



PR 1999/94 - Income tax: Brooklyn Park Olive Groves (revised arrangement)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *15 September 1999*



Product Ruling

Income tax: Brooklyn Park Olive Groves (revised arrangement)

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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.*

No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product as an investment. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the ‘track record’ of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below.

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 persons who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Brooklyn Park Olive Groves Project, or just simply as ‘the Project’ or the ‘product’.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
 - sections 6-5 and 8-1 and Subdivisions 387-A, 387-B and 387-C of the *Income Tax Assessment Act 1997* ('ITAA 1997'); and
 - sections 82KL, 82KZM and Part IVA of the *Income Tax Assessment Act 1936* ('ITAA 1936').
3. This Ruling does not deal with the consequences or effects of the Goods and Services Tax or any associated 'A New Tax System' legislative reforms or their effect on the various Income Tax Acts (including the provisions set out above).

Class of persons

4. 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'.
5. 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, who otherwise do not intend to derive assessable income from it and those persons who enter into an arrangement that falls within any of the categories listed in paragraph 58.

Qualifications

6. 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.

Note: without limiting the generality of the term, a material difference may arise in relation to a variation in the facts of the arrangement described in the Ruling. It may also arise in circumstances where the person otherwise included in the class of

persons enters into the arrangement as described, but also enters into transactions or arrangements (including financing arrangements) that, when viewed as a whole with the arrangement described in the Ruling, will produce a different taxation consequence for the arrangement. This might include, for example, where the Participant borrows to enter into the arrangement by way of a limited or non-recourse loan and the overall consequence might be that the arrangement is one that would have attracted the application of a tax avoidance provision.

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Date of effect

8. This Ruling applies prospectively from 15 September 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).

9. 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

10. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. 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

11. The arrangement that is the subject of this Ruling is described below. The description is based on the documents listed below and these documents, or relevant parts of them, as the case may be, form part of and are to be read with this description:

- Application for Product Ruling dated 28 July 1999;
- The Brooklyn Park Olive Groves Draft Prospectus dated 28 July 1999;
- Constitution of Brooklyn Park Olive Groves Limited ('BPOG');
- Scheme Constitution of Brooklyn Park Olive Groves;
- Compliance Plan for the Brooklyn Park Olive Groves Managed Investment Scheme dated 5 March 1999;
- Draft Management Agreement between Australian Green and Gold Limited ('AG&G' or 'the Manager'), BPOG and the Grower dated 28 July 1999;
- Draft Licence to Occupy Agreement between BPOG ('the Licensor') and the Grower dated 28 July 1999;
- Option Deed between MJ Shakspeare ('the Grantor') and BPOG ('the Grantee') for the property known as 'Brooklyn Park' (Lot 62 on SP 119592 in the County of Marsh and Parish of Sands);
- Draft Agreement for Sale between MJ Shakspeare ('the Vendor') and BPOG ('the Purchaser') for 'Brooklyn Park';
- Draft Loan Agreement between BPOG ('the Borrower') and the Promoters ('the Lender');
- Draft Head Lease proposed to be between BPOG and Australian Rural Group Limited ('ARG' or 'the Custodian');
- Draft Sublease proposed to be between ARG and BPOG;
- Draft Brooklyn Park Olive Groves Water and Services Agreement dated 28 July 1999;
- Facsimile message on behalf of the applicant to the ATO dated 19 July 1999;

- Facsimile message on behalf of the applicant to the ATO dated 20 August 1999; and
- Facsimile message on behalf of the applicant to the ATO dated 30 August 1999.

12. The Applicant previously obtained a Product Ruling (PR 1999/58) in respect of the Brooklyn Park Olive Grove Project, which was to commence in the year ended 30 June 1999. PR 1999/58 was withdrawn on 21 July 1999 at the Promoter's request, due to the delay in commencement and proposed alterations in the arrangement to be ruled on. The following documents or relevant parts of them, as the case may be, identified in PR 1999/58 as being part of the arrangement ruled on, also form part of this arrangement:

- letters from the ATO to the applicant dated 29 April 1999 and 25 May 1999;
- letters on behalf of the applicant to the ATO dated 6 May 1999 and 26 May 1999;
- letter from AG&G to the ATO dated 26 May 1999; and
- facsimile message on behalf of the applicant to the ATO on 27 May 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 purposes 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 arrangement is summarised as follows.

