



PR 2000/64 - Income tax: Carina Park Almond Project

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 This document has changed over time. This is a consolidated version of the ruling which was published on *28 May 2001*



Product Ruling

Income tax: Carina Park Almond 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**, **Previous Rulings**, **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 1999/95 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.

[**Note:** This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

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 and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

Terms of Use of this Product Ruling

This Product Ruling has been given on the basis that the person(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

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 Carina Park Almond Project, or just simply as 'the Project'.

Tax law(s)

2. The tax law(s) that are dealt with in this Ruling are:

- section 8-1 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
- section 27-5 (ITAA 1997);
- section 387-125 (ITAA 1997);
- section 387-165 (ITAA 1997);
- section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- section 82KZM (ITAA 1936);
- sections 82KZMA – 82KZMD (ITAA 1936);
- Part IVA (ITAA 1936).

3. On 11 November 1999, the Government announced further changes to the tax system as part of The New Business Tax System. A number of those changes, especially those to do with 'tax shelters', could affect the tax laws dealt with in this Ruling. Some of the changes apply from the date of announcement and others are proposed to apply from nominated dates in the future.

4. Although the Ruling mentions certain of those announced changes, the information given on the treatment of expenditure which may be affected by them is not binding on the Commissioner. Legally binding advice in respect of those changes cannot be given until the relevant law(s) are enacted.

5. However, if the changes become law the operation of that law will take precedence over the application of this Ruling, and to that extent, the Ruling will be superseded. If requested, when the relevant law(s) are enacted, the Commissioner will formalise the non-binding information shown in this Ruling by issuing a new Product Ruling that describes the operation of those law(s).

Class of persons

6. 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'.

7. 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

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

9. 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

11. This Ruling applies prospectively from 31 May 2000, 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).

12. 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

13. 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.

Previous Rulings

14. This Ruling replaces Product Ruling PR 2000/9, which is withdrawn on and from the date this Ruling is made. Subject to changes in the law relating to certain prepayments, Product Ruling 2000/9 will continue to apply to investors who entered into the Project on or before 31 May 2000.

Arrangement

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

- **Project Constitution** the parties to which are the Growers and Blaxland Rural Investments Limited ('BRIL', 'the Manager', or 'the Responsible Entity');
- **Allotment Agreement** between BRIL and the Growers;
- **Management Agreement** between BRIL and the Growers;
- Almond Orchard Management Agreement and Deed of Variation of Almond Orchard Management Agreement between the Manager and Select Harvests Limited ('Select');

- Agency Agreement - Custodian, between BRIL and Cardinal Financial Securities Limited ('the Custodian');
- Almond Orchard Lease between Kyndalyn Park Pty Ltd and the Custodian;
- Deed of Option to Lease between Kyndalyn Park Pty Ltd and the Custodian;
- Sublease between the Custodian and the Manager;
- the Prospectus issued by the Manager on 30 April 1999;
- Compliance Plan for the Responsible Entity;
- Information package from the Loan Facilitator dated 20 May 1999;
- Additional correspondence received from BRIL dated 21 May 1999, 22 June 1999, 28 June 1999, 5 July 1999, 6 August 1999, 11 August 1999, 17 August 1999, 18 August 1999 and 19 August 1999.
- Correspondence received from BRIL to ATO dated 17 May 2000.

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

16. The documents highlighted are those Growers enter into or become a party to. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate¹ of a Grower, will be a party to, which are part of the arrangement to which this Ruling applies other than any finance agreement to which paragraph 38 below applies.

17. The arrangement is called Carina Park Almond Project. Growers entering the Project will occupy, under licence, land owned by Kyndalyn Park Pty Ltd, known as Carina Park, 70 kms south of Mildura on the Murray River. The land has been leased to the Custodian, which has, in turn, subleased the land to the Manager. The Manager grants a licence to each Grower, by way of an Allotment Agreement, to conduct almond-growing activities on the land.

18. There are 700 Allotments of 0.4 hectares on offer. The total land area for this stage of the Project is 280 hectares. In the 13 months following execution of the Allotment and Management Agreements 100 trees per Allotment will be planted. The Project will be operated by the Manager as the Responsible Entity.

¹ In this Ruling 'associate' has the meaning as defined in section 318 of the ITAA 1936.

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19. Growers will engage BRIL to perform services including the establishment and maintenance of the Orchard and the annual harvesting and marketing of the almonds produced. BRIL will engage Select to professionally manage the Orchard and sell the entire production of the Orchard for the life of the Project.

Years 1 to 3 payments

20. The fees payable by a Grower in the Project in the first three years for one allotment are:

	Year ended 30 June 2000	Year ended 30 June 2001	Year ended 30 June 2002
Management fee	2,378	737	629
Maintenance	1,400	2,448	2,423
Allotment licence fee	100	100	100
Lease of water licences	40		
Acquisition of water licences		1,200	1,200
Installation of irrigation	782	915	848
Purchase of trees	600		
Planting cost	500		
Total	\$5,800	\$5,400	\$5,200

21. The Manager forecasts that a Grower could expect to achieve an internal rate of return of 12% before tax. The term of the Project will be for 25 years. Select has a right, through the Manager, to acquire the Growers' Interests, at market value, in either the fifteenth, twentieth or twenty fifth years so the Project may end early.

