



PR 1999/60 - Income tax: Soho Lemon Farm Project

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Product Ruling

Income tax: Soho Lemon Farm Project

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Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 98/1 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Product Ruling is about

1. This Ruling sets out the Commissioner’s opinion on the way in which the ‘tax laws’ identified below apply to the defined class of person, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Soho Lemon Farm Project, or just simply as ‘the Project’ or the ‘product’.

Tax law(s)

2. The tax laws dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* (‘ITAA 1997’);
 - section 8-1 of the ITAA 1997;
 - section 25-25 of the ITAA 1997;
 - section 387-125 of the ITAA 1997;
 - section 387-185 of the ITAA 1997;
 - Part IVA of the *Income Tax Assessment Act 1936* (‘ITAA 1936’);
 - section 82KL of the ITAA 1936; and
 - section 82KZM of the ITAA 1936.

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Class of persons

3. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant Agreements until their term expires) and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Growers'.

4. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

Qualifications

5. The Ruling provides this specified class of persons with a binding ruling as to the tax consequences of this product. The Commissioner accepts no responsibility in relation to the commercial viability of this product, and gives no assurance the prices charged for the product are reasonable, appropriate, or represent industry norms. A financial (or other) adviser should be consulted for such information.

6. The Commissioner rules on the precise arrangement identified in the Ruling.

7. The class of persons defined in the Ruling may rely on its contents, provided the arrangement (described below at paragraphs 12 to 29) is carried out in accordance with details described in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out:

- the Ruling has no binding effect on the Commissioner, as the arrangement entered into is not the arrangement ruled upon; and
- the Ruling will be withdrawn or modified.

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Date of effect

9. This Ruling applies prospectively from 16 June 1999, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

10. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

11. This Product Ruling is withdrawn and ceases to have effect after 30 June 2001. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

Arrangement

12. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- Application for Product Ruling received by this Office on 18 March 1999;
- Prospectus dated 21 April 1999 and issued by Soho Lemon Management Limited ('the Manager');
- Draft Constitution of the Soho Lemon Farm Project;
- Draft Management Agreement between a Grower and Soho Lemon Management Limited ('SLML');
- Draft Head Lease between Tidak Saja Pty Ltd, the Landholder and SLML;

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- Draft Plantation Lease between SLML, the Lessor, and the Grower;
- Draft Custody Agreement;
- Draft Compliance Plan provided on 10 May 1999; and
- correspondence from Arthur Andersen to the ATO dated 25 May 1999, 26 May 1999 and 2 June 1999.

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

13. For the purpose of describing the arrangement 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 the Grower, will be party to. The effect of these agreements is summarised as follows.

Overview

14. The Draft Constitution establishes a managed investment scheme to be known as the Soho Lemon Farm Project (clause 2).

15. The Prospectus for the Project, lodged with the ASIC on 21 April 1999, describes the main features of the scheme. The Prospectus states the Project, through the Manager, seeks to raise \$19.2 million by offering participants ('Growers') the opportunity to lease land on the Bellarine Peninsula, Victoria on which plantations of Lisbon lemon trees will be established on 128 hectares. Approximately 880 trees will be planted on each hectare of the Plantation Land.

16. The minimum fee is \$15,000 and the minimum area that may be leased by a Grower is 0.1 hectare, which is referred to as a Plantation Allotment (clause 1.1(ab), Draft Project Constitution).

17. The Manager may accept oversubscriptions, the number of which will be subject to the availability of suitable land. The minimum amount to be raised under the Prospectus is \$500,000.

18. The Draft Project Constitution provides how a Grower acquires an interest in the Project. Once registered as the holder of an Interest, a Grower has no right to withdraw from the Project or to require the Responsible Entity to purchase its Interest (clause 9, Draft Project Constitution).

The Plantation Lease

19. The Plantation Lease will be an agreement where a Grower will lease from the Manager a minimum of 0.1 hectares of the Project Land.

