

# ***CR 2015/82 - Income tax: Jubilee Almonds No. 1-5 Syndicates***



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## Class Ruling

### Income tax: Jubilee Almonds No. 1-5 Syndicates

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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.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### **Relevant provision(s)**

2. The relevant provisions dealt with in this Ruling are:
- Section 152-40 of the *Income Tax Assessment Act 1997* (ITAA 1997), and
  - Section 328-125 of the ITAA 1997.

All subsequent legislative references within this Ruling are to the ITAA 1997 unless otherwise indicated.

#### **Class of entities**

3. The class of entities to which this Ruling applies are the persons who are members of the Jubilee Almonds No. 1-5 Syndicates. Any reference to 'Growers' in this ruling is to be construed as a reference to the members of the Jubilee Almonds No. 1-5 Syndicates.

## Qualifications

4. This Ruling does not consider if the members of the Jubilee Almonds Syndicates satisfy all of the basic conditions for relief in section 152-10.
5. This Ruling does not consider if the CGT Asset (interest in the trust over land) satisfies all elements of the active asset test in section 152-35.
6. This Ruling does not consider if the members of the Jubilee Almonds Syndicates are connected with each other for the purpose of section 328-125.
7. This Ruling assumes that no Syndicate member, either alone or together with any Syndicate member with which they are affiliated, is connected with the trust.
8. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 11 to 36 of this Ruling.
9. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
  - this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
  - this Ruling may be withdrawn or modified.

## Date of effect

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10. This Ruling applies from 27 April 2015 to 30 June 2018. The Ruling continues to apply after 30 June 2018 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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11. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:
  - The Acquisition and Development Agreement for the Jubilee Almonds Venture

- The Syndicate Agreement for the Jubilee Almonds No. 1 Syndicate
- The Syndicate Agreement for the Jubilee Almonds No. 2 Syndicate
- The Syndicate Agreement for the Jubilee Almonds No. 3 Syndicate
- The Syndicate Agreement for the Jubilee Almonds No. 4 Syndicate
- The Syndicate Agreement for the Jubilee Almonds No. 5 Syndicate

12. Jubilee Almonds Pty Ltd (Jubilee Almonds) was incorporated as a proprietary limited company on 9 January 1987.

13. On 28 October 1987, the Acquisition and Development Agreement for the Jubilee Almonds Venture (Development Agreement) was executed between the persons named in schedule 1 of the Agreement (Growers), Jubilee Almonds, and SNPL.

14. The Development Agreement sets out the terms and conditions for the acquisition of the orchards, and does not make provision for the operation and management of the orchards.

15. The key terms of the Acquisition and Development Agreement are:

- 2.1 The Growers agree to associate themselves as provided in this agreement:-
  - 2.1.1 To purchase the land described in the land purchase agreement and to subdivide the land into allotments
  - 2.1.2 To develop the land as irrigated almond orchards
  - 2.1.3 ...
- 2.3 Each Grower will pay as each Grower's proportion of all costs incurred in the acquisition of land and the development of it the same proportion of the total costs which the area of irrigable land to be developed by the Grower bears to the aggregate of all irrigable land to be developed by all Growers who are parties to this agreement.
- 3.1 To facilitate and carry into effect their common and co-operative undertakings under this agreement each Grower hereby appoints Jubilee Almonds the Grower's agent and manager with authority to undertake on the Grower's respective part and behalf the matters, obligations and undertakings set out in the Agreement.

- 3.2 To ensure that the ultimate beneficial ownership and control of Jubilee Almonds is vested in the Growers in the proportions as their obligations to contribute costs under this agreement each Grower agrees to acquire and retain for so long as the Grower is bound by the provisions of this agreement the beneficial ownership of that number of shares in Jubilee Almonds, as a proportion of the total issued capital from time to time of Jubilee Almonds, being the same proportion as the area of that Grower's irrigable land bears to the aggregate area of irrigable land being developed by all Growers under the agreement.

For every hectare that a Syndicate member has a beneficial interest in, they receive 10 shares in Jubilee Almonds Pty Ltd. In total, 4644 shares in Jubilee Almonds have been issued to Syndicate members.

- 3.5 By executing this agreement Jubilee Almonds: -
- 3.5.1 agrees to act as manager and agent for the Growers to undertake on their behalf the functions described in this agreement
- ...
- 3.5.3 that all charges, costs and levies charged by Jubilee Almonds to the Growers shall be calculated on the basis that the amount of such charges and costs will enable Jubilee Almonds to recover only the costs incurred by it in carrying out its obligations under the agreement (...) and that it will fix its charges costs and levies to Growers so as to derive no profit advantage gain or reward for carrying out its obligations hereunder or under any agreement into which it may enter into with any of the Growers for the management and operation of the orchards
- 7.1 Contemporaneously with the execution of a Memorandum of Transfer from [GRPL] to Jubilee Almonds of the land under the Land Purchase Agreement Jubilee Almonds will execute a Declaration of Trust in respect of the land acknowledging that it holds the land on trust absolutely for [SNPL] and the Growers in the proportions; [SNPL] as to 185 undivided 453 parts and as to the Growers for the remaining 268 undivided 453 parts in the proportions as between the Growers themselves the same proportions which the area of irrigable land of each grower bears to 268.
- 8 The Growers approve the provisional allocation of the allotments into which the land is to be subdivided by the directors of Jubilee Almonds as contained in the land allocation schedule which is Annexure 4 hereto.
- 10.5 The money required by Jubilee Almonds in connection with the development of the orchards and for any incidental purposes thereto including the repayment or payment of any moneys borrowed or raised or other financial accommodation obtained and the payment of interest thereon or the repayment or performance of any debt or liability incurred by Jubilee Almonds in connection therewith in accordance with this agreement and in conformity with Annexure 5 shall be provided by the Growers rateably in accordance with Clause 2.3.