Project Constitution

22. Clause 11.1 states the Project is to be known as Carina Park Almond Project and its purpose is to invite the public to become proprietors of their own business venture of almond production (cl 11.4). Clause 2 prescribes the amounts that Growers must pay in order to participate in the Project. There are no withdrawal rights under the Project (cl 10). A Grower has the right to assign their interest only in the circumstances set out in clause 18 of the Constitution and on the terms and conditions of the Allotment Agreement and Management Agreement. Growers are able to remove the Responsible Entity by taking action under the Corporations Law.

23. Each Grower is vested with the following assets:
- the trees on the Grower's allotment (cl 16.3(a)(i));
 - the internal irrigation system installed on the Grower's allotment (cl 16.3(a)(ii));
 - the Grower's interest in the Project (cl 16.3(a)(iii)); and
 - the almonds attributable to the Grower's allotment (cl 16.3(a)(iv)).

Compliance Plan

24. The objective of the Compliance Plan is to ensure the interests of the Growers are protected. The Compliance Plan provides that the Responsible Entity will act in the interests of Growers in preference to its own (cl 1(e)). The Responsible Entity must ensure that the Constitution and the Compliance Plan meet the relevant requirements of the Corporations Law (cl 1(b)). The Responsible Entity must ensure that all property of the Project is clearly identified and held separately from any other property of the Responsible Entity or other managed investment schemes and ensure that the assets of the Project are regularly and appropriately valued (cl 3). All Project property will be held by the Custodian (cl 1(f)(i)). The Compliance Plan outlines the various reports and reconciliation which will be provided to each Grower by the Manager.

Allotment Agreement

25. Pursuant to clause 2.1 of the Allotment Agreement, the Manager grants each Grower a licence to:

- use and occupy the allotment for the purpose of developing, planting, growing, maintaining and harvesting the trees;
- draw water; and
- use the horticultural infrastructure on location on the land.

A fee of \$100 a year is payable to the Responsible Entity for this licence (cl 7).

26. The Responsible Entity's right to acquire the Grower's trees and allotment irrigation system in the years ended 30 June 2014, 2019 and on termination of the Project is detailed in clause 3. Clause 3.3 deals with the distribution of proceeds to Growers from the sale of water licences by the Responsible Entity. The Grower's rights and obligations are set out in clause 5 and the Responsible Entity's

obligations are set out in clause 6. Clause 9 allows the Responsible Entity to assign its rights and interests under this Agreement.

Management Agreement

27. Pursuant to the Management Agreement, BRIL is engaged to develop, maintain and generally manage the Project. The fees payable to BRIL in return for its services are set out in clause 5. Growers enter into this agreement until 30 June 2024, or earlier if BRIL exercises its right, under the allotment agreement clause 3, to acquire the Growers' interests. BRIL is entitled to delegate all or any of the functions to be performed by it pursuant to the Management Agreement (cl 8.1).

28. BRIL is to establish the Grower's allotment with 100 trees within 13 months of the acceptance of the Grower's application (clause 4.2). The orchard services to be provided by the Manager are detailed at clause 4. These include, among other things:

- establishment of the trees;
- ongoing management of the Orchard;
- harvesting the almonds produced; and
- marketing the almonds produced.

29. The Manager will pool for sale all produce of each Grower's business with that of each other Grower and will market and sell all such produce (clause 4.3). The proceeds of the pooled sales will be paid to the Custodian for crediting to the account of each Grower on a proportional basis (clause 15 of the Management Agreement and clause 25 of the Constitution). Where the produce from a Grower's allotment is of sufficiently reduced quality or quantity, that Grower's share of the pooled sale proceeds may be reduced (cl 4.6 of the Management Agreement and clause 25.1 of the Constitution). Growers have the right to elect to have any almonds harvested from their farm made available to them to sell or deal with as they determine (cl 4.3(n)).

30. Income of the Project is to be held on behalf of the Growers by the Custodian and to be applied in payment of the Growers' obligations under the Management Agreement. Any net income remaining after the payment of these fees is to be distributed to Growers after the final payment is received for each sale of produce (clause 25 of the Constitution).

31. The Grower may terminate the Management Agreement in certain instances, including where the Manager defaults in the performance of its duties (clause 10).

32. All costs and expenses incurred by the Manager in carrying out its duties are to be borne by it and the Grower has no further obligation to make any payment, save those under clauses 5.1 to 5.4 of the Management Agreement (clause 5.6).

33. If in any year of the Project the income resulting from the sale of produce is insufficient to meet the annual Management and Occupancy fees of that year, participants are still liable to pay the shortfall pursuant to clause 7.2 of the Constitution.