20. The Project Land will be leased by the Manager from an entity known as Tidak Saja Pty Ltd through the Head Lease Agreement. The Project Land consists of the whole of the land described in Certificate of Title Volume 10334 Folio 333 and part of the land described in Certificate of Title Volume 9249 Folio 248, which parcels of land together comprise approximately 128 hectares (clause 1.1(ah), Draft Plantation Lease).

21. A Schedule in the Plantation Lease will specify the Plantation Allotment/s to be leased by a Grower, the annual rent payable, which will be \$50 per allotment increased by 2.5% per annum from 1 July 2003, and the term of the lease, which will be approximately 15 years terminating 30 June 2014. Rent will be payable in advance on 30 June each year. A Grower will also be liable to a portion of rates and taxes in relation to the Project Land.

22. This agreement sets out the Grower's obligations, which include pruning of the lemon trees, irrigation and fertilisation, soil management and maintenance of any buildings, sheds, firebreaks, windbreaks, fences, access roads or tracks on the Plantation Allotment (clause 10).

23. The Grower will engage the Manager pursuant to the Management Agreement to develop and manage the Grower's Plantation and to harvest and sell the lemons on the Grower's behalf (clause 8.2, Draft Plantation Lease).

The Management Agreement

24. The Management Agreement will be between each several Grower and the Manager. In consideration of the fees payable by the Grower, the Manager will provide to the Grower the services and obligations as provided in this Agreement in accordance with the Management Plan.

25. Under clause 4.1 of this Agreement, the Manager will implement the Management Plan and perform or cause to be performed the following Services in relation to the Plantation Allotment and the Plantation Trees in accordance with Best Citricultural Practice:

- earthworks including construction of bench rows, dams, channels, culverts and drains;

- establishment of windbreaks and construction of access roads and tracks;
- installation and maintenance of irrigation system;
- soil cultivation, planting, establishment and management of the Plantation Trees in accordance with the Management Plan;
- tending, maintaining and generally monitoring and caring for the Plantation Trees so as to ensure as far as is reasonable the health and vigour of the Plantation Crop;
- complying with and obeying all Acts and regulations, by-laws, orders, ordinances and rules made in respect of or applying to the use or occupancy of the Plantation Allotment and in particular:
 - provision of sufficient healthy lemon tree root stock to achieve the stocking rate set out in the Schedule;
 - prompt repair of all damage done to any roads, tracks or fences on the Plantation Allotment or on abutting land resulting from the actions of the Manager or its contractors or their respective employees;
 - securing of the entrances to the Plantation Allotment in order to prevent trespassers entering the Plantation Allotment and the taking of such other security measures as appears appropriate; and
 - maintenance of insurance policies.

26. The Manager will also be responsible for the harvesting, marketing and sale of the plantation crop on behalf of the Grower. For this service, Growers will be liable for a marketing fee that is equal to ten per cent of the gross proceeds of sale of the plantation crop (clause 10).

Fees per Plantation Allotment

27. Having regard to the contractual terms of the of the Plantation Lease and Management Agreements, the fees payable in the first three years per 0.1 hectare by a participant in the Project will be as follows:

	Year 1	Year 2	Year 3
Management fee	\$13,273	\$750	\$1,600
Irrigation	\$760	Nil	Nil
Plant costs	\$747	Nil	Nil
Windbreaks	\$144	Nil	Nil
Rent	\$50	\$50	\$50
Rates (estimate)	\$26	\$28	\$29
Total	\$15,000	\$828	\$1,679

Finance

28. Growers may fund the investment themselves or borrow from an unassociated lending institution. No entity or related entity involved in the Project is involved in the provision of financing for the Project.

29. This Ruling only applies to loan agreements that exhibit the following features:

- all loan terms will be of an arm's length nature;
- there is no right to assign;
- borrowers will remain fully liable for the balance of the loan outstanding at any time and lenders will take legal action against defaulting borrowers;
- none of the funds lent will be transferred back to the lender, or any associate, as part of any 'round robin', or equivalent, transaction;
- the loan will not be a 'split loan', of the type described in Taxation Ruling TR 98/22;
- there will be no indemnity, or equivalent, agreements to reduce the borrower's liability; and
- repayments of principal and payments of interest will not be linked to derivation of income from the Project and will be made regularly, commencing from, or about, the time of the making of the loan.