14. The arrangement is called the 'Brooklyn Park Olive Groves Project' and will be registered as a Managed Investment Scheme under the Corporations Law. In the draft Prospectus, participants are invited to conduct a business of commercially growing olives for domestic and international sale. The Project is to run for a period ending on 30 June 2020.

15. The Project's olive trees will be located on a property known as 'Brooklyn Park' or 'the Project Land' and identified as Lot 62 on SP 119592 in the County of Marsh, Parish of Sands. 'Brooklyn Park' is 209.2 hectares in size and is located 22 kilometres west of Inglewood in the Darling Downs region of Queensland. 'Brooklyn Park' will be owned by Brooklyn Park Olive Groves Limited ('BPOG').

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16. A Grower's minimum investment in the Project will be one parcel of 1,000 A Shares in BPOG, at a cost of \$1,000. Growers can subscribe for one or more parcels. Each parcel of A Shares carries with it a requirement that the Grower enter into a Licence to Occupy Agreement with BPOG.

17. Under the Licence to Occupy Agreement, the Grower is given the right to occupy a portion of the Project Land known as an 'Allotment'. Each Allotment will have 50 olive trees planted on an individually identifiable area of 0.20 hectare (a 'Grove').

18. There are 1 million A Shares of \$1 each in BPOG on offer, which equates to 1,000 Allotments. The minimum subscription has been set at 250,000 A Shares (250 Allotments). If the minimum subscription is not reached by 28 May 2000, all subscription monies will be refunded to investors in full without interest.

19. The directors of BPOG have reserved the right to accept oversubscriptions and will then acquire additional land from the property adjoining the Project Land.

20. BPOG has been granted an option to purchase the Project Land for \$1 million. Provided the minimum subscription (250,000 shares) is reached by 28 May 2000, BPOG will enter into a Loan Agreement with the Promoters if the maximum subscription (1,000,000 shares) is not reached by that date. The loan will enable BPOG to fund the balance of the purchase price of the Project Land. The Loan Agreement provides that repayments will be funded by any subsequent subscriptions for shares. No interest is payable by BPOG to the Promoters, except in the event that BPOG defaults, in which case the interest rate will be 16%.

21. BPOG will lease the Project Land to ARG who will then sublease the land back to BPOG. BPOG will then be in a position to enter into a Licence to Occupy Agreement with each Grower, granting the Grower occupancy rights over an individual Allotment.

22. Growers can elect to enter into the Management Agreement, whereby they appoint the Manager, Australian Green & Gold Limited ('AG&G'), to establish and maintain their Allotments for the term of the Project. Growers can also elect to conduct the Business themselves or through an approved contractor. Growers who do not use the services of AG&G will be outside the arrangement to which this Ruling applies and will be unable to rely on this Ruling.

23. Possible projected returns for Growers are set out in Section 9 of the draft Prospectus. The projected returns depend on a range of assumptions. On the basis of these assumptions, a Grower could expect to achieve an internal rate of return before tax of 10.32%. This Ruling gives no assurance or guarantee whatsoever in respect of the future success of, or financial returns associated with, the Project.

Managed Investment Scheme requirements

24. The Project will be registered with ASIC as a Managed Investment Scheme under the Corporations Law. All of the resulting ASIC requirements are, or will be, complied with for the duration of the Project, including the requirements that the Project has a Scheme Constitution, a Responsible Entity and a Compliance Plan.

Scheme Constitution

25. Upon entering into the Management Agreement, Growers become bound by the provisions of the Scheme Constitution. The Constitution primarily sets out the rights, powers, duties and obligations of the Manager. A summary of this document appears at Section 13 of the draft Prospectus entitled 'Significant Documents'.

Responsible Entity

26. The Manager is the Responsible Entity for the Project and will have the primary responsibility for managing the Project, ensuring compliance with the Corporations Law, the Scheme Constitution and the Management Agreement.

Compliance Plan

27. The Compliance Plan describes how the Responsible Entity will ensure its compliance with the Corporations Law and the Project Scheme Constitution. The Compliance Plan is designed to protect the rights of Growers.