34. There are no sale agreements in place for the almonds that will be produced and harvested under the Project. Growers are paying as part of the management fees an amount to BRIL for it to market and sell the almonds (clause 4.3).

35. A participant who enters into the Carina Park Almond Project and utilises the services of BRIL will be bound by the Management Agreement and Project Constitution. These documents detail, among other things, the fees and charges for which an investor is liable. Once a Grower's application has been accepted, the Manager will be responsible for planting 100 trees on each Allotment within 13 months of acceptance of the Grower's application (clause 4.2). The Manager will advise Growers when certain 'business operations' have been commenced on their behalf, for example, when their trees have been planted.

Almond Orchard Management Agreement

36. Pursuant to its right to delegate any functions required of it, BRIL has contracted with Select to undertake the obligations under the Management Agreement to establish the Orchard in year one and undertake all necessary horticultural work in future years. An Almond Orchard Management Agreement exists between the Manager and Select detailing those services to be undertaken by Select in each year. Select is specifically required to acquire rootstock for the Growers in the Project (cl 3.1) and install the internal irrigation system (cl 3.2). Select is required to undertake all preplanting activities, planting of trees, irrigation and maintenance of the Orchard and other necessary operations over the life of the Project (cl 3.7(a) to (l)).

37. Select is required to harvest the almonds on behalf of the Growers (cl 3.8), process those almonds (cl 4) and guarantee the sale of those almonds by the end of the financial year following harvest (cl 5.1). Select is entitled to charge fees for the processing and marketing of the almonds at the rates of \$800 a tonne (cl 11) and \$500 a tonne (cl 12), respectively. These processing and marketing fees are subject to CPI indexation.

Finance

38. Growers can fund their investment in the Project themselves, borrow from an independent lender, or borrow using a Loan Facilitator, as described below.

39. The Manager has engaged the services of a Loan Facilitator, a company not associated with the Manager or any associates of the Manager, to arrange loans from an independent financier, to cover the fees payable to the Manager.

40. This Ruling does not apply if a Grower enters into a finance agreement that includes any of the following features:

- split loan features of a type described in Taxation Ruling TR 98/22;
- entities associated with the Project become involved in the provision of finance to growers for the Project;
- indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- non-arm's length terms and conditions;
- 'additional benefits', for the purposes of section 82KL, are granted to the borrower, or the funding arrangements transform the project into a 'scheme' to which Part IVA may be applied;
- repayments of principal and payments of interest are linked to deriving income from the Project;
- funds borrowed, in whole or in part, are not available for the conduct of the project but are transferred (by any means, and directly or indirectly) back to the lender or any associate; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

Agency Agreement - Custodian

41. BRIL has appointed Cardinal Financial Securities Limited to act as its agent within the scope of the agreement. The role of the Custodian is to hold the Project property as agent for BRIL. The agreement does not create a trustee or partnership relationship (cl 3). The Custodian must not give a charge, mortgage or any other encumbrance over any of the Project property (cl 5).

Irrigation expense

42. BRIL is required to install the Allotment Irrigation System by 30 June 2000.

43. BRIL has delegated this duty to Select under the Almond Orchard Management Agreement (cl 3.2). Select's obligations in respect of Growers who enter the Project after 30 June 1999 are detailed in the correspondence dated 17 August 1999.

44. On or before 28 February 2000 BRIL will request in writing that Select install the Internal Irrigation System in lots of at least twenty acres. Select will then install the system on the same terms as set out in the Almond Orchard Agreement, except that the completion date will be one agreed to by Select and BRIL, and will enable BRIL to satisfy its obligations under the Management Agreement.

45. Each Grower is required to pay \$2,545 in instalments over 3 years for the irrigation system on their allotment (cls 5.1 and 5.2 of the Management Agreement). Growers accept liability for all three instalments at the time the first instalment is paid. All of the \$2,545 for each Grower will be expended on the installation of the Allotment Irrigation System by Select by the completion date, being no later than 30 June 2000.

Ruling**Allowable deductions**

46. For a Grower who invests in the Project, the deduction available for the prepaid Management fee and the prepaid Maintenance fee will depend upon the date that the investment is made and, in some cases, whether or not they are 'small business taxpayers'.

IMPORTANT: Paragraph 47 (relating to 'small business taxpayers') and paragraphs 48 to 50 (relating to taxpayers who are not 'small business taxpayers') describe the deductions allowable under the current law, but Growers are advised to carefully examine the information contained in paragraphs 53 to 55 relating to proposed changes to the prepayment rules. Growers who invest in the Project after 1pm, AEST, 11 November 1999 may be affected by these changes.

Deductions for Growers who are 'small business taxpayers'

47. For a Grower who is a 'small business taxpayer' and invests in the Project on or before 30 June 2000, the deductions shown in the

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Table below will be available for the years ended 30 June 2000 to 30 June 2002.