Ruling

30. For a Grower who invests in the Project by 30 June 1999, the following deductions will be available for the years ended 30 June 1999 to 30 June 2001:

PR 1999/60**Deductions available in each year**

	ITAA 1997	Year 1	Year 2	Year 3
Fee type	section	30/6/1999	30/6/2000	30/6/2001
Management fee	8-1	\$13,273	\$750	\$1,600
Irrigation	387-125	\$253	\$253	\$253
Rent	8-1	\$50	\$50	\$50
Rates	8-1	\$26	as incurred	as incurred
Interest on borrowed funds	8-1	as incurred	as incurred	as incurred

Irrigation

31. Deductibility under section 387-125 is calculated on the basis of one-third of the capital expenditure in the year in which the expenditure is incurred and for each of the next 2 years of income.

Plant costs

32. Plant costs (i.e., 'establishment expenditure') include the purchase of trees, rods and rootstock together with earthworks and labour for planting. A deduction of 13% of the capital cost will be available to the Grower under section 387-185, calculated from the year in which the tree enters its first commercial season.

Loan application fees

33. Loan application fees/other up-front borrowing costs for loans covered by this Ruling would be deductible over a five year period from the time the loan agreement is entered into, under section 25-25.

Sections 82KZM and 82KL; Part IVA

34. For a Grower who invests in the Project the following provisions of the ITAA 1936 do not apply:

- the expenditure by Growers does not fall within the scope of section 82KZM;
- section 82KL does not apply to deny the deductions otherwise allowable; and

- the relevant provisions of Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Explanations

Section 8-1

35. Consideration of whether the management fees are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing in question must have sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoing is not deductible under the second limb if it is incurred when the business has not commenced; and
- where a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced and, hence, whether the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

Growers carrying on business

36. A citricultural scheme can constitute the carrying on of a business. Where there is a business, or a future business, the gross sale proceeds of lemons will constitute gross assessable income. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income. These operations will include the planting, tending, maintaining and harvesting of the lemon trees, as well as the distribution and marketing of the lemons.

37. Generally, a Grower will be carrying on a citricultural business where:

- the Grower has an identifiable interest in specific growing trees coupled with a right to harvest and sell the fruit produced;

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- the citricultural activities are carried out on the Grower's behalf; and
- the weight and influence of the general indicators of a business, as used by the Courts, point to the carrying on of a business.

38. For this Project, Growers have, under the Draft Plantation Lease Agreement, rights in the form of a lease over an identifiable area of land that is consistent with the intention to carry on a business of a commercial orchard. Under this Agreement, Growers engage Soho Lemon Management Ltd, as Manager, to develop and manage the Grower's Plantation and to harvest and sell the lemons on the Grower's behalf (clause 8.2, Draft Plantation Lease).

39. The Draft Project Constitution provides the conditions in which a Grower acquires an identifiable interest in a specific plantation allotment and the Grower has a legal interest in it by virtue of the Plantation Lease Agreement.

40. Growers have the right to use the land in question for citricultural purposes and to have Soho Lemon Management Ltd come onto the land to carry out its obligations under the Management Agreement. The Growers' degree of control over Soho Lemon Management Ltd, as evidenced by the agreements and supplemented by the Corporations Law, is sufficient.

41. Under the Project, Growers are entitled to receive regular reports of the Project's activities (clause 8, Draft Project Constitution). Growers are able to terminate the Management Agreement in certain instances, such as cases of default or neglect (clause 8, Draft Project Constitution).

42. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the arrangement's description for all the indicators. The Independent Citrus Expert's Report in the Prospectus has found that the Land is entirely suitable for the growing of lemons. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections in the Prospectus that suggest the Project should return a 'before-tax' profit to the Growers, i.e., a 'profit' in cash terms that does not depend in its calculation, on the fees in question being allowed as a deduction.