Rights of Shareholders in BPOG

28. As an investor in the Project, a Grower must subscribe for a minimum of 1,000 A Shares in BPOG at a cost of \$1 per share, payable on application. The Grower subscribes by completing the 'Application for Shares' form attached to the draft Prospectus. Upon acceptance of the Grower's Application by the directors of BPOG, the Grower becomes bound by BPOG's Constitution.

29. As a holder of A Shares, the Grower also consents to, and agrees to be bound by, the terms and conditions of the Licence to Occupy Agreement. The rights, privileges, conditions and other obligations of A Shareholders are set out in Rule 4.3 of the Constitution of BPOG and are summarised in Section 13 of the draft Prospectus entitled 'Significant Documents'.

30. BPOG also has 250,000 Ordinary Shares on issue to the Promoters at 1 cent each, in consideration of services provided by them. Ordinary Shares rank equally with A Shares with respect to voting rights, dividends and capital. Ordinary Shares differ from A Shares in that Ordinary Shares do not include any rights to occupy the Project Land. The occupancy rights attached to A Shares, by virtue of the Grower's licence to occupy, cease on 30 June 2020. After this date, holders of A Shares will rank pari passu with holders of Ordinary Shares. The taxation consequences flowing from the events occurring at that time do not form part of this Ruling.

Licence to Occupy Agreement

31. Each Grower enters into a Licence to Occupy Agreement with BPOG until 30 June 2020 (clause 3.2). Under the Agreement, BPOG grants the Grower a licence to occupy an Allotment on the Project Land for the purpose of conducting the 'Business' (clause 7.1). 'Business' is defined as planting, growing, cultivating, harvesting and marketing olives for domestic and overseas sale (clause 1).

32. Each Allotment is 0.20 hectare in size and will have 50 olive trees planted on it, with row spacings approximately 8 metres by 5 metres (clause 4.2). Each Grower's Allotment will be a distinct area of the Project Land and will be identified on an Allotment Plan to be maintained by BPOG (clause 4.3). Each tree position will be numbered and shown in relation to the boundaries of the Project Land. This will enable Growers to identify their individual Allotment and tree holding. BPOG will advise Growers of the location of their individual Allotment(s) (clause 4.1).

33. The Agreement places certain obligations on the Grower to maintain the Allotment (clause 5.1). It also permits the Grower to use dams, irrigation systems, roads and other infrastructure located on the Project Land (clause 3.3).

34. The Grower is required to pay an annual Access Fee commencing at \$1,000 to BPOG. Provided the Grower enters into the Management Agreement and is not in default in relation to the Licence to Occupy Agreement and the Management Agreement, BPOG will waive the Access Fee (clause 8.7). As this Ruling only applies to Growers who enter into, and comply with, the Management Agreement, the Access Fee and any waiver of the Fee are outside the arrangement to which this Ruling applies.

35. The Grower is required to pay an annual Licence Fee in advance for each year of the Agreement. The Fee is \$20 per year for the first 4 years (clause 8.1). From the fifth year onwards, the annual Fee will equal the Fee of the preceding year indexed by the All

Groups Consumer Price Index for Brisbane ('CPI'), in accordance with the formula in clause 8.2.

36. The Grower will pay all telephone, garbage, waste, electric light and power charges levied against the Land or the Allotment in respect of the Grower's use of the Allotment to conduct the Business. BPOG will pay for all charges and assessments levied on the Allotment, including water and municipal rates (clause 9).

37. The Agreement allows the Grower to delegate the conduct of all or part of the Business to the Manager or an approved contractor (clause 12). As a consequence, the Agreement allows delegates of the Grower to enter upon the Allotment for the purpose of conducting the Grower's Business (clause 10.4).

38. The Agreement may be terminated prior to 30 June 2020, where either party defaults or does not fulfil its obligations (clause 11). Growers are not entitled to assign the licence, except as set out in BPOG's Constitution (clause 10.1).

39. Upon termination of the Agreement, the Grower must remove any item brought onto the Allotment or any improvement constructed on the Allotment (clause 11.5(a)). BPOG will be legally entitled to any trees growing on the Allotment and things brought onto the Allotment by the Grower that are not removed within 14 days following termination of the Agreement (clause 11.5(b)).

Management Agreement

40. Growers may elect to use the services of the Manager, AG&G, by entering into the Management Agreement. The parties to the Management Agreement are the Grower, the Manager and BPOG. The Management Agreement will terminate on 30 June 2020, subject to the valid terminations as set out in clause 17.