- 10.6 The money required by Jubilee Almonds shall be paid by each Grower to it within 14 days after Jubilee Almonds shall make a call requiring payment...
- 10.11 If a Grower defaults in paying a call or levy for the Grower's contribution to the costs the directors may serve on the Grower a default notice ... and may exercise in respect of the Grower in default the powers authorities and discretions contained in Section 10 of this agreement.
- 10.13 If the Grower does not pay the amount required by the default notice the Grower authorises and empowers the directors to exercise the following powers and authorities:-
- 10.13.1 To seek out a person or persons willing to take an assignment of the defaulting grower's entitlement under this agreement and to pay the accrued past and future liabilities of the defaulting grower under this agreement;
- 10.13.2 ...
- 10.13.3 If Jubilee Almonds shall find one or more assignees Jubilee Almonds as attorney for the defaulting grower may execute a deed in such form as jubilee Almonds may require to assign to the assignee or assignees the interest of the defaulting grower under this agreement;
- 10.13.4 Jubilee Almonds shall account to the defaulting grower for the amounts if any which the assignee pays to Jubilee Almonds in consideration of the assignment in excess of the accrued past liabilities of the defaulting grower not paid prior to the assignment and interest thereon and all of the costs of Jubilee Almonds arising out of or associated with the assignment;
- 10.13.5 ...
- 11.1 A Grower may with the consent of Jubilee Almonds assign the Growers interest in this agreement and the land to be developed by the Grower and provisionally allocated subject to the conditions of this section.
- 11.4 Jubilee Almonds shall require an assignee to covenant to be bound by the terms of this agreement from the date of the assignment.
- 12.1 Subject to obtaining the consent of the holder or person entitled to any mortgage charge or encumbrance over the land or, if the terms of any easement exception or reservation of any title requires the consent of the holder of or person entitled to such easement exception or reservation that holder or persons consent on 30<sup>th</sup> June 1999 Jubilee Almonds shall transfer to each Grower an estate in fee simple of the land in the allotments developed for the Growers on that date and in any event subject to such mortgages charges encumbrances easements exceptions and reservations.

16. Annexure 2 of the Development Agreement shows that the land was subdivided into 60 allotments. Annexure 2 shows the area of the allotments as follows:

Area (in hectares)	Allotment
8.160	4, 5, 6, 7, 8, 9, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, 26, 27, 28, 29, 30, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59
8.830	3
9.210	2
9.600	1
12.20	10, 11, 12, 22, 23, 24, 31, 32, 33, 43, 44, 45, 55, 56, 60

17. Jubilee Almonds had the land subdivided into individual titles for each allotment. The titles were issued to Jubilee Almonds but have not been transferred to the Growers. The Certificates of Title for allotment 41 and allotment 46 show that the registered proprietor in fee simple is Jubilee Almonds.

18. The Certificates of Title for allotment 41 and allotment 46 show the area of allotments 34-54 (inclusive) as follows:

Area (in hectares)	Allotment
8.160	35, 36, 38, 39, 41, 42, 47, 48, 50, 51, 53, 54
8.196	52
8.197	49
8.199	46
8.202	40
8.203	37
8.205	34
12.24	44, 45
12.30	43

19. On 28 October 1987, the Syndicate Agreement for the Jubilee Almonds No. 1 Syndicate was executed by Jubilee Almonds and the persons named and described in the schedule to that agreement (Syndicate Agreement 1).

20. On 28 October 1987, the Syndicate Agreement for the Jubilee Almonds No. 2 Syndicate was executed by Jubilee Almonds and the persons named and described in the schedule to that agreement (Syndicate Agreement 2).

21. On 28 October 1987, the Syndicate Agreement for the Jubilee Almonds No. 3 Syndicate was executed by Jubilee Almonds and the persons named and described in the schedule to that agreement (Syndicate Agreement 3).

22. On 28 October 1987, the Syndicate Agreement for the Jubilee Almonds No. 4 Syndicate was executed by Jubilee Almonds and the persons named and described in the schedule to that agreement (Syndicate Agreement 4).

23. On 28 October 1987, the Syndicate Agreement for the Jubilee Almonds No. 5 Syndicate was executed by Jubilee Almonds and the persons named and described in the schedule to that agreement (Syndicate Agreement 5).

24. The Syndicate Agreements set out the terms and conditions for the management and operation of the allotments by Jubilee Almonds as agent for the Syndicates.

25. Each Syndicate Agreement has identical terms and differs only in respect of the information in the Schedule to the Agreements.

26. The key terms of the Syndicate Agreements are:

- 1.2 The members are each parties to the Development Agreement as Growers.
- 1.3 To facilitate the economic and efficient working of their respective orchards as they are progressively developed under the Development Agreement, to share the costs of the maintenance and operation of their orchards and the revenue derived from them as they progressively come into production the members have agreed to associate as members of a syndicate and to appoint Jubilee Almonds as the manager of their syndicate operations.
- 2.1 The members associate themselves under this agreement:-
  - 2.1.1 To share the cost of management and operation of their orchards as the orchards are brought into production under the Development Agreement.
  - 2.2.2 To share the proceeds of the sale of the crops grown on their orchards during the period of their association under the agreement.
- 2.3 Each member will pay as each member's proportion of all costs incurred in the management and operations of the members' orchards the same proportion of the total costs incurred in the management and operation of all of the members' orchards as the area of irrigable land to be developed in each member's orchard bears to the aggregate of all irrigable land to be developed by the members of the syndicate in their orchards and the members shall in the same proportions share the proceeds of the sale of all crops harvested from their orchards.

Under each Syndicate Agreement the members of a Syndicate are jointly entitled to the income from the sale of the crops grown on the orchards they have a beneficial interest in.

The amount of income each member is entitled to receive is in proportion to the amount of land their interest bears to the total amount of land of their Syndicate.



- 4.1 The members hereby appoint Jubilee Almonds manager of the syndicate's operations with authority to undertake the total operational and management function of the members' orchards including harvesting and sale of the crops produced from them and the division of the profits derived from the operations of the syndicate
- 5.1 The members will fund and pay all of the costs incurred by Jubilee Almonds in discharging its functions under this agreement.
- 5.2 The money required by Jubilee Almonds to fund the discharge of its functions under this agreement shall be paid by the Growers rateably in accordance with clause 2.3.
- 5.3 Moneys required by Jubilee Almonds shall be paid by each member within 14 days of Jubilee Almonds making a call requiring payment...
- 5.4 The amounts of calls paid by members shall be credited by Jubilee Almonds to the members in the accounts of the syndicate maintained in its books. All payments to meet the costs of the discharge of its functions under this agreement shall be paid by jubilee almonds as agent for the members out of the funds subscribed by the members and debited the accounts of the members' pro rata.
- 5.6 Each member agrees that to better secure the members' performance of the members' obligations under this agreement Jubilee Almonds shall by virtue of this agreement be deemed empowered to sue in its own name to recover from a member the amount of any levy unpaid and interest thereon. Moneys recovered by Jubilee Almonds (excluding interests and costs) by virtue of any such proceedings shall be credited by Jubilee Almonds to the accounts of the member in its books.
- 5.7 If a member defaults in paying levies or calls for the members' contribution Jubilee Almonds may serve a default notice conforming with the requirements of Clause 5.2 and may exercise in respect of the member in default the powers authorities and discretions contained in Clause 5.9.
- 5.9 If the member does not pay the amount required by the default notice the member authorises and empowers the directors of Jubilee Almonds to exercise the following powers and authorities:-
  - 5.9.1 To seek out a person or persons willing to take an assignment of the defaulting member's entitlement under this agreement and to pay the accrued past and future liabilities of the defaulting member under this agreement;
  - 5.9.2 ...