43. Growers will engage the professional services of a Manager to comply with Growers' obligations set out in clause 10 of the Plantation Lease Agreement. These services will be provided in accordance with 'Best Citricultural Practice' (clause 4, Management Agreement).

44. The lease, rates and management fees associated with the citricultural activities will relate to the gaining of income from this

business, and hence have a sufficient connection to the operations by which this income (from the sale of lemons) is to be derived. The tests of deductibility under paragraph 8-1(1)(a) are met. The exclusions in section 8-1(2) do not apply, except as set out below.

45. Lease and management fees are pre-paid. Taxation Ruling TR 94/25 states that the facts in *Coles Myer Finance Ltd v. Federal Commissioner of Taxation* (1993) 176 CLR 640; 93 ATC 4214; (1993) 25 ATR 95 were fundamentally different from those of a pre-payment and that the decision did not affect the deductibility of pre-paid expenses. The lease and management fees will be incurred in the year of payment.

Interest deductibility

46. Some Growers may finance their investment in the Project through a loan facility. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of lease and management fees. The interest expense incurred will be in respect of a loan to finance the establishment and development of a Plantation Allotment that will continue to be directly connected with the gaining of business income from the Project. These fees will, thus, have a sufficient connection with the gaining of assessable income. No capital, private or domestic component is identifiable in respect of them.

Assessable income

47. Gross sale proceeds derived from the sale of lemons harvested from the project will be assessable income of the Growers, under section 6-5, in the year in which a recoverable debt accrues to them. This will depend on the terms of the specific sale contracts entered into.

Expenditure of a capital nature

48. Any part of the expenditure of a Grower entering into a primary production business that is attributable to acquiring an asset or advantage of an enduring kind is generally capital, or capital in nature, and will not be an allowable deduction under section 8-1. It is evident from the Project documentation that separate amounts are payable by Growers to cover the capital costs of carrying on their business as follows:

- windbreak costs;
- irrigation; and

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- plant costs.

49. Soho Lemon Management Ltd has identified that the expenditure applicable to construction of windbreaks amounts to \$144. As the expenditure of this nature cannot be considered under specific deduction provisions relevant to the carrying on of a business of primary production, the \$144 will not be deductible.

Subdivision 387-B: expenditure on conserving or conveying water

50. Capital expenditure incurred by a person carrying on a primary production business, on the construction, acquisition and installation of plant, equipment and structural improvements to be used primarily and principally for the purpose of conserving or conveying water for use in such a business, qualifies for a write-off over a three year period (i.e., 33 1/3% with no pro-rating required) under Subdivision 387-B, specifically, section 387-125. It is not necessary for a taxpayer incurring this expenditure to be the owner of the underlying land to claim the deduction, so long as they are in a business of primary production on the land.

51. In this Project, the Manager will commence to carry on the primary production business on behalf of a Grower upon execution of the Management Agreement. Accordingly, a Grower's business of primary production will commence at the time the expenditure is incurred. The requirements of Subdivision 387 B have, thus, been met in this respect.

52. Soho Lemon Management Ltd has identified that the expenditure applicable to the conserving or conveying of water for each plantation allotment amounts to \$760. For a Grower entering into the Project by 30 June 1999 and commencing to carry on a primary production business by that date, a deduction will be allowable under section 387-125 for the years ended 30 June 1999 to 30 June 2001 inclusive, of \$253 per year.

Subdivision 387-C: horticultural provisions

53. Subdivision 387-C allows capital expenditure on establishing horticultural plants owned and used, or held ready for use, in Australia in a business of horticulture to be written off for tax purposes. A lessee or licensee of land carrying on a business of horticulture is taken to own the plants growing on that land rather than the actual owner of the land.

54. Under this Subdivision, if the effective life of the plant is less than three years the expenditure can be written off in full. If the effective life of the plant is more than three years, an annual deduction is allowable on a prime cost basis during the plant's maximum write-

off period. The period starts from the time the plant enters its first commercial season. The write-off rate is detailed in section 387-185. For a plant with an effective life of 13 to 30 years, as in this Project, the rate is 13%.

