



# ***PR 2000/9 - 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 *8 March 2000*



## Product Ruling

### Income tax: Carina Park Almond Project

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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.

#### *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 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.*

#### **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 in future years to confirm the arrangement has been implemented as described below and to ensure that 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.

## **What this Product Ruling is about**

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1. This ruling set out the Commissioner's opinion on the way in which the 'tax law(s)' 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 Carina Park Almond Project, or just simply as 'the Project' or the 'product'.

### **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 of the ITAA 1997;
- section 387-125 of the ITAA 1997;
- section 387-165 of the ITAA 1997;
- section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- section 82KZM of the ITAA 1936;
- section 82KZMB of the ITAA 1936;
- section 82KZMC of the ITAA 1936;
- section 82KZMD of the ITAA 1936; and
- Part IVA of the ITAA 1936.

3. On 21 September 1999, the Government announced a number of changes to the tax system as part of the New Business Tax System. A number of those changes could affect the tax laws dealt with in this Ruling. On 11 November 1999 the Government announced further changes, some of which could also affect the tax laws dealt with in this ruling, especially those to do with 'tax shelters'. Some of those changes apply from the dates of announcement and others are proposed to apply from nominated dates in the future.

4. 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, including the proposed changes announced as part of the New Business Tax System, except certain of those legislative reforms which have now been enacted.

5. This Ruling does not deal with the announced changes which have not been enacted. We cannot give a legally binding ruling on those changes until the relevant legislation is enacted.

**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. If the arrangement described in this 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**

10. This Ruling applies prospectively from 8 March 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).

11. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely upon 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, the product ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

## Withdrawal

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12. This Product Ruling is withdrawn and ceases to have effect on 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, for arrangements entered into 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

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

- Application for Product Ruling received 31 December 1999;
- Draft Second Supplementary Prospectus received 16 February 2000, closes 31 May 2000;
- **Draft Second Supplementary Constitution** the parties to which are the Growers and Blaxland Rural Investments Limited ('BRIL', 'the Manager', or 'the Responsible Entity') received 16 February 2000;
- **Draft Allotment Agreement** between BRIL and the Growers received 16 February 2000;
- **Draft Management Agreement** dated 28 January 2000, 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;
- Compliance Plan for the Responsible Entity;
- Information package from the Loan Facilitator dated 20 May 1999;
- Additional correspondence received from BRIL dated 7 January 2000 and 28 February 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.**

14. 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 associate<sup>1</sup> 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 39 below applies.

15. 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.

16. There are 700 Allotments of 0.4 hectares on offer, with 100 trees per Allotment being planted. The total land area for this stage of the Project is 280 hectares. The Project will be operated by the Manager as the Responsible Entity. The Prospectus for the Project closes on 31 May 2000 and the Manager will not accept applications after that date.

17. 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 4 payments**

18. The fees payable by a Grower in the Project in the first four years for one allotment of 0.4 hectares are:

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

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	<b>On application</b>	<b>31 August 2000</b>	<b>31 July 2001</b>	<b>31 July 2002</b>
Management fee	1,184	1,194	737	629
Maintenance	120	1,280	2,448	2,423
Allotment licence fee	14	86	100	100
Lease of water licences	-	40	-	-
Acquisition of water licences	-	-	1,200	1,200
Installation of irrigation	782	-	915	848
Planting cost	-	1,100	-	-
<b>Total</b>	<b>\$2,100</b>	<b>\$3,700</b>	<b>\$5,400</b>	<b>\$5,200</b>

19. The Manager forecasts that a Grower could expect to achieve an internal rate of return of 14% 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**

20. 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). The Constitution prescribes the amounts which Growers must pay in order to participate in the Project (cl 2). 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 the Constitution and on the terms and conditions of the Allotment Agreement and Management Agreement (cl 18). Growers are able to remove the Responsible Entity by taking action under the Corporations Law.

21. 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**

22. 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**

23. 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 (cl 2.1(a));
- draw water (cl 2.1(b)); and
- use the horticultural infrastructure on location on the land (cl 2.1(c)).

The amount of the fee and the due dates for payment each year are set out in cl 7.

24. The Responsible Entity has the 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 (cl 3.2).

25. If the Responsible Entity sells the Water Licences it must distribute to the Growers their portion of the net proceeds from the sale within 14 days of receiving those proceeds (cl 3.3(a)).

26. The Grower's and the Responsible Entity's rights and obligations in regard to use of the Allotment are set out in this agreement (cls 5 and 6 respectively). The Responsible Entity has the right to assign its rights and interests under this Agreement (cl 9).