5.9.3 If Jubilee Almonds shall find one or more assignees Jubilee Almonds as attorney for the defaulting member may execute a deed in such form as jubilee Almonds may require to assign to the assignee or assignees the interest of the defaulting member under this agreement;

5.9.4 Jubilee Almonds shall account to the defaulting member for the amounts, if any, which the assignee pays to Jubilee Almonds in consideration of the assignment in excess of the accrued past liabilities of the defaulting member not paid prior to the assignment and interest thereon and all of the costs of Jubilee Almonds arising out of or associated with the assignment;

5.9.5 ...

5.10 If a member is in default under the provisions of this agreement entitling Jubilee Almonds to exercise the powers in this section contained the member shall be deemed for the purposes of Clause 10.9 of the Development Agreement in the payment of the charges levied by Jubilee Almonds under the Development Agreement so that and to the intent that Jubilee Almonds shall and may exercise in respect of the member the rights which Jubilee Almonds has under the Development Agreement by reason of a default of the member under Clause 10.9 of the Development Agreement and to the further intent and purpose that the default rights which Jubilee Almonds may exercise under this agreement and the Development Agreement shall be exercised together as if the default under this agreement were a default under the Development Agreement and vice versa.

The members acknowledge and declare that the powers in this section are conferred on Jubilee Almonds to provide a means by which the loss and damage of members not in default may but not necessarily will be minimised by the exercise of these powers by Jubilee Almonds...

6.1 A member may assign a member's interest in this agreement only if simultaneously with the assignment the member assigns to the same assignee the member's interest as a Grower under the Development Agreement upon and in accordance with the provisions of Section 11 of the Development Agreement.

6.2 The assignee of the interest of a member shall be required as a condition of the assignment to enter into a covenant with Jubilee Almonds as manager of the syndicate and on behalf of the other members of the syndicate to be bound by the terms of this agreement from the date of the assignment.

27. Collectively the Syndicates will be referred to, in this Ruling, as 'the Syndicates', and the members of each Syndicate will be referred to as 'the Members'.

28. The Development Agreement describes the interests of the Growers named in the schedule to the agreement as follows:

<b>Grower</b>	<b>Area of land (in hectares) to be developed by the Grower</b>	<b>Allotment provisionally allocated</b>	<b>Area (in hectares) of allotment (Annexure 2)</b>
Grower 1	8	45	12.20
Grower 2	8	35	8.160
Grower 3	8	13	8.160
Grower 4	16	14 and 40	4.160 and 8.160
Grower 5	12	49 and 52	8.160 and 8.160
Grower 6	8	11	12.20
Grower 7	20	32 and 33	12.20 and 12.20
Grower 8	12	55	12.20
Grower 9	8	21	8.160
Grower 10	8	24	12.20
Grower 11	8	23	12.20
Grower 12	8	20	8.160
Grower 13	8	36	8.160
Grower 14	12	47 and 48	8.160 and 8.160
Grower 15	8	39	8.160
Grower 16	8	34	8.160
Grower 17	24	13, 16 and 37	8.160, 8.160, and 8.160
Grower 18	8	56	12.20
Grower 19	8	41	8.160
Grower 20	32	17, 18, 27 and 43	8.160, 8.160, 8.160 and 12.20
Grower 21	8	42	8.160
Grower 22	12	10	12.20
Grower 23	8	12	12.20
Grower 24		53	8.160
SNPL		1-9, 19, 22, 25, 26, 28-31, 38, 44, 46, 51, 54, 57, 58 and 60	

29. The Syndicate Agreements (SA) describe the interests of the Syndicate members named in the schedules to the agreements as follows:

<b>Member</b>	<b>SA</b>	<b>Area of land (in hectares) to be developed by the member</b>	<b>Allotment provisionally allocated</b>	<b>Area (in hectares) of allotment (Annexure 2 of Development Agreement)</b>
Member 1.1 (Grower 18)	1	8	56	12.20
Member 1.2 (Grower 20)	1	32	17, 18, 27 and 43	8.160, 8.160, 8.160 and 12.20
Member 1.3 (Grower 21)	1	8	42	8.160
Member 2.1 (Grower 17)	2	24.2	15, 16 and 37	8.160, 8.160 and 8.160
Member 2.2	2	17.4	5, 51 and 53	8.160, 8.160 and 8.160
Member 2.3 (Grower 10)	2	10	24	12.20
Member 2.4 (Grower 12)	2	7.1	29	8.160
Member 2.5	2	12.3	38 and 58	8.160 and 8.160
Member 2.6	2	16.2	19 and 35	8.160 and 8.160
Member 2.7	2	8	10	12.20
Member 3.1 (Grower 22)	3	16.4	28 and 40	8.160 and 8.160
Member 3.2 (Grower 14)	3	13	13 and 21	8.160 and 8.160
Member 3.3 (Grower 5)	3	12.2	55	12.20
Member 3.4	3	7.8	30	8.160
Member 3.5 (Grower 21)	3	13.6	9 and 57	8.160 and 8.160
Member 3.6 (Grower 8)	3	17.3	14 and 44	8.160 and 12.20
Member 3.7 (Grower 9)	3	8	4	8.160
Member 3.8	3	8.1	41	8.160

<b>Member</b>	<b>SA</b>	<b>Area of land (in hectares) to be developed by the member</b>	<b>Allotment provisionally allocated</b>	<b>Area (in hectares) of allotment (Annexure 2 of Development Agreement)</b>
Member 4.1 (Grower 18)	4	11.9	39 and 54	8.160 and 8.160
Member 4.2 (Grower 4)	4	21	26, 33 and 45	8.160, 12.20 and 12.20
Member 4.3 (Grower 19)	4	12	8 and 49	8.160 and 8.160
Member 4.4 (Grower 1)	4	11	12	12.20
Member 4.5 (Grower 11)	4	11	23	12.20
Member 4.6 (Grower 7)	4	26.6	3, 32 and 52	8.830, 12.20 and 8.160
Member 5.1 (Grower 16)	5	22.2	20, 34 and 36	8.160, 8.160 and 8.160
Member 5.2 (Grower 6)	5	8	7	8.160
Member 5.3 (Grower 23)	5	8	1	9.600
Member 5.4 (Grower 15)	5	12	47 and 48	8.160 and 8.160
Member 5.5 (Grower 3)	5	8.2	25	8.160
Member 5.6	5	8	2	9.210
Member 5.7	5	8	46	8.160
Member 5.8 (Grower 24)	5	11	11	12.20