Fee type	ITAA 1997 section	Deductions for small business taxpayers only		
		Year 1	Year 2	Year 3
		30/6/2000	30/6/2001	30/6/2002
Management fee	8-1	\$2,378 – see Note (i) below	\$ 737	\$ 629
Maintenance fee	8-1	\$1,400 - see Note (i) below	\$2,448	\$2,423
Allotment Licence fee	8-1	\$100	\$ 100	\$ 100
Use of water licence	8-1	\$40 – see Note (ii) below		
Installation of irrigation	387-125	\$848 – see Note (iii) below	\$ 848	\$ 848
Purchase of trees	387-165	See Note (iv) below		
Planting of trees	387-165	See Note (iv) below		

Notes:

- (i) Legislative change means that the full deduction will not be allowed in the year ended 30 June 2000 for Growers who are not 'small business taxpayers'. See paragraphs 48 to 50 and the Example at paragraph 101.
- (ii) The \$40 fee paid for the use of Water licences is deductible under section 8-1. Later fees paid for the acquisition of Water licences by Growers are capital in nature and are not deductible.
- (iii) A deduction is allowable under section 387-125 for capital expenditure of \$2,545 incurred for installation of the irrigation system. The deduction is calculated on the basis of one third of the capital expenditure in the year in which the expenditure is incurred, and one third in each of the next 2 years of income.
- (iv) A deduction at the rate of 13% is allowable under section 387-165 for capital expenditure incurred for the purchasing and planting of trees. For Growers who enter the Project before 30 June 2000 it is likely that the

first commercial season will be in the financial year ended 30 June 2003.

Deductions for Growers who are not ‘small business taxpayers’

48. For a Grower who invests in the Project on or before 30 June 2000 who is **not a ‘small business taxpayer’** and is carrying on a business, the deduction available in respect of the Management fee and the deduction in respect of the Maintenance fee is determined under subsection 82KZMB(2), using the formula in subsection 82KZMB(3) and the percentages shown in Columns 3 and 4 of the Table in subsection 82KZMB(5). (The Example at paragraph 101 illustrates the application of this method).

49. In calculating the deduction available, the term ‘expenditure’ refers to expenditure for prepaid Management fees and Maintenance fees (shown in the Table below) that are otherwise allowable under section 8-1 whose ‘eligible service period’ ends not more than 13 months after being incurred by the taxpayer and which are not ‘excluded expenditure’. The ‘eligible service period’ (defined in subsection 82KZL(1)) means, generally, the period over which the services are to be provided.

Fee type	ITAA 1997 section	Expenditure incurred by taxpayers who are not ‘small business taxpayers’.		
		Year 1	Year 2	Year 3
		30/6/2000	30/6/2001	30/6/2002
Management fee	8-1	\$2,378 see Note (v) below	\$737 see Note (vi) below	\$629 see Note (vi) below
Maintenance fee	8-1	\$1,400 see Note (v) below	\$2,448 see Note (v) below	\$2,423 see Note (v) below

Notes:

- (v) The amounts shown in the table above for taxpayers who are not ‘small business taxpayers’ are **NOT** deductible in full in the year incurred. The deduction for each of the fees must be determined using the formulae shown below. The project manager will inform affected taxpayers of the number of days in the ‘eligible service period’ in the expenditure year. This figure is necessary for the tax deduction for each of the fees to be calculated.
- (vi) Amounts of less than \$1,000 will be ‘excluded expenditure’ as defined in section 82KZL(1) and are deductible in full in the year in which they are incurred.

PR 2000/64**Year 1: Expenditure incurred on or before 30 June 2000**

Available deduction = A + B

Where:

$$A = \text{Expenditure} \times \frac{\text{Number of days of eligible service period in the expenditure year}}{\text{Total number of days of the eligible service period}}$$

$$B = (\text{Expenditure less } A) \times 80\%$$

Year 2: Expenditure is incurred on or after 1 July 2000 and on or before 30 June 2001

Available deduction = A + B + C

Where:

$$A = \text{Expenditure} \times \frac{\text{Number of days of eligible service period in the expenditure year}}{\text{Total number of days of the eligible service period}}$$

$$B = (\text{Expenditure less } A) \times 60\%$$

C = balance of the Year 1 expenditure not previously deducted.

Year 3: Expenditure incurred on or after 1 July 2001 and on or before 30 June 2002

Available deduction = A + B + C

Where:

$$A = \text{Expenditure} \times \frac{\text{Number of days of eligible service period in the expenditure year}}{\text{Total number of days of the eligible service period}}$$

$$B = (\text{Expenditure less } A) \times 40\%$$

C = balance of the Year 2 expenditure not previously deducted.

