



Product Ruling

Income tax: AIL Almond Grower Project – Swan Hill 2007 Growers (to 15 June 2007) – financial years ending 30 June 2013 and 30 June 2014

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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.

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 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 AIL Almond Grower Project – Swan Hill 2007 Growers (to 15 June 2007) 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 Growers.
4. The class of entities who can rely on those tax benefits consists of those entities who were specifically identified in paragraph 7 and subject to the exclusions in paragraph 8 of Product Ruling PR 2006/148 *Income tax: AIL Almond Grower Project – Swan Hill 2007 Growers (to 15 June 2007)* who, between 18 October 2006 and 15 June 2007 inclusive, entered into the specific scheme that is set out in paragraphs 17 to 81 of PR 2006/148 and paragraphs 16 to 26 of this Product Ruling.
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 to participate in the Project before 18 October 2006 or after 15 June 2007
 - have participated in the scheme through offers made other than through the Product Disclosure Statement, or
 - elect, or have elected, to take and sell their own produce.

Qualifications

6. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out has been and continues to be carried out in accordance with the scheme described in paragraphs 17 to 81 of PR 2006/148 and paragraphs 16 to 26 of this Product 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

Continuing application of PR 2006/148

8. This Product Ruling applies only to the specified class of entities that entered into the scheme set out in paragraphs 17 to 81 of PR 2006/148 between 18 October 2006 and 15 June 2007 inclusive. However, PR 2006/148 only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme, other than those set out in paragraphs 16 to 26 of this Product Ruling.

Ruling

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

9. A Grower who is an individual, alone or in partnership, and within the defined class of entities outlined in paragraph 4 of this Product Ruling may have losses arising from their participation in the Project that would be deferred to a later financial year under section 35-10.

10. Under the conditions outlined in paragraph 97 of PR 2006/148, the Commissioner exercised the discretion in paragraph 35-55(1)(b) for each Grower for the financial years ending 30 June 2007 to 30 June 2012.

11. The Responsible Entity advised on 13 November 2013 that the almond growing business of Growers would not produce a tax profit in the financial years ending 30 June 2013 or 30 June 2014, and requested the Commissioner extend his discretion to allow losses to be claimed in these financial years. The Responsible Entity has reduced the Allotment Sublease fee payable by Growers in the financial year ended 30 June 2015, and has forecast that Growers will make tax profits in each of the financial years ending 30 June 2015 to 30 June 2025.

Section 35-55 – exercise of Commissioner’s discretion for the financial years ended 30 June 2013 and 30 June 2014

12. For the financial years ending 30 June 2013 and 30 June 2014, the Commissioner will exercise the discretion in subsection 35-55(1) once the following conditions are satisfied:

- the Grower carried on their business of almond growing during the financial year
- the business activity that is carried on is not materially different to that in the scheme described in paragraphs 17 to 81 of PR 2006/148
- the only changes to the scheme are those described in paragraphs 16 to 26 of this Product Ruling, and
- the Grower has incurred a taxation loss for the income year from carrying on that business activity.

13. If these conditions are met for the financial years ending 30 June 2013 and 30 June 2014, the Commissioner will exercise the discretion under:

- paragraph 35-55(1)(b) for a Grower in the Project who satisfies the income requirement in subsection 35-10(2E), and
- paragraph 35-55(1)(c) for a Grower in the Project who does not satisfy the income requirement in subsection 35-10(2E).

14. In any year where the discretion is not exercised, losses incurred by a Grower will be subject to the loss deferral rule in section 35-10 and the Grower will not be able to offset the losses from the Project against other assessable income.

15. Note that the discretion has not been exercised for Growers who incur interest expenditure in relation to the Project. Such Growers are subject to the loss deferral rules in section 35-10.

Scheme

16. The scheme that is the subject of this Ruling is called the AIL Almond Grower Project – Swan Hill 2007 Growers (to 15 June 2007) and is described in paragraphs 17 to 81 of PR 2006/148. It also incorporates the following additional documents:

- letter requesting a Product Ruling, received on 13 November 2013
- Report dated February 2013 titled ‘Orchard Inspection and General Discussion on Recent Yield Variability within Australian Almond Orchards’, received 13 November 2013
- ‘AIL Almond Grower Project – 2007 After Tax Analysis for a Grower’ for the financial years ended 30 June 2012 through 30 June 2025, received 13 November 2013

- 'AIL Almond Grower Project – 2007 After Tax Analysis for a Grower' for the financial years ended 30 June 2013 through 30 June 2025, received 29 January 2014
- Report dated December 2013 titled 'Independent Assessment of Almond Investors Limited Orchards at Piangil', received 29 January 2014
- (Draft) letter to unit holders dated 28 February 2013 titled 'AIL Almond Asset Trust – 2007 Sale of Permanent Water Shares & Reduction in Sub Lease Fee' advising of the sale of permanent water rights and a proposed unspecified reduction to the allotment sub lease fee, received 3 April 2014
- Minutes of a meeting of the directors of Almond Investors Limited dated 3 April 2014 recording a proposed amendment to the Allotment Sublease Agreement and Constitution, received 9 April 2014
- Advice that the Grower allotment sublease fee for the financial year ended 30 June 2015 will be not more than \$740 per allotment, and
- Other information received on 18 November 2013, 29 January 2014, 4 February 2014, 13 February 2014, 3 April 2014, 9 April 2014, and 7 May 2014.

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

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

Changes to the Allotment Sublease agreement

18. Schedule 3 of the Allotment Sublease agreement for the Project sets out the rent payable for each Allotment by each Grower. The amount payable was set at \$1,050 for the financial year ended 30 June 2010, and thereafter the rent would be increased annually by the consumer price index.