30. In total, 464.4 hectares of orchards are managed and operated by Jubilee Almonds on behalf of the Syndicates.

31. As at December 2014, the interests held by the members of each Syndicate, were as follows:

Syndicate	Total of the interests held by Syndicate members (per hectare)	Members	Interest held by Member (per hectare)
1	89.9	Current Member 1.1	17.5
		Current Member 1.2	8.0
		Current Member 1.3	41.1
		Current Member 1.4	0.8
		Current Member 1.5	11.3
		Current Member 1.6	11.2
2	95.2	Current Member 2.1	24.2
		Current Member 2.2	17.4
		Current Member 2.3	16.2
		Current Member 2.4	12.3
		Current Member 2.5	8.0
		Current Member 2.6	2.5
		Current Member 2.7	2.5
		Current Member 2.8	2.5
		Current Member 2.9	2.5
		Current Member 2.10	7.1
3	91.1	Current Member 3.1	13.6
		Current Member 3.2	8.1
		Current Member 3.3	5.4
		Current Member 3.4	11.0
		Current Member 3.5	1.3
		Current Member 3.6	10.7
		Current Member 3.7	13.0
		Current Member 3.8	8.0
		Current Member 3.9	12.2
		Current Member 3.10	7.8
4	102.8	Current Member 4.1	6.5
		Current Member 4.2	9.6
		Current Member 4.3	10.5
		Current Member 4.4	11.9
		Current Member 4.5	11.0
		Current Member 4.6	11.0
		Current Member 4.7	21.0
		Current Member 4.8	17.3
		Current Member 4.9	4.0

Syndicate	Total of the interests held by Syndicate members (per hectare)	Members	Interest held by Member (per hectare)
5	85.4	Current Member 5.1	2.3
		Current Member 5.2	5.9
		Current Member 5.3	22.2
		Current Member 5.4	11.0
		Current Member 5.5	4.0
		Current Member 5.6	8.0
		Current Member 5.7	8.0
		Current Member 5.8	8.0
		Current Member 5.9	4.0
		Current Member 5.10	4.0
		Current Member 5.11	4.0
		Current Member 5.12	4.0

32. On 5 February 1988 Jubilee Almonds made a declaration of trust over the land it holds as follows:

TO: The persons named and described in the Schedule hereto.

WHEREAS:

(a) ...

(c) Clause 7 of the Acquisition and Development Agreement provides that contemporaneously with the execution of a Memorandum of Transfer from [GRPL] of the land Jubilee Almonds will execute a Declaration of Trust in respect of the land acknowledging that it holds the land on trust absolutely for [SNPL] and the Growers in the proportions:

[SNPL] as to 185 undivided 453 parts; and

As to the Growers for the remaining 268 undivided 453 parts in the proportions as between the Growers themselves the same proportions which the area of irrigable land to be developed by each Grower under the Acquisition and Development Agreement bears to 268.

NOW BY THIS DEED JUBILEE ALMONDS HEREBY ACKNOWLEDGES AND DECLARES that it holds the land on trust absolutely for [SNPL] and the Growers in the proportions:-

For [SNPL] as to 185 undivided 453 parts; and

As to the Growers in the same proportions which the number set out in the Schedule opposite the name of the Grower bears to 268.

## SCHEDULE

NAME & ADDRESS OF GROWER	THE PROPORTION WHICH THE GROWERS INTEREST IN THE LAND BEARS TO 268
[Grower 1]	8
[Grower 24]	8
[Grower 2]	8
[Grower 3]	8
[Grower 4]	16
[Grower 5]	12
[Grower 6]	8
[Grower 7]	20
[Grower 8]	12
[Grower 9]	8
[Grower 10]	8
[Grower 11]	8
[Grower 12]	8
[Grower 13]	8
[Grower 14]	12
[Grower 15]	8
[Grower 16]	8
[Grower 17]	24
[Grower 18]	12
[Grower 19]	8
[Grower 20]	32
[Grower 21]	8
[Grower 22]	12
[Grower 23]	8

33. The Annual report for Jubilee Almonds Pty Ltd for the year ended 30 June 2013 provides the following information:

- Jubilee Almonds Pty Ltd is the project manager of the Jubilee Almond Project. In this capacity it incurs expenditure to effectively operate the project on behalf of investors. This expenditure is then charged to investors through an annual management fee.
- Gross income from almond sales was \$6,749,338 (\$5,917,532 in 2012).



- Expenses allocated to processing, sorting, packing, cracking, hulling, shelling and other related expenses was \$1,299,069 (\$1,438,599 in 2012).
- Net income from almond sales was \$5,450,269 (\$4,478,933 in 2012), or \$11,736 on a per hectare basis (\$9,645 in 2012).
- The taxable income of a Grower, after deducting the management fee and the irrigation rate, was \$1,626 per hectare (tax loss of \$95 in 2012).
- The management fee was \$7,610 per hectare (\$7,430 in 2012).

34. The Consolidated Investor Summary of the Jubilee Almonds Project, and the Annual report for Jubilee Almonds Pty Ltd, for the year ended 30 June 2014 provides the following information:

- Gross income from almond sales was \$10,021,864.
- Net income from almond sales was \$18,493.22 per hectare (Jubilee Almonds accounts show that net income from almond sales in 2014 was \$8,588,252).
- The management fee charged to investors was \$9,410.00 per hectare (Jubilee Almonds accounts show that the total management fee in 2014 was \$4,370,004).
- Taxable income of an investor was \$6,420.82 per hectare.
- The crop for 2013 was 1,743 tons.
- The crop for 2014 was 1,747 tons.
- From 2014-2017 the almond orchards will be replanted; 39 hectares was replanted in 2014, and it is expected that 73 hectare will be replanted in 2015, 73 hectare will be replanted in 2016, and 93 hectare will be replanted in 2017.

35. A syndicate member does not otherwise receive information with respect to the performance of their Syndicate.

36. Syndicate members are contemplating selling their interests in the almond orchards. The almond orchards cannot be sold without approval of each member of the Syndicates.

## **Ruling**

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### **Section 152-40 – A Syndicate Member’s beneficial interest in the trust over the land will not be an active asset of that member for the purposes of section 152-35**

37. The trust over the land does not cause any of the Syndicate members to be absolutely entitled to any part of the land. Under the terms of the trust, a ‘Grower’ (a Syndicate member) is given an interest in a number of unspecified undivided parts (for example, 8 of 268 undivided 453 parts). The Syndicate members do not own the land. As such, the land is not the relevant capital gains tax (CGT) asset of the Syndicate members. The relevant CGT asset is the Syndicate member’s interest in the trust over the land (interest in the trust).