50. For a Grower who invests in the Project on or before 30 June 2000 who is **not a 'small business taxpayer'** and is carrying on a business, deductions other than the Management fee and the Maintenance fee are shown in the Table below:

Fee type	ITAA	Deductions for taxpayers who are not small business taxpayers		
	1997 section	Year 1 30/6/2000	Year 2 30/6/2001	Year 3 30/6/2002
Allotment Licence fee	8-1	\$100 see Note (vii) below	\$100 see Note (vii) below	\$100 see Note (vii) below
Use of water licence	8-1	\$40 see Note (ii) above		
Installation of irrigation	387-125	\$848 see Note (iii) above	\$848 see Note (iii) above	\$848 see Note (iii) above
Purchase of trees	387-165	See Note (iv) above		
Planting of Trees		See Note (iv) above		

Notes:

- (vii) Amounts of less than \$1,000 will be ‘excluded expenditure’ as defined in section 82KZL(1) and are deductible in full in the year in which they are incurred. Where these amounts exceed \$1,000, as may be the case where a Grower acquires a number of interests in the Project, deductions are determined on the same basis as shown above for prepaid Management fees and prepaid Maintenance fees.

Goods and Services Tax

51. For a Grower who invests in the Project, sections 27-5 or 27-30 of the ITAA 1997 will apply to reduce the amount of any deduction allowable by any GST input tax credit to which the Grower is entitled or, in the case of section 27-5, a decreasing adjustment that a Grower has.

Division 35 – deferral of losses from non-commercial business activities**Section 35-55 – Commissioner’s discretion**

51.1 For a Grower who is an individual and who entered the Project on or after 31 May 2000 and prior to any withdrawal of this Product Ruling the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner has decided for the income years ended 30 June 2001 to 30 June 2004 that the rule in section 35-10 does not apply to this business activity provided that the

Project has been, and continues to be carried on in a manner that is not materially different to the arrangement described in this Ruling.

51.2 This exercise of the discretion in subsection 35-55(1) will not be required where, for any year in question:

- a Grower's business activity satisfies one of the objective tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the 'Exception' in subsection 35-10(4) applies.

51.3 Where, either the Grower's business activity satisfies one of the objective tests, the discretion in subsection 35-55(1) is exercised, or the Exception in subsection 35-10(4) applies, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of deductions attributable to their business activity in excess of any assessable income from that activity, i.e., any 'loss' from that activity, to a later year. Instead, this 'loss' can be offset against other assessable income for the year in which it arises.

51.4 Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner's decision to exercise the discretion in paragraph 35-55(1)(b) as an indication that the Tax Office sanctions or guarantees the Project or the product to be a commercially viable investment. An assessment of the Project or the product from such a perspective has not been made.

Sections 82KZM, 82KZMB, 82KL and Part IVA

52. For a Grower who invests in the Project the following provisions have application as indicated:

- expenditure by Growers who are small business taxpayers is not within the scope of section 82KZM;
- section 82KZMB applies to expenditure by Growers who are not small business taxpayers and are carrying on a business;
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Proposed new laws

Proposed changes to prepayment rules

- 53. [Omitted]
- 54. [Omitted]
- 55. [Omitted]

Explanations

Section 8-1

56. Consideration of whether the Allotment licence, Maintenance fees, and Management fees are deductible under section 8-1 begins with an examination of paragraph 8-1(1)(a). To be deductible under this paragraph:

- the outgoings in question must have a 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 all that happens in a year of income is that 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 and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

57. An outgoing or a loss incurred in carrying on a business for the purpose of gaining or producing assessable income is deductible under the general deduction provisions of section 8-1, provided it is not expenditure or a loss of capital or of a capital, domestic or private nature. 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 almonds for sale at a profit, the gross sale proceeds from the sale of almonds from the Project will constitute 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 almond trees and the harvesting of the almonds.

58. Under the Management Agreement, Growers engage BRIL to farm their allotment on their behalf. They also have the right to have the harvested almonds made available to themselves to sell or utilise how they wish. The purpose for which the participant utilises the almonds will then be a determining factor as to whether the amounts incurred on any Allotment licence or Management fee will be an allowable deduction. This Ruling applies to those parties utilising the services of BRIL.

Is the Grower in business?

59. Generally, a Grower will be carrying on a business of growing almonds where:

- they have an identifiable interest in specific growing almond trees coupled with a right to harvest and sell the almonds resulting from those trees;
- the horticulture activities are carried out on their behalf; and
- the weight of the general indicators of a business, as developed by the Courts, point to them carrying on such a business.

60. 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 surveying of the land, installation of the irrigation items, and other preplanting work, all conducted as part of a coordinated and concerted plan to grow and harvest almonds for sale at a profit.

61. For this Project investors have, under the Allotment Agreement, rights in the form of a licence over an identifiable area of land growing trees, consistent with the intention to carry on a business of growing almonds. If BRIL does not exercise its right to purchase the Growers' trees and irrigation system upon termination of the Management and Allotment Agreements, Growers have the right to remove the trees and above ground irrigation lines and independently sell them, should they desire.

62. Under the Management Agreement, Growers appoint BRIL, as Manager, to provide services such as preplanting and planting of almond trees, the installation of irrigation, and all horticultural operations necessary to develop a mature fruit bearing tree.

