2004 Growers'.

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:

- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it
- were accepted into this Project between 1 July 2004 and 30 September 2004. These Growers are referred to in Product Ruling PR 2004/40 as 2005 Growers
- participate in the scheme through offers made other than through the Product Disclosure Statement
- have elected to take their own almonds, or
- held almond allotments and their business activity would not have passed at least one of the four tests in the absence of the special circumstances that occurred during the 2012-13 or 2013-14 income years.

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 14 to 43 of Product Ruling PR 2004/40.

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

8. This Product Ruling applies only to the specified class of entities that entered into the scheme set out in paragraphs 14 to 43 of PR 2004/40 between 7 April 2004 and 15 June 2004.

9. 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.

Ruling

Continuing application of Product Ruling PR 2004/40

10. Although now withdrawn, the tax benefits set out in Product Ruling PR 2004/40 continue to apply to participants who are within the class of entities specifically identified in paragraph 44 of that Product Ruling and who entered the specific scheme that is set out in paragraph 14 to 43 of that Product Ruling between 7 April 2004 and 15 June 2004. This is subject to there being no material difference in the scheme or in the entities' involvement in the scheme.

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

11. A Grower who is an individual, alone or in partnership, and within the defined class of entities outlined in paragraphs 3 to 5 of this Ruling may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10.

Paragraph 35-55(1)(a) – exercise of Commissioner's discretion for special circumstances

12. Subject to the Project being carried out in the manner described in paragraphs 14 to 43 of PR 2004/40, the Commissioner will exercise the discretion in paragraph 35-55(1)(a) for Growers that held at least 4 allotments in the Project for the 2012-13 income year and 3 allotments in the 2013-14 income year.

13. Where Growers held less than 4 allotments in the Project for the 2012-13 income year or 3 allotments in the 2013-14 income year, the Commissioner has not exercised the discretion under paragraph 35-55(1)(a) as the Commissioner is not satisfied that these Growers, but for the special circumstances, would have passed at least one of the four tests.

Subsection 35-10(2E) and special circumstances discretion

14. The discretion exercised in paragraph 12 of this ruling also applies to Growers who do not satisfy the income requirement in subsection 35-10(2E) for the 2012-13 and 2013-14 income years, provided they held at least 4 allotments in the Project for the 2012-13 income year and 3 allotments in the 2013-14 income year.

Scheme

15. The scheme that is the subject of this Ruling is called the 2004 Swan Hill Almond Grower Project and is described in paragraphs 14 to 43 of Product Ruling PR 2004/40. It also incorporates the following additional documents:

- application for a Product Ruling received on 24 February 2014 and additional information received on 3 April 2014
- Product Ruling PR 2009/54 which exercised the Commissioner's discretion under paragraph 35-55(1)(b) for 2004 Growers for the 2008-09 income year, and
- Product Ruling PR 2011/1 which exercised the Commissioner's discretion under paragraphs 35-55(1)(b) and 35-55(1)(c) for 2004 Growers for the 2009-10, 2010-11 and 2011-12 income years.

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

Commissioner of Taxation
21 May 2014

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.

Paragraph 35-55(1)(a) – exercise of Commissioner's discretion for special circumstances

16. In deciding to exercise the discretion in paragraph 35-55(1)(a) on a conditional basis for the 2012-13 and 2013-14 income years, the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 *Income tax: non-commercial business losses: Commissioner's discretion* and Taxation Ruling TR 2001/14 *Income tax: Division 35 – non-commercial business losses*. Based on the evidence supplied by the Responsible Entity Almond Investors Limited, the Commissioner has determined that for the 2012-13 and 2013-14 income years, it is unreasonable to apply the rule in section 35-10 where a Grower held at least 4 allotments in the 2012-13 income year and 3 allotments in the 2013-14 income year, as the Grower's activity was affected by special circumstances outside the control of the Manager and the Growers would have passed at least one of the four tests in the relevant income year, but for the special circumstances.

17. The exercise of the Commissioner's discretion under paragraph 35-55(1)(a) is conditional on the Project being carried on in the manner described in PR 2004/40 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.

Subsection 35-10(2E) and special circumstances discretion

18. For the 2009-10 and later income years, the income requirement in subsection 35-10(2E) was introduced to limit those who can rely on the four tests.

19. Paragraph 35-55(1)(a) includes a note which explains that the paragraph is:

> …intended to provide for a case where a business activity would have satisfied one of the tests if it were not for the special circumstances.

20. Paragraph 66B of TR 2007/6 explains the above note in paragraph 35-55(1)(a) does not prevent the discretion applying to those Growers who do not satisfy the income requirement in subsection 35-10(2E).

The four tests and their application to Growers

Assessable income test – section 35-30

21. If the amount of assessable income *derived by a Grower from the Project for the 2012-13 and 2013-14 income years would have been at least $20,000, but for special circumstances occurring in each of these income years, the Commissioner, subject to other requirements, could exercise his discretion in paragraph 35-55(1)(a).

22. Based on the information provided by Almond Investors Limited it is reasonable to have expected Growers who held at least 4 almond allotments in the 2012-13 income year and 3 allotments in the 2013-14 income year to have derived assessable income of at least $20,000 in each of these income years, but for special circumstances.

Profits test – section 35-35

23. To pass this test, a Grower's almond growing activity would need to have produced a tax profit in 3 out of the past 5 years. Information provided by Almond Investors Limited indicates that up to and including the 2013-14 income year, no Grower in the Project would have made a tax profit, irrespective of the number of allotments held.

24. For the 2007-08 to the 2011-12 income years, the Commissioner exercised his discretion under the lead time limb in paragraphs 35-55(1)(b) and 35-55(1)(c) – refer to Product Rulings PR 2004/40, PR 2009/54 and PR 2011/1. Therefore, although Growers may have expected a tax profit in the 2012-13 and 2013-14 income years, but for special circumstances, this would have resulted in a profit in only 2 of the past 5 years.

Real property test – section 35-40

25. To pass this test, a Grower in the Project would be required to use real property, or have an interest in real property, on a continuing basis, that has a value of at least $500,000. Units held by a Grower, or their associates, in the 2004 Swan Hill Almond Orchard Asset Trust are not considered to be real property held by a Grower for the purposes of the Project. Given this, no Grower in the Project is expected to pass this test.

Other assets test – section 35-45

26. To pass this test, a Grower would need to use certain other assets, on a continuing basis in their almond growing *business activity, that have a total value of at least $100,000. Assets counted for this test include the written down value of assets you can claim as a deduction under Division 40, trading stock and the future value of payments for leased assets (excluding land).

27. No Grower in the Project is expected to pass this test, however a Grower who believes they pass this test in the 2012-13 or 2013-14 income year may request a private ruling on the exercise of the Commissioner's discretion under paragraph 35-55(1)(a).

Appendix 2 – Detailed contents list

28. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

PR 2004/40; PR 2009/54;
PR 2011/1; TR 2001/14;
TR 2007/6

Subject references:

- Commissioner's discretion
- non-commercial losses
- primary production
- producing assessable income
- product rulings
- taxation administration

Legislative references:

- ITAA 1997
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2E)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(a)
- ITAA 1997 35-55(1)(b)
- ITAA 1997 35-55(1)(c)
- ITAA 1997 Div 40
- TAA 1953

ATO references

NO:	1-5B0LW13
ISSN:	1441-1172
ATOlaw topic:	Income Tax ~~ Product ~~ orchards

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