**Management Agreement**

27. BRIL is engaged to develop, maintain and generally manage the Project. In return for these services BRIL will be paid management, maintenance, processing and marketing fees (cl 5).



Growers enter into this agreement until 30 June 2024, or earlier if BRIL exercises its right, to acquire the Growers' Interests (Allotment Agreement cl 3). BRIL is entitled to delegate all or any of the functions to be performed by it under this agreement (cl 8.1).

28. BRIL is to establish the Grower's Allotment with 100 trees. The establishment duties include:

- installation of the Allotment Irrigation System by 30 June 2000 (cl 4.1(a)(b));
- supply almond rootstock either on the date of acceptance of the Grower's application or by 31 May 2000, whichever is later (cl 4.1(a)(c));
- commence planting the rootstock either on the date of acceptance of the Grower's application or by 01 June 2000, whichever is later (cl 4.1(a)(e)).

No part of the initial Management fee is for work to be performed after 30 June 2000.

29. BRIL is also required to provide ongoing management and harvesting duties after the establishment of the Trees, including:

- provide suitable irrigation, fertilisation and nutrients to the Trees;
- harvesting and processing the almonds; and
- marketing and selling the almonds produced (cl 4.2).

The fees for these services will commence to be paid in the year ended 30 June 2001 (cl 5.1(d)).

30. 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 (cl 4.4). The proceeds of the pooled sales will be paid to the Custodian for crediting to the account of each Grower on a proportional basis (Management Agreement cl 15 and Constitution cl 25). 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 (Management Agreement cl 4.4(c) and Constitution cl 25.1). 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 4.2(n)).

31. 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 (Constitution cl 25).

32. The Grower may terminate the Management Agreement in certain instances, including where the Manager defaults in the performance of its duties (cl 10).
33. The Responsible Entity will bear all costs of carrying out its duties under this agreement (cl 5.6).
34. 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 (Constitution cl 7.2).
35. Select have agreed to sell the entire product of almonds from Carina Park for the full term of the Project (see paragraph 38 below). Growers will pay a fee to BRIL for it to market and sell the almonds (cl 5.4).
36. 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 or by 1 June 2000, whichever is later, the Manager will be responsible for planting 100 trees on each Allotment (cl 41(e)). 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**

37. 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)).
38. 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

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

40. 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.

41. 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;
- indemnity arrangements or equivalent collateral agreements, limiting 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

42. 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**

43. BRIL is required to install the Allotment Irrigation System by 30 June 2000 (Management Agreement cl 4.1(b)). BRIL has delegated this duty to Select under the Almond Orchard Management Agreement (cl 3.2).

44. Each Grower is required to pay \$2,545 in instalments over 3 years for the Irrigation System on their Allotment (Management Agreement cls 5.1 and 5.2). Growers accept liability for all three instalments at the time the first instalment is paid (Management Agreement cl 5.1(c)). 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**

45. For a Grower who invests in the Project by 31 May 2000, who incurs the fees set out in paragraph 18, the following deductions will be available for the years ended 30 June 2000 to 30 June 2002:

	<b>Year ended 30 June 2000</b>	<b>Year ended 30 June 2001</b>	<b>Year ended 30 June 2002</b>
Management fee	1,184	1,194	737
Maintenance	120	1,280	2,448
Allotment licence fee	14	86	100
Lease of water licences	-	40	-
Acquisition of water licences	-	-	-
Installation of irrigation	848	848	848
Planting cost	-	-	-
<b>Total</b>	<b>\$2,166</b>	<b>\$3,448</b>	<b>\$4,133</b>

**Management fee**

46. Management fees are deductible under section 8-1. For fees incurred from 1 July 2000 new section 27-5 of the ITAA 1997 will apply to reduce the amount of the deduction allowable by any input tax credit to which the Grower is entitled.

**Maintenance fee**

47. Maintenance fees are deductible under section 8-1. For fees incurred from 1 July 2000 new section 27-5 of the ITAA 1997 will

apply to reduce the amount of the deduction allowable by any input tax credit to which the Grower is entitled.

## **Licence fee**

48. Licence fees are deductible under section 8-1. For fees incurred from 1 July 2000 new section 27-5 of the ITAA 1997 will apply to reduce the amount of the deduction allowable by any input tax credit to which the Grower is entitled.

## **Use of water licence**

49. The \$40 fee paid for the use of Water licences is deductible under section 8-1, however new section 27-5 of the ITAA 1997 will apply to reduce the amount of the deduction allowable by any input tax credit to which the Grower is entitled. Later fees paid for the acquisition of Water licences by Growers are capital in nature and are not deductible.