63. Growers only have the right to use the land in question for almond-growing purposes. BRIL may come onto the land to carry out its obligations under the Management Agreement. The Growers' degree of control over BRIL, as evidenced by the Agreements, is sufficient. Under the general terms of the Project, Growers are entitled to receive regular progress reports on BRIL's activities. Growers are able to terminate arrangements with BRIL in certain instances, such as cases of default. The horticulture activities described in the Management Agreement are carried out on the Growers' behalf. Growers control their investment.

64. 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. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections contained 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.

65. Growers will engage the professional services of a Manager who holds itself out as having the appropriate credentials. There is a means to identify which trees Growers have an interest in. The services are based on accepted horticultural practices and are of the type ordinarily found in horticulture ventures that would commonly be said to be businesses.

66. Growers have a continuing interest in the trees from the time they are acquired until the termination of the Project. The horticulture 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 Growers' horticulture activities will constitute the carrying on of a business.

Deductibility of expenses

67. The Allotment licence, as well as Management and Maintenance fees, will relate to the gaining of income from this business, and hence have a sufficient connection to the operations by which this income is to be gained. They will, thus, be deductible under paragraph 8-1(1)(a), to the extent that they are not capital or of a capital nature (see further below). Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fees are not considered to be grossly excessive. The tests of deductibility under paragraph 8-1(1)(a) are met. The exclusions do not apply, except as set out below.

Sections 27-5 and 27-30 - Goods and Services Tax

68. Section 27-30 of the ITAA 1997 operates to deny a deduction that would be otherwise available under section 8-1 for the year ended 30 June 2000 to the extent that the loss or outgoing (incurred after 30 November 1999 and before 1 July 2000) includes an amount relating to an input tax credit to which a Grower will be entitled on or after 1 July 2000.

69. Section 27-5 of the ITAA 1997 operates to deny a deduction, that would be otherwise available under section 8-1, to the extent that the loss or outgoing incurred (on or after 1 July 2000) includes an amount relating to an input tax credit to which a Grower is entitled or a decreasing adjustment that a Grower has.

Subdivision 960-Q - Small business taxpayers

70. In this product ruling the term 'small business taxpayer' is relevant for the purposes of certain prepaid expenditure.

71. Whether a Grower is a 'small business taxpayer' depends upon the individual circumstances of each Grower and is beyond the scope of this product ruling. It is the individual responsibility of each Grower to determine whether or not they are within the definition of a 'small business taxpayer'.

72. A 'small business taxpayer' is defined in section 960-335 of the ITAA 1997 as a taxpayer who is carrying on a business and either their 'average turnover' for the year is less than \$1,000,000 or their turnover recalculated under section 960-350 is less than \$1,000,000.

73. 'Average turnover' is determined under section 960-340 by reference to the average of the taxpayer's 'group turnover'. The group turnover is the sum of the 'value of business supplies' made by the taxpayer and entities connected with the taxpayer during the year (section 960-345).

Section 82KZM - Prepaid expenditure for 'small business taxpayers'

74. Section 82KZM operates to spread over more than one income year a deduction for prepaid expenditure incurred by a 'small business taxpayer' 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 to be done within 13 months after the day on which the expenditure is incurred.

75. Management, Maintenance and Allotment Licence fees are incurred on execution of the Management and Allotment Agreements.

In addition, a fee for the use of the Water licences is payable in the first year. In each instance, the fees are charged for providing services to a Grower only for the period of 13 months from the time they are incurred. The fees are expressly stated to be for a number of specified services. In effect, the Manager is promising to provide significantly more services, in terms of value in the first year of the Project, compared to years two and three.

76. No explicit conclusion can be drawn from the arrangement's description, that the fees in the first year have been inflated to result in reduced fees being payable for subsequent years. There is no evidence that might suggest the services covered by the fee could not be provided within 13 months of incurring the expenditure in question. Thus, for the purposes of this Ruling, no part of the initial Management fee or the fee for use of the Water licence is for BRIL doing 'things' that are not to be wholly done within 13 months of each fee being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditures identified above that are incurred by a 'small business taxpayer' in each of the financial years ended 30 June 2000 to 30 June 2002.

Sections 82KZMA - 82KZMD - Prepaid expenditure for taxpayers other than small business taxpayers

77. For a Grower who is not a 'small business taxpayer' and is carrying on a business, sections 82KZMA to 82KZMD determine the amount of a deduction otherwise allowable under section 8-1 where expenditure is incurred under an agreement for the doing of a thing that is not to be wholly done within the income year in which the expenditure is incurred ('the expenditure year'). Generally, these provisions operate to limit the amount of deduction available in the expenditure year to the amount that relates to that income year.

78. Section 82KZMA is a gateway provision that sets out when the new treatment will apply. Sections 82KZMB and 82KZMC set out the rules for prepayments incurred in the transitional period, for things to be done wholly within 13 months. For Growers investing in the Project, transitional treatment applies to prepayments initially incurred in the 1999-2000 income year. Section 82KZMD governs the deductibility of prepayment expenditure where the eligible service period ends more than 13 months after the date the expenditure was incurred, and does not apply to the Project.