41. The Manager must carry out its duties under the Agreement in a manner consistent with best agricultural practice (clause 6.1). Clause 5.2 details the duties to be carried out by the Manager in the first 13 months of the Agreement, whereby the Manager will:

- properly prepare the Allotment, including the performance of soil conservation, irrigation and drainage work on the Land to the benefit of the Allotment;
- cause at least 50 trees to be planted on the Allotment; and
- identify the Grower's trees with appropriate markings.

42. The Manager will also provide additional services to the Grower as set out in clauses 6.2 and 6.3, including:

- procuring, planting and tending the trees on the Allotment;
- minimising soil erosion and maintaining soil quality on the Grove;
- keeping the Grove free from vermin, vegetation, insects and diseases that might inhibit the growth of the trees;
- maintaining and cultivating the trees, including watering, weeding and applying fertilisers, nutrients and herbicides;
- procuring all necessary plant, equipment, machinery and materials;
- maintaining windbreaks, access roads and tracks; and
- harvesting the trees and marketing and selling the olives produced (subject to the Grower's right to make an election regarding these services).

43. In general, the Manager will carry out the above services at or about the same time in respect of all Growers who have entered into the Management Agreement.

44. The Manager guarantees survival of the Grower's trees to the commencement of the fourth year of the term of the Agreement. Thereafter, the Manager does not guarantee survival of the Grower's trees or that they will produce olives (clause 5.4).

45. Under the Management Agreement, Growers may elect not to use all the services provided by the Manager. Growers may elect to have the Manager harvest the trees on their Allotment separately (clause 7.1) or they may elect to harvest the trees on their Allotment themselves (clause 7.2). Growers may also elect to retain the olives harvested from their Allotment and market, sell or otherwise deal with as they see fit (clause 7.3). Any Grower who makes an election under clause 7.1, 7.2 or 7.3 will be outside the arrangement to which this Ruling applies and will be unable to rely on this Ruling.

46. The Manager is entitled to delegate all or any of the functions to be performed by it under the Agreement (clause 21).

47. The Manager will pool the olives produced by the Grower's trees with those of each other Grower, and market and sell all such olives (clause 8.1). The proceeds of the sale of all olives will be paid to the Custodian, to be divided among all Growers. The allocation of gross sales proceeds to each Grower does not make reference to the quality, volume, prices or any other factor relating to the olives produced by the Grower's Allotment (clause 8.2). The Grower's share of pooled sales is based on the 'Grower's Percentage' as defined in clause 1. The Grower's Percentage is the number of trees on the

Grower's Allotment(s) expressed as a percentage of the total number of trees harvested by the Manager.

48. The Custodian will establish an account for each Grower, to which the Grower's share of sale proceeds will be credited (clause 8.3). The Manager will account for the gross sale proceeds received and Management Fees payable and must provide each Grower with certain financial information in respect of the Grower's olives (clause 8.5). The Manager is also required to provide the Grower with various reports, including half yearly reports on the Management Services provided and the progress and condition of the Grove (clause 15).

49. Growers are not entitled to assign their rights or obligations under the Management Agreement, except in certain circumstances (clause 20.2). Where a Grower's interest is assigned, the Grower will no longer be entitled to rely on this Ruling.

50. In consideration of services provided, Growers will pay the Manager a Management Fee. The Fee may be paid by equal monthly instalments in advance or by way of an annual advance, which attracts a 10% discount (clause 13.2). Any Grower who does not elect to pay the Management Fee in advance under clause 13.3 will be outside the arrangement to which this Ruling applies and will be unable to rely on this Ruling. Under clause 13.3, the annual Fees payable per Allotment, net of the 10% discount, are as follows:

- in respect of the period from the commencement of the Agreement to the end of Year 1 (i.e., the period ending 30 June 2001) - \$9,143 payable as to \$4,900 on or before the commencement of the Agreement and \$4,243 on 1 June 2000;
- in respect of Year 2 - \$1,759 payable by 1 June 2001;
- in respect of Year 3 - \$1,759 payable by 1 June 2002;
- in respect of Year 4 - \$1,759 payable by 1 June 2003; and
- in respect of Year 5 and subsequent years, the Fee will be calculated as a percentage of gross sales proceeds of olives harvested in the immediately preceding financial year in accordance with the following table:

Year	Percentage
5	80%
6	70%
7	60%
8	50%
9-20	40%

Water and Services Agreement

51. To supplement the water supply and infrastructure available to the Project, the Manager and the Growers will enter into a Water and Services Agreement with the owner of the property adjoining the Project Land ('the Supplier'). Infrastructure refers to accommodation and administration buildings, machinery service sheds and storage sheds located on the adjoining property. The Agreement will run from the date of commencement of the Project until 30 June 2020. Under the Agreement the Manager will pay the Supplier the following fees:

- **Water Supply Fees:** for the first 4 years the Fee will be \$100 per megalitre of water supplied. For year 5 the Fee will be \$50,000. For years 6 to 20 the Fee in each year will equal the Fee in the previous year indexed by the CPI, in accordance with the formula in the Agreement; and
- **Infrastructure Fees:** for the first year the Fee will be \$30,000. The Fee for each subsequent year will equal the Fee of the previous year indexed by the CPI, in accordance with the formula in the Agreement.

52. If the Management Agreement is terminated, the Supplier will grant the Growers an option to enter into a Water and Services Agreement with the Supplier.

Planting and commercial harvesting

53. Under the Management Agreement, the Manager undertakes to establish the Business of the Grower, including the planting of trees, within the first 13 months of the term of the Agreement. It is anticipated that planting will commence soon after the attainment of minimum subscription and proceed through to September 2000. Preparation of the Groves will commence prior to 30 June 2000 and within the first 13 months of the Agreement. The olive trees are expected to be ready for the first commercial harvesting in April 2004.

Fee summary

54. For Growers who elect under clause 13.2 of the Management Agreement to pay the Management Fee by annual payment in advance, attracting a 10% discount, the amounts payable per Grove in years 0 to 2 are as follows:

Fee type	Year 0 30/6/2000	Year 1 30/6/2001	Year 2 30/6/2002
Acquisition of 1,000 A Shares in BPOG	\$1,000		
Licence Fee	\$20	\$20	\$20
Supply of 50 olive trees	\$375		
Irrigation	\$3,148		
Landcare	\$1,365		
Management Fee	\$4,255	\$1,759	\$1,759
Total	\$10,163*	\$1,779	\$1,779

* The initial contribution payable in Year 0 is payable as to \$5,920 on commencement of the Agreement and \$4,243 on 1 June 2000.

55. The fees payable for year 3 and onwards, until termination of the Project on 30 June 2020, will consist of the annual Management Fee (see paragraph 50) and Licence Fee (see paragraph 35).

Finance

56. The Project does not include the provision of finance to Growers. If any Grower borrows funds to take part in the Project, the borrowing will be a private arrangement between the Grower and the party providing the funds. Such arrangements are outside the arrangement to which this Ruling applies.

Undertaking by the Manager

57. The Manager has provided the ATO with an undertaking to contact Growers to provide them with the correct date of commencement of the olive trees' first commercial season, in the event that it differs from the estimated date of 1 April 2004, for the purpose of the horticultural write-off provisions.

Excluded arrangements

58. Note that the arrangement to which this Ruling applies does not include situations where Growers:

- do not enter into and comply with the Management Agreement (see paragraph 34);
- assign their interest in the Project (see paragraph 49);
- do not elect under clause 13.2 of the Management Agreement to pay the Management Fee by annual payment in advance (see paragraph 50);

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- elect to have the Manager harvest their olive trees separately (see paragraph 45);
- elect to harvest their olive trees themselves (see paragraph 45); or
- elect to retain the olives harvested from their trees to market, sell or otherwise deal with as they determine (see paragraph 45).

Ruling

59. For a Grower who invests and is accepted into the Project by 30 June 2000, the following deductions will be available for the years ended 30 June 2000 to 30 June 2002:

Expense type	ITAA 1997 Section	Deductions available each year		
		Year 0 30/6/2000	Year 1 30/6/2001	Year 2 30/6/2002
Management Fee (see paragraph 61)	8-1	\$4,255	\$1,759	\$1,759
Licence Fee (see paragraph 62)	8-1	\$20	\$20	\$20
Landcare (see paragraph 63)	387-55	\$1,365		
Irrigation (see paragraph 64)	387-125	\$1,049	\$1,049	\$1,049
Olive tree establishment	387-165	See paragraph 65		

60. For a Grower who invests and is accepted into the Project between 1 July 2000 and 30 June 2001, the deductions available to them for the year ended 30 June 2001 will be as detailed above for year 0, and for the year ended 30 June 2002 will be as detailed above for year 1.