38. For the purpose of section 152-40, a Syndicate member’s interest in the trust will not be an active asset of the member. In addition, subsection 152-40(3) does not apply to the members’ interests in the trust.

### **Section 328-125 – A Syndicate member will not be connected with their Syndicate, unless the requirements of subsection 328-125(2) are satisfied**

39. For the purposes of section 328-125, a Syndicate member will not be connected with their Syndicate unless the Syndicate member (their affiliates, or the member and their affiliates) is entitled to receive at least 40 percent of their Syndicate’s distribution of income whether directly or through a nominee (subsection 328-125(2)).

### **Section 328-125 – the Syndicates are not connected**

40. For the purposes of section 328-125, a Syndicate will not be connected with another Syndicate.

## 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.*

41. Division 152 provides various concessions to small business to reduce their capital gains. To be entitled to the concessions, an entity must satisfy the basic conditions for relief in subsection 152-10(1):

A \*capital gain (except a capital gain from \*CGT event K7) you make may be reduced or disregarded under this Division if the following basic conditions are satisfied for the gain:

- (a) a \*CGT event happens in relation to a \*CGT asset of yours in an income year;
- ...
- (b) the event would (apart from this Division) have resulted in the gain;
- (c) at least one of the following applies:
  - (i) you are a small business entity for the income year;
  - (ii) you satisfy the maximum net asset value test (see section 152-15);
  - (iii) you are a partner in a partnership that is a small business entity for the income year and the CGT asset is an interest in an asset of the partnership;
  - (iv) the conditions mentioned in subsection (1A) or (1B) are satisfied in relation to the CGT asset in the income year;

Note: For determining whether an entity is a small business entity, see Subdivision 328-C (as affected by sections 152-48 and 152-78).

- (d) the CGT asset satisfies the active asset test (see section 152-35).

42. This class ruling only considers whether the beneficial interests in the trust over the land (the CGT asset) are 'active assets' of the Syndicate members, and **does not** consider whether the CGT asset satisfies the 'active asset' test under paragraph 152-10(1)(d).

43. The ruling also considers whether Syndicate members are 'connected with' their Syndicate under section 328-125, but does not consider whether Syndicate members are connected with each other or other entities. The concept of 'connected with' is relevant to determining whether the requirements in paragraphs 152-10(1)(c) and 152-10(1)(d) are satisfied.

44. This ruling **does not** consider whether paragraphs (a), (b) and (c) of subsection 152-10(1) are satisfied by Syndicate members.

45. Further it **does not** consider whether the Syndicate members satisfy the additional basic condition for an interest in a trust under subsection 152-10(2). Subsection 152-10(2) provides that if the CGT Asset is an interest in a trust, the taxpayer must be a CGT Concession Stakeholder in the trust. A CGT Concession Stakeholder in a trust is an individual who is entitled to receive at least 20% of any distribution of income or capital that the trustee may make to which the individual would be beneficially entitled (subsections 152-60, 152-55, 152-65, and 152-70).<sup>1</sup>

46. Any decision on the application of paragraphs 152-10(1)(a), (b), (c) and (d) and subsection 152-10(2) to a Syndicate member will require consideration of the individual circumstances of the Syndicate member, and is outside the scope of this ruling.

**A Syndicate member's interest in the trust over the land is not an active asset of that member**

***Whether the growers are absolutely entitled to the land held on trust?***

47. The instrument of trust provides the land is held on trust absolutely for SNPL and the Growers in the proportions of 185 of the 453 undivided parts for SNPL and 268 of the 453 undivided parts for the Growers named in the schedule to the trust in the proportions specified in the schedule.

48. Subsection 106-50(1) states that:

For the purposes of this Part and Part 3-3 (about capital gains and losses) and Subdivision 328-C (What is a small business entity), from just after the time you come absolutely entitled to a CGT asset as against the trustee of a trust (disregarding any legal disability), the assets is treated as being your asset (instead of being an asset of the trust).

49. Subsection 106-50(2) states that once you are absolutely entitled to a CGT asset as against the trustee any act done by the trustee in relation to the asset is as if you had done it.

50. The Commissioners view on the meaning of 'absolutely entitled', in the context of the CGT provisions, is stated in Draft Taxation Ruling TR 2004/D25, which relevantly provides the following:

**Core principle**

10. The core principle underpinning the concept of absolute entitlement in the CGT provisions is the ability of a beneficiary, who has a vested and indefeasible interest in the entire trust asset, to call for the asset to be transferred to them or to be transferred at their direction. This derives from the rule in *Saunders v. Vautier* applied in the context of the CGT provisions (...). The relevant test of absolute entitlement is not whether the trust is a bare trust (...).

<sup>1</sup> The facts provided suggest that no Syndicate member will have a beneficial entitlement to at least 20% of the distribution of income and capital of the trust to meet this basic condition.

## ***Rule in Saunders v. Vautier***

11. Under the rule in *Saunders v. Vautier*, the courts do not regard as effective a direction from the settlor of the trust that purports to delay the beneficiary's full enjoyment of an asset. However, if there is some basis upon which a trustee can legitimately resist the beneficiary's call for an asset, then the beneficiary will not be absolutely entitled as against the trustee to it.

...

## ***One beneficiary with all the interests in a trust asset***

21. A beneficiary has all the interests in a trust asset if no other beneficiary has an interest in the asset (even if the trust has other beneficiaries).

22. Such a beneficiary will be absolutely entitled to that asset as against the trustee for the purposes of the CGT provisions if the beneficiary can (ignoring any legal disability) terminate the trust in respect of that asset by directing the trustee to transfer the asset to them or to transfer it at their direction (...).

## ***More than one beneficiary with interests in a trust asset***

23. If there is more than one beneficiary with interests in the trust asset, then it will usually not be possible for any one beneficiary to call for the asset to be transferred to them or to be transferred at their direction. This is because their entitlement is not to the entire asset.

24. There is, however, a particular circumstance where such a beneficiary can be considered absolutely entitled to a specific number of the trust assets for CGT purposes. This circumstance is where:

- the assets are fungible;
- the beneficiary is entitled against the trustee to have their interest in those assets satisfied by a distribution or allocation in their favour of a specific number of them; and
- there is a very clear understanding on the part of all the relevant parties that the beneficiary is entitled, to the exclusion of the other beneficiaries, to that specific number of the trust's assets.

25. Because the assets are fungible, it does not matter that the beneficiaries cannot point to *particular* assets as belonging to them. It is sufficient in these circumstances that they can point to a specific number of assets as belonging to them...