55. Soho Lemon Management Limited has identified that the relevant expenditure attributable to the establishment of the lemon plantation is \$747. For a Grower entering into the Project, no amount will be allowable as a deduction for the years ended 30 June 1999 to 30 June 2001. Soho Lemon Management Limited projects that the first commercial season will be the year ended 30 June 2002 and the write-off will, therefore, commence in that year.

Section 82KZM

56. Section 82KZM operates to spread over more than one income year a deduction for pre-paid expenditure that would otherwise be immediately deductible, in full, under section 8-1. The section applies if certain expenditure incurred under an agreement is in return for the doing of a thing under the agreement that is not wholly done within 13 months after the day on which the expenditure is incurred.

57. Management fees of \$13,275, \$750 and \$1,600 are deductible in years 1 to 3, respectively, as discussed previously in this Ruling. For this Ruling's purposes, no explicit conclusion can be drawn from the arrangement's description that the management fees have been inflated to result in reduced management fees being payable for subsequent years. The management fees are expressly stated to be for a number of specified services. There is no evidence that might suggest the services covered by management fees could not be provided within 13 months of incurring the expenditure in question.

58. Thus, for the purposes of this Ruling, it can be accepted that no part of the management fees that are deductible under section 8-1 in years 1 to 3 is to do 'things' that are not to be done wholly within 13 months of the management fee expenditure being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and this section will not apply to the deductible part of the management fee expenditure incurred by the Growers in years 1 to 3.

Section 82KL

59. Section 82KL is a specific anti-avoidance provision that operates to deny an otherwise allowable deduction for certain expenditure incurred, but effectively recouped, by the taxpayer. Under subsection 82KL(1), a deduction for certain expenditure is disallowed where the sum of the 'additional benefit' plus the

‘expected tax saving’ in relation to that expenditure equals or exceeds the ‘eligible relevant expenditure’.

60. An ‘additional benefit’ (see the definition of ‘additional benefit’ at subsection 82KH(1) and paragraph 82KH(1F)(b)) is, broadly speaking, a benefit received that is additional to the benefit for which the expenditure is ostensibly incurred. The ‘expected tax saving’ is, essentially, the tax saved if a deduction is allowed for the relevant expenditure.

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

Part IVA

62. For Part IVA to apply there must be a ‘scheme’ (section 177A); a ‘tax benefit’ (section 177C); and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

63. The Soho Lemon Farm Project will be a ‘scheme’. The Growers will obtain a ‘tax benefit’ from entering into the scheme, in the form of the tax deductions for the amounts indicated in this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

64. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the sale of the fruit from the trees. Further, there are no features of the Project, for example, such as the management fees being ‘excessive’, not commercial, and predominantly financed by a non-recourse loan, that might suggest the Project was so ‘tax driven’, and so designed to produce a tax deduction of a certain magnitude that would attract the operation of Part IVA.

Detailed contents list

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Commissioner of Taxation

 16 June 1999

Previous draft:

No draft issued

*Related Rulings/Determinations:*IT 175; PR 98/1; TR 92/1; TR 92/20;
TR 97/16; TR 98/22

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Subject references:

- business income
- carrying on a business
- commercial viticulture
- management fees
- product rulings
- public rulings
- taxation administration
- tax avoidance

- ITAA1936 177C
- ITAA1936 177D
- ITAA1997 6-5
- ITAA1997 8-1
- ITAA1997 8-1(1)(a)
- ITAA1997 8-1(1)(b)
- ITAA1997 8-1(2)
- ITAA1997 387-B
- ITAA1997 387-125
- ITAA1997 387-C
- ITAA1997 387-185

Legislative references:

- ITAA1936 82KH(1)
- ITAA1936 82KL
- ITAA1936 82KL(1)
- ITAA1936 82KH(1F)(b)
- ITAA1936 82KZM
- ITAA1936 Part IVA
- ITAA1936 177A

Case references:

- Coles Myer Finance Ltd v. Federal Commissioner of Taxation (1993) 176 CLR 640; 93 ATC 4214; (1993) 25 ATR 95

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