19. The Responsible Entity proposes to invoice Growers less than the scheduled rent in the financial year ended 30 June 2014.

20. The Responsible Entity proposes an amendment to Schedule 3 of the Allotment Sublease agreement whereby after 30 June 2014:

For any subsequent financial year during the term of the Project, the rent may be less than the amount calculated in accordance with this Schedule 3 Part (1)(c)(i). In those circumstances, any rent payable incurred by each Grower in each financial year is the amount recorded in the total of the monthly invoices issued by the Responsible Entity to each Grower in the relevant financial year.

21. The Responsible Entity advises that the intent of the amendment is that after 30 June 2014, Growers may be charged any amount of rent up to a maximum of the amount specified in Schedule 3 of the Allotment Sublease agreement.

Changes to the Constitution of the AIL Almond Grower Project – Swan Hill

22. The Responsible Entity proposes to amend the Constitution to provide that during the term of the Project, after the financial year ended 30 June 2014, the rent payable by a Grower under the Allotment Sublease agreement may be less than the amount calculated in accordance with Schedule 3 Part (1)(c)(i). In those circumstances, the only rent payable by each Grower in each financial year is the amount recorded in the total of the monthly invoices issued by the Responsible Entity to each Grower in the relevant financial year. The intent of the amendment is that after 30 June 2014, Growers may be charged any amount of rent up to a maximum of the amount specified in Schedule 3 of the Allotment Sublease agreement.

Changes to Grower Fees

23. The Allotment Sublease fee to be invoiced to Growers for the financial year ended 30 June 2014 will be \$570 per Grower per Allotment. For future financial years, the Allotment Sublease fee will be set by the Responsible Entity every June, and it may be less but will be no greater than the amount specified in Schedule 3 of the Allotment Sublease agreement.

24. The Responsible Entity proposes that the Allotment Sublease fee payable for each Allotment by each Grower will be not more than \$740 for the financial year ended 30 June 2015.

25. All other fees remain as specified at paragraphs 62 to 65 of PR 2006/148.

26. 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.

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.*

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

27. Based on the information provided with the application for this Product Ruling, a Grower who was accepted into the Project within the class of entities defined in paragraph 4 and subject to the exclusions in paragraph 5 of this Product Ruling who carries on a business of almond growing individually (alone or in a partnership) is expected to incur losses from their participation in the Project which will be subject to Division 35. These losses will be subject to the loss deferral rules in section 35-10 unless an exception applies or, for each financial year in which losses are incurred, the Commissioner exercises the discretion in subsection 35-55(1) on 30 June of that specific financial year.

28. The exceptions to the loss deferral rule depend upon the circumstances of individual Growers and are outside the scope of this Ruling.

29. The Commissioner will apply the principles set out in Taxation Ruling TR 2007/6 *Income tax: non-commercial business losses: Commissioner's discretion when exercising the discretion*.

Section 35-55 – exercise of the Commissioner's discretion for the financial years ended 30 June 2013 and 30 June 2014

30. In the application for this Product Ruling, the Responsible Entity explained that special circumstances delayed Growers making a profit from their participation in the Project, and that a two year extension to the discretion granted in PR 2006/148 was requested. The application for this Product Ruling provides that the activity will produce a tax profit for Growers in the year ending 30 June 2015 and later financial years. The Commissioner accepts that the period of the requested extension is within the lead time for the almond growing industry.

31. Where, in the financial years ended 30 June 2013 and/or 30 June 2014, a Grower with income for non-commercial loss purposes of less than \$250,000 (that is, the Grower satisfies the income requirement in subsection 35-10(2E)) incurs a loss from carrying on their business activity the discretion in subsection 35-55(1)(b) is exercised for that year, because the Commissioner has determined:

- it is because of its nature that the business activity of the 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 almond growing industry, the Grower's business activity will satisfy one of the four tests set out in Division 35 or produce assessable income for a financial year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C)).

32. Where, in the financial year ended 30 June 2013 and/or 30 June 2014, a Grower with income for non-commercial loss purposes of \$250,000 or more (that is, the Grower does not satisfy the income requirement in subsection 35-10(2E)) incurs a loss from carrying on their business activity, the discretion in paragraph 35-55(1)(c) is exercised for that year, because the Commissioner has determined:

- it is because of its nature that the business activity of the Grower will not produce assessable income greater than the deductions attributable to it, and
- there is an objective expectation that within a period that is commercially viable for the almond growing industry, the Grower's business activity will produce assessable income for a financial year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C)).

33. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) or 35-55(1)(c) is conditional on the Project being carried on the manner described in paragraphs 17 to 81 of PR 2006/148 and paragraphs 16 to 26 of this Product Ruling during the financial years specified. If the Project is carried out in a materially different way to that described in the PR 2006/148 or this Product Ruling, a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

34. In each individual year where the Commissioner's discretion is exercised a Grower within either paragraph 31 or paragraph 32 of this Product Ruling who would otherwise be required to defer a loss arising from their participation in the Project under section 35-10 until a later financial year is able to offset that loss against their other assessable income.

35. Note that the discretion under Division 35 has not been exercised under this ruling for Growers who incur interest expenditure in relation to the Project, because there is no objective expectation that these Growers will satisfy one of the four tests set out in Division 35 or produce assessable income in that year greater than the deductions attributable to the Project within a period that is commercially viable for the almond industry, that is, by the financial year ended 30 June 2015. Growers who incur interest expenditure (or other expenses not within the scope of the ruling) may apply for a private ruling on the application of subsection 35-55(1).

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2007/6; PR 2006/148

Subject references:

- Commissioner's discretion
- non commercial losses
- product rulings

Legislative references:

- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(2C)
- ITAA 1997 35-10(2E)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(b)
- ITAA 1997 35-55(1)(c)
- TAA 1953

ATO references

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