Management Fee

61. The Management Fee paid by the Grower for the services outlined in the Management Agreement will be an allowable deduction in the year incurred (section 8-1).

Licence Fee

62. The Licence Fee paid by the Grower in relation to the Grower's Allotment will be an allowable deduction in the year incurred (section 8-1).

Landcare

63. The Grower's expenditure on eligible landcare activities will be deductible in full in the year incurred, provided the Grower has commenced a business of primary production at the time the expenditure in question is incurred. A Grower who applies for and is accepted into the Project in the year ended 30 June 2000 but for whom no services are provided in that income year, will not be considered to be carrying on such a business (section 387-55).

Irrigation

64. The Grower's capital expenditure on irrigation will be an allowable deduction, on the basis of one-third of the total expenditure in the year the expenditure is incurred, and one-third in each of the following two years of income (section 387-125).

Olive tree establishment

65. A deduction under section 387-165 for the cost of establishing olive trees would ordinarily be allowable to the Grower during the income year that the trees are first used for the purpose of producing assessable income. As it is not expected that the trees will enter their first commercial season in the period ruled on, i.e., to 30 June 2002, no amount has been specified as being deductible. For further explanation see paragraphs 90 to 94.

Section 82KL

66. Section 82KL does not apply to deny the deductions otherwise allowable.

Section 82KZM

67. The expenditure by Growers does not fall within the scope of section 82KZM.

Part IVA

68. The provisions in Part IVA will not be applied to the arrangement described in this Ruling.

Assessable income

69. Growers will be assessable on their share of the gross sale proceeds from the sale of olives in accordance with section 6-5.

Explanations

Section 8-1: Management and Licence Fees

70. Consideration of whether the prepaid Management and Licence Fees are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoings in question must have sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where taxpayers merely contractually commit 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 and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

Is the Grower carrying on a business?

71. Olive growing activities can constitute the carrying on of a business. A business includes a 'primary production business', which is defined under subsection 995-1(1) to include a business of propagating and cultivating plants. Where there is a business, or a future business, of growing olives for sale at a profit, the gross proceeds from the sale of olives will constitute gross assessable income under section 6-5. 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 be the planting, tending and maintaining of olive trees and the harvesting of the olives for sale.

72. A Grower will be considered to be carrying on a business of growing olives where:

- the Grower has an identifiable interest in specific growing trees coupled with a right to harvest and sell the olives produced;
- the olive growing activities are carried out on the Grower's behalf; and
- the weight of the general indicators of a business, as developed by the Courts, point to the Grower carrying on a business.

An identifiable interest and a right to harvest and sell olives

73. By virtue of the Licence to Occupy Agreement and the Management Agreement, the Grower has an occupancy right over an identifiable 0.20 hectare area of land growing 50 olive trees. There is a means to identify trees in which the Grower has an interest. Growers have the right to harvest and sell the olives themselves or have an independent contractor, or the Manager, do so on their behalf.

Olive growing activities carried out on the Grower's behalf

74. Under the Licence to Occupy, Growers have the right to use their Allotments for olive growing purposes and to have AG&G or other contractors enter the land to carry out the management and other services required in the Business.

75. Growers can control AG&G's activities. This control is provided on an individual Grower basis under the Management Agreement and also pursuant to the rules in the Constitution of BPOG in respect of Managed A Shares. Additional control over AG&G is provided under the Corporations Law.

76. Growers are entitled to agricultural, land and financial reports from AG&G. They are able to terminate the Management Agreement with AG&G in certain instances, such as cases of default.

77. The olive growing activities detailed in the Licence to Occupy Agreement and the Management Agreement are carried out on the Grower's behalf. From the information provided, Growers control their investment in the Project.

General indicators of business

78. The general indicators of a business, as developed by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the arrangement's description in this Ruling for all these indicators. The Olive Consultant's Report in the Prospectus considers the Project is feasible and commercially viable. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to cash flow 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.