## **Installation of irrigation expenses**

50. Growers incur a liability to pay irrigation expenses of \$2,545 upon entering the Project. Expenses incurred on irrigation are deductible to the Grower in the year incurred and in the next two years at the rate of 33.3% under Subdivision 387-B.

## **Purchase and planting of trees**

51. The costs of purchasing and planting trees are capital in nature. A deduction is allowable under Subdivision 387-C at the rate of 13% per annum, commencing from the time the trees enter their first commercial season. For Growers who enter the Project before 31 May 2000 it is likely the first commercial season will be in the financial year ended 30 June 2003.

## **Sections 82KL, 82KZM and Part IVA**

52. For a Grower who invests in the Project the following provisions of the ITAA 1936 have application as indicated:

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

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

## **Explanations**

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### **Section 8-1**

53. Consideration of whether the Management, Maintenance, Allotment licence and Use of water licence 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 paragraph 8-1(1)(b) 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 paragraph 8-1(1)(b) applies. However, that does not preclude the application of paragraph 8-1(1)(a) and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

54. 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.

55. 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 Management, Maintenance, Allotment licence or Use of water licence fee will be an allowable deduction. This Ruling applies to those parties utilising the services of BRIL.

## **Is the Grower in business?**

56. 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, points to them carrying on such a business.

57. 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.

58. 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.

59. 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.

60. 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.

61. 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.

62. 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.

63. 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**

64. The Management, Maintenance, Allotment licence and Use of water licence 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 fees 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.

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



**Expenditure of a capital nature**

66. 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.

67. 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 (Management Agreement cl 5). These amounts are detailed at paragraph 18 of this Ruling.

**Subdivision 387-B: expenditure on conserving or conveying water**

68. Capital expenditure incurred by a person carrying on a primary production business, on the construction, acquisition and installation of plant, equipment and structural improvements to be used primarily and principally for the purpose of conserving or conveying water for use in such a business, qualifies for a write-off over a three year period (i.e., 33 $\frac{1}{3}$ % 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.

69. 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 31 May 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.

**Subdivision 387-C: horticultural provisions**

70. 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.

71. 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). The write-off deductions will, for a Grower who has been accepted into the Project by 31 May 2000 and whose primary production business has commenced, start in the fourth year of the Project, on the basis that it is then that 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.

72. 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.

73. 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.

74. For a Grower entering into the Project by 31 May 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 paragraph 51.

***Alternative view***

75. 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**

76. 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.

**Section 82KZM**

77. Section 82KZM operates to spread over more than one income year a deduction for prepaid expenditure that would otherwise be immediately deductible, in full, under section 8-1. The section applies to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement that is not wholly done within the same year of income as the execution of the relevant agreement.

78. 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 by 30 June of the year of execution of the Agreement. The fees are expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the arrangement's description that the fees have been inflated to result in reduced fees being payable for subsequent years.

79. There is no evidence that might suggest the services covered by the fee could not be provided within the same year of income as the expenditure in question is incurred. Thus, for the purposes of this Ruling, no part of the initial fee or the fee for use of the Water licence is for BRIL doing 'things' that are not to be wholly done within the year of income of the 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 in each of the financial years ended 30 June 2000 to 30 June 2002. New sections 82KZMB, 82KZMC and 82KZMD will not apply to the Project since the services to be provided in respect of the initial fee are to be completed in the same year of income as the expenditure is incurred (see paragraph 82KZMA(3)(c)).

**Part IVA**

80. 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.

81. 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.

## **Detailed contents list**

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**Commissioner of Taxation**

8 March 2000

*Previous draft:*

Not previously issued in draft form

- schemes and shams
- taxation administration
- tax avoidance

*Related Rulings/Determinations:*

TR 92/1; TR 92/20; TR 97/11;  
TR 97/16; TR 98/22; TD 93/34;  
PR 1999/95

*Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 318
- ITAA 1997 6-5

*Subject references:*

- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees expenses
- producing assessable income
- product rulings
- public rulings

- ITAA 1997 8-1
  - ITAA 1997 8-1(1)(a)
  - ITAA 1997 8-1(1)(b)
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  - ITAA 1997 387-130
  - ITAA 1997 387-140
  - ITAA 1997 387-C
  - ITAA 1997 387-165
  - ITAA 1997 387-170
  - ITAA 1997 387-170(3)
  - ITAA 1997 387-185
  - ITAA 1997 995-1(1)
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