79. The deduction available to Growers for the management fee and the maintenance fee will be determined in accordance with the rules contained in section 82KZMB. Because the quantum of the management fee and the maintenance fee is the same or lower in the second and subsequent years, the capping provisions contained in

section 82KZMC will have no practical effect on the deduction available.

80. During the transitional period the amount of the deduction available to Growers is determined using the formula in subsection 82KZMB(3) and the percentages shown in the table in subsection 82KZMB(5).

81. The Allotment Licence Fee of \$100 is 'excluded expenditure' as defined in section 82KZL(1). Pursuant to section 82KZMA(4), section 82KZMB does not apply to expenditure that is 'excluded expenditure'. 'Excluded expenditure' is deductible in full in the year in which it is incurred.

Proposed changes to prepayment rules

82. [Omitted]

83. [Omitted]

84. [Omitted]

85. [Omitted]

Expenditure of a capital nature

86. Any part of the expenditure of a Grower entering into the horticulture 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 apparent from the Project's Agreements that certain payments made are attributable to the acquisition of capital assets. These include preplanting costs, the cost of establishing the trees, and the erection and establishment of the irrigation system. However, expenditures of this nature can fall for consideration under specific deduction provisions of the ITAA 1997 relevant to the carrying on of a business of primary production.

87. The Manager, BRIL, has identified the relevant expenditures that are of a capital nature. A Grower entering into the Project incurs and pays a separate amount to BRIL for these capital items (refer clause 5 of the Management Agreement). These amounts are detailed at paragraph 20 of this Ruling.

Subdivision 387-B: expenditure on conserving or conveying water

88. 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., 33¹/₃% with no pro rating required), under section 387-125 of Subdivision 387-B. A taxpayer incurring this expenditure need not be the owner of the land to claim the deduction, so long as they are in a business of primary production. In this case, there will generally be no delay between the signing of the Agreements and the commencement of 'business operations'. Accordingly, a Grower's business of primary production will generally have commenced at the time the expenditure is incurred. The requirements of Subdivision 387-B have, thus, been met in this respect.

89. The Manager, BRIL has identified that the expenditure applicable to the conserving or conveying of water for the Orchard, that meets the requirements of section 387-130, amounts to \$2,545. For a Grower entering into the Project by 30 June 2000, 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 2000 to 30 June 2002 inclusive, of \$848 per year.

90. However, a deduction under section 387-125 is denied where the Grower is entitled to claim a water facility tax offset under section 388-55 and elects to do so.

Subdivision 387-C: horticultural provisions

91. The capital costs relating to establishing the almond trees are deductible as a 'write-off', over time, under Subdivision 387-C. This Subdivision allows capital expenditure incurred in establishing horticultural plants to be written off where the plants are used in a business of 'horticulture'. Under subsection 387-170(3), the definition of 'horticulture' covers the cultivation of almond trees.

92. The write-off commences from the time the trees are used or held ready for use for the purpose of producing assessable income in a horticultural business (see sections 387-165 and 387-170). The write-off rate will be 13% per year, assuming an effective life of the plants of greater than 13 but less than 30 years (see section 387-185).

93. The write-off deductions will, for a Grower who has been accepted into the Project by 30 June 2000 and whose primary production business has commenced, start in the third year of the Project, on the basis that it is then the almond trees enter their first commercial season and, hence, begin to be used for the purpose of producing assessable income in a horticultural business.

94. Costs of establishing horticultural plants may include the cost of acquiring the plants, the cost of establishing the plants, and the costs of ploughing, contouring, top dressing, fertilising and stone

removal. Expressly excluded is expenditure incurred on draining swamps or the clearing of land.

95. BRIL has identified that the relevant expenditure attributable to the establishment of the almond trees is \$1,100. This amount will be subject to the horticultural provisions and allowable as a deduction under Subdivision 387-C.

96. For a Grower entering into the Project by 30 June 2000, no deduction will be allowable for the years ended 30 June 2000, 30 June 2001, and 30 June 2002. There will be an amount deductible for the year ended 30 June 2003 in accordance with note iv to paragraph 47.

Alternative view

97. The applicant has indicated disagreement with the ATO view that the almond trees do not commence to be used for the purpose of producing assessable income in a horticultural business until their first commercial season, and has submitted an alternative view that the almond trees commence to be so used immediately after their planting.

Section 82KL

98. The operation of section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. Here, no 'additional benefit' has been identified to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1.

Part IVA

99. 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). The Carina Park Almond Project will be a 'scheme'. It will commence generally on the date the Prospectus is issued. The Growers will obtain a 'tax benefit' from entering into the scheme, in the form of the section 8-1 deduction, and deductions allowable under Subdivisions 387-B and 387-C, 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.

100. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the yearly sale of almonds. Further, there are no features of the Project, for

example, such as the Management and Licence fees being 'excessive', and uncommercial, and predominantly financed by a non-recourse loan, that might suggest the Project was 'tax driven', and so designed to produce a tax deduction of a certain magnitude that would attract the operation of Part IVA.