79. As detailed above, the Grower's Allotment and the individual trees upon that Allotment can be identified. The Grower bears certain business risks including, from commencement of the fourth year of the Management Agreement, failure of the Grower's trees to survive. The services provided by the Manager are those ordinarily found in olive growing ventures that would commonly be said to be businesses.

80. Growers have a continuing interest in the trees from the time they are acquired until the termination of the Project. The olive growing activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. The Grower's olive growing activities will constitute the carrying on of a business.

81. By weighing up all of the attributes of the Project it is accepted that Growers in the Project will be in a business of primary production from the date that 'business operations' are first commenced on their behalf. 'Business operations', in this context, mean such things as installation of irrigation items and other pre-planting work, all conducted as part of a co-ordinated and concerted plan to grow and harvest olives for sale at a profit.

82. The Management Fees and Licence Fees payable by the Grower will relate to the gaining of income from this business. Hence, they have a sufficient connection with the operations by which this income is gained. Further, no 'non-income producing' purpose in incurring the Fees is identifiable from the arrangement. They will, thus, be deductible under the first limb of section 8-1, to the extent that they are not capital or of a capital nature. The Management Fee payable under the Management Agreement includes separate Fees for the trees, landcare and irrigation establishment costs. These amounts are of a capital nature and not deductible under section 8-1. The Fees, on the basis of the information provided, cannot be said to be grossly excessive. The tests of deductibility under the first limb of section 8-1 are met.

Subdivision 387-A: landcare expenditure

83. Capital expenditure incurred by a person carrying on a primary production business in respect of various measures primarily and principally for the prevention of land degradation qualifies for a 100% deduction in the year in which the expenditure is incurred, under Subdivision 387-A. The expenditure that qualifies includes, among other things, the eradication of animal and vegetable pests and other measures, including fencing, to prevent soil erosion, salinity, and preserve natural vegetation (section 387-60).

84. In order to claim a deduction under section 387-55, a business must be being carried on at the time the expenditure was incurred. A taxpayer claiming the deduction need not actually own the land but can be a tenant or a lessee, provided the land is used at that time in carrying on a business of primary production. However, where all that occurs in an income year, is that a person has been accepted into the Project as a Grower but no business operations have been commenced on his/her behalf, he/she will not be accepted as having commenced a primary production business and no deduction under Subdivision 387-A will be allowable for that, or any other, year of income.

85. In this Project, a Grower's business of primary production will generally have commenced at the time the expenditure is incurred. The requirements of Subdivision 387-A will have been met in this respect.

86. Under the Management Agreement, the Grower is required to pay an amount of \$1,365 for expenditure attributable to landcare. This amount is eligible expenditure for the purposes of sections 387-55 and 387-60. For a Grower who enters into the Project by 30 June 2000, and commences to carry on a primary production business by that date, a deduction for \$1,365 will be allowable in the year ended 30 June 2000.

Subdivision 387-B: irrigation expenditure

87. Section 387-125 allows a taxpayer, who is carrying on a business of primary production on land in Australia, to claim a deduction for capital expenditure on conserving or conveying water. The deduction is allowed over a three year period and applies to plant or a structural improvement primarily or principally used for the purpose of conserving or conveying water for use in a primary production business. Irrigation systems of the kind proposed by this Project would be covered by Subdivision 387-B.

88. A taxpayer who is a lessee or licensee of land and who is conducting a primary production business on the land may qualify for a deduction under Subdivision 387-B. Upon entering into the Licence

to Occupy Agreement the Grower becomes a licensee of a distinct portion of the Project Land. A deduction will be available to the Growers in this Project at a rate of 33.3% per annum (with no pro-rating required) for the cost of the irrigation system.

89. The expenditure applicable to conserving or conveying water for each olive Grove, as provided for in the Management Agreement, that meets the requirements of section 387-130, amounts to \$3,148. For a Grower entering into the Project by 30 June 2000 and who incurs the expenditure for use in a primary production business, a deduction will be allowable under section 387-125 for the years ended 30 June 2000 to 30 June 2002, inclusive, of \$1,049 per year.

Subdivision 387-C: olive tree establishment expenditure

90. Section 387-165 allows capital expenditure on establishing horticultural plants for use in a horticultural business to be written off for tax purposes. Under subsection 387-170(3), the definition of 'horticulture' may include the cultivation of olive trees. For the purpose of this Subdivision, a lessee or licensee of land carrying on a business of horticulture is treated as owning the plants growing on that land rather than the actual owner of the land.