## ***When are assets fungible?***

93. Assets are fungible if each asset matches the same description such that one asset can be replaced with another. Assets are fungible if they are of the same type (for example, shares in the same company and with the same characteristics).

94. The test is not an extreme one. Assets within the class need not be exactly identical and in this regard it is enough that a beneficiary might reasonably be expected to be indifferent between them. For example, in the case of shares, the mere fact that each share is allocated a unique number in the company's share register is not enough to prevent those shares being treated as fungible. Therefore, shares in a listed public company can be fungible. However, land would rarely be fungible because each parcel of land is unique.

51. The terms of the trust create a trust over 'the land', and give SNPL and each of the Growers in the schedule thereto an interest in the 453 undivided parts of the land. The trust does not identify the size of a part (although there are 464.4 hectares of orchards and 453 parts; 1.0252 hectares per part), and does not identify which of the 453 undivided parts are held for each Grower or SNPL.

52. The Schedule/Annexures to the Development Agreement and the Schedule to each of the Syndicate Agreements do state the area of land to be developed by a Grower/member (in hectares), and provides a draft of the allotments to be allocated to a Grower/member. However, the land interests stated in the Development Agreement and Syndicate Agreements do not correspond with the fractional undivided interests specified in the executed trust deed nor does either correspond with the area of the eventual subdivided allotments, despite the trust being executed subsequent to the Agreements being entered.

53. The interests of some Growers have been assigned to other Growers (either existing or new), which have changed the interests in the land of the trust. When an interest is assigned by a Grower, the interest in the land is identified as an amount of hectares (not parts or allotments), and does not identify which hectares. There has been no change to the trust to reflect the changes of Growers interests.

### ***Analysis of Core Principle & the Rule in Saunders v. Vautier<sup>2</sup>***

54. The terms of the trust clearly provide that the trust property is the land in 453 undivided parts. There is one subject of trust (being the land), and the beneficiaries of the trust are given an interest in unspecified undivided parts of that land. No Grower has a vested and indefeasible interest in an entire trust asset (a particular parcel of land). Further, although the trust describes the land in terms of '453 undivided parts', the actual allotments do not correspond in area with any particular Grower's share of the 453 undivided parts.

55. Therefore, on the terms of the trust, no Grower may terminate the trust over a particular allotment by directing the trustee to transfer that allotment to them or transfer it at their direction. The trustee might choose to satisfy the Grower's interest by conveying an allotment of land but that is entirely at the volition of the trustee in terms of their equitable duties under the trust deed. No Grower can compel the trustee to act in this way.

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<sup>2</sup> *Saunders v. Vautier* (1841) 4 Beav 115; (1841) 49 ER 282.

56. Further, were the trustee to convey a particular allotment to a particular grower ostensibly in satisfaction of the grower's equitable interest, the grower would either be advantaged or disadvantaged under the trust and relative to the other growers. That is, the trustee would not be discharging their equitable duties in accordance with the trust deed.

57. A disadvantaged grower would then have standing in an action in equity to restrain the trustee from acting in that way. That is either the trustee, or any disadvantaged Grower could legitimately resist a Grower's call for their beneficial interest to be satisfied by conveying a particular allotment.

58. Further, under the terms of each Syndicate Agreement, the trustee might reasonably refuse to satisfy a Grower's equitable interest were the Grower, for example, delinquent in making their contributions under the Syndicate Agreement.

59. For each of these reasons, no Grower has absolute entitlement over any particular trust property as a matter of core principle.

60. As stated at paragraph 94 of TR 2004/D25, the Commissioner's view is that 'land would rarely be fungible because each parcel of land is unique.'

61. On the current facts, each allotment is a different size, and so no particular allotment can be said to match the same description as another allotment.

62. In any event, the question of whether trust property is fungible is only enlivened if 'the beneficiary is entitled against the trustee to have their interest in those assets satisfied by a distribution or allocation in their favour of a specific number of them' (paragraph 24 of TR 2004/D25). For the reasons already explained, the terms of the executed trust deed do not enable a Grower to compel the trustee to satisfy their interest in this way. Rather, the Grower has an undivided fractional interest in the entire of the trust property and any decision of the trustee as to how that interest might be satisfied is at the volition of the trustee.

63. For all of these reasons the Grower cannot be said to be absolutely entitled to any particular asset of the trust.

## ***Whether the relevant CGT Asset of the Growers is an active asset?***

64. Subsection 152-40(1) provides that a CGT asset is an active asset if, at the relevant time:

- (a) you own the asset (whether the asset is tangible or intangible) and it is used, or held ready for use, in the course of carrying on a business that is carried on (whether alone or in partnership) by:
  - (i) you; or
  - (ii) your affiliate; or
  - (iii) another entity connected with you; .....

65. As the Growers are not absolutely entitled to the land as against the trustee (Jubilee Almonds), the Growers are not deemed to own the trust asset for the purposes of section 152-40. As such, subsection 152-40(1) will not be satisfied by any particular Grower in respect of the land.

66. The relevant CGT asset of the Growers is an interest in a trust. Subsections 152-40(3), (4) and (5) apply to determine if an interest in a trust is an active asset.

67. Subsection 152-40(3) provides that a CGT asset is also an active asset at a given time if, at that time, you own it and:

- (a) it is either a share in a company that is an Australian resident at that time or an interest in a trust that is a resident trust for CGT purposes for the income year in which that time occurs; and
- (b) the total of:
  - (i) the market values of the active assets of the company or trust; and
  - (ii) the market value of any financial instruments of the company or trust that are inherently connected with a business that the company or trust carries on; and
  - (iii) any cash of the company or trust that is inherently connected with such a business;
 is 80% or more of the market value of all of the assets of the company or trust.

68. Certain other rules are contained in subsections 152-40(3A) and 152-40(3B) and certain exceptions are contained in subsections 152-40(4), 152-40(4A) and 152-40(5); should subsection 152-40(3) be otherwise satisfied.

***Subparagraph 152-40(1)(a)(i) – is Jubilee Almonds carrying on the almond growing business of each syndicate as trustee?***

69. Jubilee Almonds, as trustee of the trust over the land, holds legal title to the land and is the owner of the land. Whether the land (trust asset) is an active asset of the trust requires consideration of subsection 152-40(1). Subsection 152-40(1) provides that a CGT asset is an active asset if, at the relevant time, the asset is owned by you and it is used by you (your affiliate or another entity connected with you) in the course of you carrying on a business (whether alone or in partnership).