Example

101. Obligation to prepay expenditure arising on or after 11:45am AEST 21 September 1999 – applies to taxpayers who are not small business taxpayers and are carrying on a business:

Joseph Gardener enters into a contract with Pinetree Pty Ltd to manage his one hectare interest in the No 2 Pine Plantation. Joseph's management contract is executed on 20 October 1999 for management services to be provided from 1 June 2000. Under the contract, the first five year's management fees, payable in advance on 1 June each year for services to be provided for the following 12 months, are \$6,000 in the first year and \$1,200 for each of the following four years. Joseph has been in business for a number of years and has calculated his average turnover for the 1999/2000 income year to be greater than \$1 million. Therefore, he is not a small business taxpayer and is subject to the 21 September 1999 changes to the tax laws relating to prepaid expenditure. Joseph is unable to deduct the whole of his prepaid management fees in the years in which they are incurred. The fees are instead deductible over the eligible service period over which the management services will be provided. However, as the law currently stands, Joseph is able to take advantage of certain transitional rules that 'shade-in' the effect of the changes to the prepayment laws.

For 1999/2000 Joseph can claim a deduction of \$4,899 for expenditure incurred on or before 30 June 2000 on management fees.

This amount is calculated as A + B where:

$$A = \text{Management fee} \times \frac{\text{Number of days of eligible service period in the expenditure year}}{\text{Total number of days of the eligible service period}}$$

$$= \$6,000 \times \frac{30}{365} = \$493$$

$$B = (\text{Management fee less } A) \times 80\%$$

$$= (\$6,000 - \$493) \times 80\% = \$4,406$$

The balance of the \$6,000 management fees that were prepaid on 1 June 2000 (i.e., \$1,101) is carried forward and can be claimed as a deduction in the 2000/2001-income year.

PR 2000/64

For 2000/2001, Joseph can claim a deduction of \$1,861 as expenditure incurred on or after 1 July 2000 and on or before 30 June 2001 on management fees. This amount is calculated as A + B + C where:

$$A = \$1,200 \times \frac{30}{365} = \$99$$

$$B = (\$1,200 - \$99) \times 60\% = \$661$$

$$C = \$1,101$$

Note that the third component (Part C) is the amount carried forward from 1999/2000. As in the first year, the balance of the \$1,200 management fees prepaid on 1 June 2001 (i.e., \$440) is carried forward and can be claimed as a deduction in the 2001/2002 income year. It should also be noted that in certain circumstances, not present in most projects with product rulings, 'capping provisions' will apply in the second and subsequent transitional years. These are complex and are not explained in this example.

Similarly, for 2001/2002, Joseph can claim a deduction of \$980 for expenditure incurred on or after 1 July 2001 and on or before 30 June 2002 on management fees. This amount is calculated as A + B + C where:

$$A = \$1,200 \times \frac{30}{365} = \$99$$

$$B = (\$1,200 - \$99) \times 40\% = \$441$$

$$C = \$440$$

Note that the third component (Part C) is again the amount carried forward from 2000/2001. As in the first two years, the balance of the \$1,200 management fees prepaid on 1 June 2002 (i.e., \$660) is carried forward and can be claimed as a deduction in the 2002/2003-income year.

Detailed contents list

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Commissioner of Taxation

31 May 2000

<i>Previous draft:</i>	- ITAA 1997 8-1
Not previously released in draft form	- ITAA 1997 8-1(1)(a)
	- ITAA 1997 8-1(1)(b)
<i>Related Rulings/Determinations:</i>	- ITAA 1997 27-5
TR 92/1; TR 92/20; TR 97/11;	- ITAA 1997 27-30
TR 97/16; TR 98/22; TD 93/34;	- ITAA 1997 Div 35
PR 1999/95	- ITAA 1997 35-10
	- ITAA 1997 35-10(4)
<i>Subject references:</i>	- ITAA 1997 35-30
- carrying on a business	- ITAA 1997 35-35
- commencement of business	- ITAA 1997 35-40
- fee expenses	- ITAA 1997 35-45
- interest expenses	- ITAA 1997 35-55
- management fees expenses	- ITAA 1997 35-55(1)
- producing assessable income	- ITAA 1997 35-55(1)(b)
- product rulings	- ITAA 1997 387-B
- public rulings	- ITAA 1997 387-125
- schemes and shams	- ITAA 1997 387-130
- taxation administration	- ITAA 1997 387-140
- tax avoidance	- ITAA 1997 387-C
	- ITAA 1997 387-165
	- ITAA 1997 387-170
<i>Legislative references:</i>	- ITAA 1997 387-170(3)
- ITAA 1936 82KL	- ITAA 1997 387-175
- ITAA 1936 82KZM	- ITAA 1997 387-185
- ITAA 1936 Pt IVA	- ITAA 1997 995-1(1)
- ITAA 1936 177A	- TAA 1953 Pt IVAAA
- ITAA 1936 177C	- Copyright Act 1968
- ITAA 1936 177D	
- ITAA 1936 318	
- ITAA 1997 6-5	

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