91. The Manager has identified the costs of establishing the horticultural plants, including the costs of acquiring the plants, establishing the plants and preparing the soil (other than costs associated with the clearing of land and the draining of swamps) as \$375 per Grove.

92. For a Grower who determines that the effective life of the olive trees for commercial horticulture is greater than 30 years (section 387-185), the write-off rate is 7% per year on a prime cost basis.

93. The write-off commences from the date the trees are used or held ready for use for the purpose of producing assessable income in a horticultural business (sections 387-165 and 387-170). It is anticipated the trees will enter their first commercial season in April 2004. The Grower's cost of olive tree establishment will be eligible for write-off deductions at a rate of 7% per annum from this date.

94. For a Grower entering into the Project by 30 June 2000, a deduction is expected to be first available in the year ended 30 June 2004. Based on the above assumptions the deduction available in each full production year will be \$26, until the cost is fully written off. This deduction may be reduced pro rata for the year in which the first commercial season commences. The Manager has given an undertaking to the ATO to advise Growers of the actual date of commencement and provide Growers with a calculation of the

deductible amount for the year in which the first commercial season commences.

Section 82KZM: prepaid expenses

95. Under the Management Agreement, a fee of \$4,900 will be incurred on execution of that Agreement to undertake the pre-planting, planting and other management services for the first year. A further Management Fee of \$4,243 is payable in year 0. In addition, Management Fees of \$1,759 are payable in years 1 and 2. These annual Fees are only in respect of the services provided to the Grower for the 12 months following the time they are incurred. The Fees are for a number of specified services as set out in the Management Agreement. The services provided in the first year have significantly more value than those provided in subsequent years.

96. The conclusion cannot be drawn from the information provided in respect of the arrangement, that the Fees in the first three years have been inflated to result in reduced Fees being payable by the Growers in subsequent years. There is no evidence that might suggest the services covered by the Management Fees are unable to be provided within 13 months of incurring the Fee. Thus, for the purposes of this Ruling, no part of the Management Fee of \$9,143 incurred in the first year or the Fees incurred in subsequent years is for AG&G doing 'things' that are not to be wholly done within 13 months of each fee being incurred. Thus, the basic precondition for the operation of section 82KZM is not satisfied, and the section will not apply to the expenditures identified above in each of the financial years ended 30 June 2000 to 30 June 2002.

Section 82KL: recouped expenditure

97. The operation of section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefits'. There are no loans provided to the Grower. No 'additional benefits' will be provided to trigger the application of section 82KL. It will not apply to deny the deductions otherwise allowable under section 8-1.

Part IVA: general tax avoidance provisions

98. 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).

99. The Brooklyn Park Olive Groves Project will be a 'scheme'. The Growers will obtain a 'tax benefit' from entering into the scheme, in the form of deductions for Management Fees and Licence Fees

allowable under section 8-1, and deductions allowable under Subdivisions 387-A, 387-B and 387-C, that would not be obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining a tax benefit.

100. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the sale of olives. The Project does not exhibit any features that might suggest the Project was so 'tax driven', and so designed to produce a tax deduction of a certain magnitude, such as being 'excessive' or 'uncommercial', that would attract the operation of Part IVA.

Section 6-5: assessable income

101. Gross sale proceeds derived from the sale of olives harvested from the Project will constitute assessable income of Growers, pursuant to 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.

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Commissioner of Taxation

15 September 1999

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Related Rulings/Determinations:

PR 98/1; TR 92/1; TR92/20;
TR 97/11; TR 97/16; TD 93/34

Subject references:

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

Legislative references:

- ITAA1936 82KL
- ITAA1936 82KZM
- ITAA1936 Pt IVA
- ITAA1936 177A
- ITAA1936 177C
- ITAA1936 177D
- ITAA1997 6-5
- ITAA1997 8-1
- ITAA1997 Subdiv 387-A
- ITAA1997 387-55
- ITAA1997 387-60
- ITAA1997 Subdiv 387-B
- ITAA1997 387-125
- ITAA1997 387-130
- ITAA1997 Subdiv 387-C
- ITAA1997 387-165
- ITAA1997 387-170
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- ITAA1997 995-1(1)

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