70. Under the scheme, the ongoing operation and management of the almond production business is set out in the Syndicate Agreements. Under the Syndicate Agreements, the members agreed to engage Jubilee Almonds to manage and operate the land as almond orchards. The ongoing functions of Jubilee Almonds include the harvesting and sale of the almond crop. The principal responsibility of each member under the Syndicate Agreements is to provide the funds to enable Jubilee Almonds to carry out its functions. Each Member is entitled to a share of the proceeds of the almond crop. It is expressly stated in the Syndicate Agreements that the capacity in which Jubilee Almonds undertakes these tasks and manages the orchards is as each Syndicate's agent. In accordance with fundamental Agency doctrine, Jubilee Almonds (as agent) is therefore acting for each of the Syndicates (as principals). Jubilee Almonds is not acting in its own capacity or in a trustee capacity in managing the orchards. These are each mutually exclusive in law to an agent acting for their principal.

71. It was also the case that at the time the Syndicate Agreements were executed, Jubilee Almonds did not have any capacity as trustee and therefore must have executed the Syndicate Agreements in its own capacity. The parties to the Syndicate Agreements were Jubilee Almonds and the persons named and described in the schedule (the members). The Syndicate Agreements were executed on 28 October 1987. The declaration of trust over the land was not executed until 5 February 1988.

72. For each of these reasons, Jubilee Almonds is not carrying on the almond production business as a trustee.

***Subparagraphs 152-40(1)(a)(ii) & 152-40(1)(a)(iii) – whether the almond growing business is carried on by an affiliate of the trust or an entity connected with the trust?***

73. Although Jubilee Almonds in its capacity as trustee of the trust is not carrying on the business, it is necessary to consider whether the business is being carried on by an affiliate of the trust, or an entity connected with the trust to determine if the land is an active asset of the trust.

74. Clause 1.3 of the Syndicate Agreements states that 'members have agreed to associate as members of a syndicate and to appoint Jubilee Almonds as the manager of their syndicate operations'. Clause 4.1 of the Syndicate Agreements also states that 'members hereby appoint Jubilee Almonds manager of the syndicate's operations with authority to undertake the total operational and management function of the members' orchards'.

75. Under the terms of the Syndicate Agreements, Jubilee Almonds is engaged to operate and manage the business for the Syndicates as agent. It is the Syndicates that are carrying on the business of almond production.

76. As such, for the land to be an active asset of the trust the Syndicates must be either connected with the trust over the land or an affiliate of the trust over the land.<sup>3</sup>

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<sup>3</sup> Refer to paragraphs 89 to 97 of this Ruling for consideration of the entity status of the Syndicates.

***Subparagraph 152-40(1)(a)(iii) – are the syndicates connected with the trust?***

77. The Syndicates will be connected with the trust over land if either entity controls the other entity as described in section 328-125.

78. Subsection 328-125(2) states:

An entity (the *first entity*) controls another entity if the first entity, its affiliates, or the first entity together with its affiliates:

- (a) except if the other entity is a discretionary trust – own, or have the right to acquire the ownership of, interests in the other entity that carry between them the right to receive a percentage (the *control percentage*) that is at least 40% of:
  - (i) any distribution of income by the other entity, or
  - (ii) if the other entity is a partnership, the net income of the partnership
  - (iii) any distribution of capital by the other entity.

79. Under subparagraph 328-125(2)(a)(ii), the trust will only be connected with a Syndicate if it has the right to receive at least 40% of the net income of the Syndicate. Under the terms of the Syndicate Agreements only the members are entitled to income. As the trust is not a member of a Syndicate it is not entitled to the income derived from the sale of the almond crops meaning the trust does not have the right to receive at least 40% of the partnership income.<sup>4</sup> The trust is therefore not connected with the Syndicates.

80. Further, a Syndicate will only be connected with the trust if a Syndicate has a right to income or capital of the trust that is at least 40%. On the facts, no syndicate can have that requisite interest.

***Subparagraph 152-40(1)(a)(ii) – are the syndicates affiliates of the trust?***

81. Section 328-130 states:

- (1) An individual or a company is an affiliate of yours if the individual or company acts, or could reasonably be expected to act, in accordance with your directions or wishes, or in concert with you, in relation to the affairs of the business of the individual or company.
- (2) However, an individual or company is not your affiliate merely because of the nature of the business relationship you and the individual or company share.

82. To be an affiliate an entity must either be an individual or a company. Each of the Syndicates is considered to be partnership of its members (see paragraph 91 of this Ruling). As the Syndicates are not individuals or companies, they cannot be affiliates of the trust over the land.

<sup>4</sup> Refer to paragraphs 109 to 110 of this Ruling for discussion about the members of a Syndicate not being affiliates of their Syndicate.

***Subparagraph 152-40(1)(a)(ii) – is Jubilee Almonds in its own capacity capable of being an affiliate of itself in its trustee capacity?***

83. The activity of Jubilee Almonds in acting as agent for the Syndicates (even if this were a business) is undertaken by Jubilee Almonds in its own capacity and not as trustee of the trust over the land. It is the Commissioner's view that the affiliate relationship does not include a relationship between a controller of an entity and the entity itself. The relationship in these situations is dictated by obligations imposed by law, formal agreements and fiduciary obligations. Accordingly, companies, trusts and partnerships are not affiliates (and vice versa) of the officers, persons and entities that are related to the company, trust or partnership in various capacities.<sup>5</sup>

***Summary – no active asset under subsection 152-40(1)***

84. For each of the reasons explained from paragraph 77 to paragraph 83 of this Ruling, and with the assumption in paragraph 7 of this Ruling, no entity is connected with the trust over land, and no Syndicate is an affiliate of the trust over land, in the sense required by subsection 152-40(1). It then follows that the land is not an active asset of the trust.

***Subsection 152-40(3) – are the growers interests in the trust an active asset?***

85. As the land is the only asset of the trust, the market value of the active assets of the trust (which is nil) will not be at least 80% of the market value of all assets of the trust. A Grower's interest in the trust will therefore not be covered by subsection 152-40(3).

86. As a Grower's interest in the trust will not be covered by subsection 152-40(3) the Grower's interest in the trust cannot be an active asset of the Grower for the purposes of section 152-40.

***A Syndicate member will not be connected with their Syndicate, unless the requirements of subsection 328-125(2) are satisfied***

87. Subsection 328-125(1) provides that an entity is connected with another entity if:

- (a) either entity controls the other entity in a way described in this section; or
- (b) both entities are controlled in a way described in this section by the same third entity.

88. Each member of a Syndicate is an entity and in order for this subsection to apply it is necessary to determine if the Syndicates are entities.

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<sup>5</sup> Advanced guide to capital gains tax concessions for small business.

89. An entity is defined under subsection 960-100(1) as meaning any of the following:

- (a) an individual;
- (b) a body corporate;
- (c) a body politic;
- (d) a partnership;
- (e) any other unincorporated association or body of persons;
- (f) a trust;
- (g) a superannuation fund
- (h) an approved deposit fund

90. However under subsection 960-100(1A), paragraph 960-100(1)(e) does not include a 'non-entity joint venture'.

91. It is therefore necessary to determine if each Syndicate is either a 'partnership' (the most relevant entity type) or a 'non-entity joint venture'.

92. 'Partnership' is defined by section 995-1 to mean:

- (a) an association of persons (other than a company or a limited partnership) carrying on a business as partners or in receipt of ordinary income or statutory income jointly;
- (b) or a limited partnership

93. 'Non-entity joint venture' is defined by section 995-1 to mean:

an arrangement that the Commissioner is satisfied is a contractual arrangement:

- (a) under which 2 or more parties undertake an economic activity that is subject to the joint control of both parties; and
- (b) that is entered into to obtain individual benefits for the parties, in the form of a share of the output of the arrangement rather than collective profits for all parties.

94. Under each Syndicate Agreement the crops of each Syndicate are held by Jubilee Almonds for grouped sale. The members of a Syndicate are jointly entitled to the income from the sale of the crops grown on the orchards.

95. The Syndicate Agreements have the effect that the amount of income each member is entitled to receive is in proportion to the amount their equitable interest in the orchards bears to the entirety of the orchard. Therefore a Syndicate member's income from the activity is not dependent upon the actual yield of any particular lot of land which might correspond to their equitable interest, but rather the collective profits of all members of their Syndicate.

96. The arrangement amounts to more than a 'non-entity joint venture'; the terms of the Syndicate Agreements show that the members of each Syndicate associated with an intent to carry on business in common and share collective profits rather than an intent to share output. Each Syndicate is a partnership for the purposes of section 995-1.

97. As a partnership, each Syndicate is an entity for the purposes of section 328-125.

98. Subsection 328-125(2) states:

An entity (the **first entity**) controls another entity if the first entity, its \*affiliates, or the first entity together with its affiliates:

- (a) except if the other entity is a discretionary trust – own, or have the right to acquire the ownership of, interests in the other entity that carry between them the right to receive a percentage (the **control percentage**) that is at least 40% of:
  - (i) any distribution of income by the other entity, or
  - (ii) if the other entity is a partnership, the net income of the partnership; or
  - (iii) any distribution of capital by the other entity; or

99. Section 328-130 states:

- (1) An individual or a company is an **affiliate** of yours if the individual or company acts, or could reasonably be expected to act, in accordance with your directions or wishes, or in concert with you, in relation to the affairs of the business of the individual or company.
- (2) However, an individual or company is not your **affiliate** merely because of the nature of the business relationship you and the individual or company share.

100. Further the example in subsection 328-130(2) states:

A partner in a partnership would not be an affiliate of another partner merely because the first partner acts, or could reasonably be expected to act, in accordance with the directions or wishes of the second partner, or in concert with the second partner, in relation to the affairs of the partnership.

101. As a result, the members of a Syndicate will not be affiliates of other members of the same Syndicate by virtue of their relationship as partners in a partnership.

102. For a member of a Syndicate to be connected with their Syndicate, the member, their affiliates, or the member and their affiliates must be entitled to receive at least 40% of the partnership income of their Syndicate (that is, the share of the net proceeds of the almond sale for distribution in their Syndicate).

103. Of the 464.4 hectares of land managed by Jubilee Almonds, 89.9 hectares is managed for members of Syndicate 1, 95.2 hectares is managed for members of Syndicate 2, 91.1 hectares is managed for members of Syndicate 3, 102.8 hectares is managed for members of Syndicate 4, and 85.4 hectares is managed for members of Syndicate 5. As such, the partnership income of Syndicate 1 will be 89.9/464.4 of the net proceeds of the almond sale, the partnership income of Syndicate 2 will be 95.2/464.4 of the net proceeds of the almond sale, and so on.

104. Where a Syndicate member (their affiliates, or the member and their affiliates) is entitled to receive at least 40 percent of their Syndicate's income, the Syndicate member will be connected with their Syndicate. Otherwise, the members of each of the Syndicates will not be connected with their Syndicate (subsection 328-130(2)). At December 2014, only 1 Syndicate member will have an entitlement of 40% or more to the net income of their Syndicate (Syndicate 1). Notwithstanding that certain members of a Syndicate may be connected with other members of their Syndicate (which may cause the member to be entitled to 40% or more of Syndicate income), all other members of each Syndicate are not connected with their Syndicate.

### **The Syndicates are not connected**

105. As discussed earlier, an entity is connected with another entity for the purposes of section 328-125 if the entity controls the other entity, or both entities are controlled by the same third entity.

106. An entity controls another entity if the entity (its affiliates, or the entity and its affiliates together) owns, or has the right to acquire the ownership of, interests in the other entity that carry between them the right to receive a percentage that is at least 40% of:

- (i) any distribution of income by the other entity, or
- (ii) if the other entity is a partnership, the net income of the partnership
- (iii) any distribution of capital by the other entity.

107. Under section 328-130 affiliates only include an individual or a company and therefore the Syndicates, being partnerships, are not affiliates of each other.

108. Under subparagraph 328-125(2)(a)(ii), a Syndicate will only be connected with another Syndicate if it has the right to receive at least 40% of the net income of the other Syndicate. Under the terms of the Syndicate Agreements only the members, are entitled to income. Since a Syndicate cannot own the orchards, it cannot, by itself, be entitled to the income derived from the sale of the almond crops meaning a Syndicate by itself will never have the right to receive at least 40% of the income for distribution of another Syndicate. As such, a Syndicate will not be connected with the other Syndicates unless its affiliates, if any, carry the requisite control percentage (at least 40%).

109. As discussed earlier, under section 328-130 an individual or a company is an affiliate of yours if the individual or company acts, or could reasonably be expected to act, in accordance with your directions or wishes, or in concert with you, in relation to the affairs of the business of the individual or company. An individual or company will not be your affiliate merely because of the nature of the business relationship you and the individual or company share. Whether an entity is an affiliate of another entity is a question of fact.

110. There is no evidence that the individuals or companies that hold interests in the income of a Syndicate, could reasonably be expected to act, in accordance with their Syndicate's directions or wishes, or in concert with their Syndicate, in relation to the affairs of the business of the individual or company. The members of a Syndicate will not be affiliates of their Syndicate.

111. The Syndicates will therefore not be connected with each other for the purposes of section 328-125.

## **Appendix 2 – Detailed contents list**

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

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Not previously issued as a draft

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TR 2004/D25; TR 2006/10

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- connected with

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