



# ***PR 2001/33 - Income tax: Heydon Park Olive Project***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *4 April 2001*



## Product Ruling

### Income tax: Heydon Park Olive Project

Contents	Para
<b>What this Product Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>11</b>
<b>Withdrawal</b>	<b>13</b>
<b>Previous Rulings</b>	<b>14</b>
<b>Arrangement</b>	<b>15</b>
<b>Ruling</b>	<b>37</b>
<b>Explanations</b>	<b>46</b>
<b>Example</b>	<b>99</b>
<b>Detailed contents list</b>	<b>100</b>

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 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.

## What this Product Ruling is about

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1. This Ruling sets 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 the Heydon Park Olive Project, or simply as 'the Project'.

### Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- Section 6-5 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
  - Section 8-1 (ITAA 1997);
  - Section 17-5 (ITAA 1997)
  - Division 27 (ITAA 1997);
  - Section 42-15 (ITAA 1997);
  - Section 387-55 (ITAA 1997);
  - Section 387-60 (ITAA 1997);
  - Section 387-125 (ITAA 1997);
  - Section 387-165 (ITAA 1997);
  - Section 388-55 (ITAA 1997);
  - Section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
  - Section 82KZL (ITAA 1936);
  - Section 82KZME (ITAA 1936);
  - Section 82KZMF (ITAA 1936); and
  - Part IVA (ITAA 1936).

### Goods and Services Tax

3. In this Ruling all fees and expenditure referred to include Goods and Services Tax ('GST') where applicable. In order for an entity (referred to in this Ruling as a Grower) to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered, or required to be registered for GST and hold a valid tax invoice.

**Business Tax Reform**

4. The Government is currently evaluating further changes to the tax system in response to the *Ralph Review of Business Taxation* and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the laws enacted at the time it was issued, future tax changes may affect the operation of those laws and, in particular, the tax deductions that are allowable. Where tax laws change, those changes will take precedence over the application of this Ruling, and to that extent, this Ruling will be superseded.

5. Taxpayers who are considering investing in the Project are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

**Note to promoters and advisers**

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for investors in projects such as this. In keeping with that intention, the Tax Office suggests that promoters and advisers ensure that potential investors are fully informed of any changes in tax laws that take place after the Ruling is issued. Such action should minimise suggestions that potential investors have been negligently or otherwise misled.

**Class of persons**

7. 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'.

8. The class of persons to whom this Ruling applies does not include persons who choose to maintain and operate their own Olive Groves, those 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. Neither does it include persons or entities who are associates, as that term is defined in subsection 82KH(1) of the ITAA 1936, of any entities involved in the arrangement.

## Qualifications

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

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11. This Ruling applies prospectively from 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, 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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13. This Product Ruling is withdrawn and ceases to have effect on 30 June 2003. 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.

## Previous Rulings

14. This Ruling replaces Product Ruling PR 2000/34, which is withdrawn on and from the date this Ruling is made. Product Ruling PR 2000/34 will continue to apply to investors who entered into the Project on or before 4 April 2001.

## Arrangement

15. The arrangement that is the subject of this Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Application for Product Ruling dated 28 January 2000;
- Draft Heydon Park Olive Project Prospectus
- **Constitution between Heydon Park Ltd (referred to herein as ‘HPL’ or the ‘Manager’), Cardinal Financial Securities Limited (referred to herein as ‘Cardinal’ or the ‘Custodian’), RRAP Investments Pty Ltd (‘RRAP’ or ‘the Landowner’) and the Growers;**
- **Management Agreement between Heydon Park Ltd (‘HPL’ or the ‘Manager’) and the Grower;**
- Agreement to Lease between RRAP and Cardinal;
- Correspondence received from the Applicant dated 28 November 2000 and 12 March 2001.

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

## Overview

16. This arrangement is called the Heydon Park Olive Project.

Location	“Rohan Hill” Talmalmo near Albury in Southern NSW
The Land	160 Hectares suitable for growing olives
Term of the Project	24 years

**PR 2001/33**

Number of investments available	400
Minimum Subscription	Minimum subscription of 50 farms, totalling \$1,170,000.
Minimum initial cost	\$25,740 per farm, consisting: Olive seedling purchase \$550; Occupation fee \$825; Management fee \$24,365.
Annual on-going cost from the second year	Prior year Occupation fee increased by the greater of 3% or CPI (per year); plus Management fee of \$1,925 (indexed by CPI from and including the third year); plus The Grower's proportion of all harvesting costs, public and product liability insurance, and other project management costs.

17. For the purposes of describing the arrangement to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower or any associate of a Grower, will be a party to. The documents highlighted are those the Growers enter into. The effect of these arrangements is summarised as follows.

18. This arrangement is called the Heydon Park Olive Project. The Project involves establishing, planting, cultivation and harvesting olives and the sale of olives or olive oil. The Project is being conducted on the RRAP property. The minimum number of applications required before the Project could commence was 50. The maximum number of farms on offer is 400. The minimum subscription was met prior to 30 June 2000.

19. Participants are invited to enter the Project by applying under a Prospectus registered on 5 May 2000 with the Australian Securities and Investment Commission. Each Participant shall complete an Application Form and Power of Attorney attached to a current Prospectus. The Power of Attorney appoints HPL to do everything necessary to execute the Management Agreement.

20. The fees payable on acceptance are \$25,740 in respect of the purchase of Olive trees, and for the occupation fee and the management fee for the Initial Period. The 'Initial Period' means the period beginning on the date of issue of each Participant's Interest and ending 12 months from the date thereof.

21. The Grower has the option of paying the full amount of \$25,740 on application or accepting the instalment plan which allows

for the payment of the first year's management fees over two years. If the Grower accepts the instalment plan, a further \$1496 is payable which represents interest at 6%. Under the instalment plan the amount payable is \$27,236. This amount is payable as a deposit of \$3,400 on application, \$2,476 (GST component) within 30 days of presentation of a tax invoice and 24 consecutive monthly instalments of \$890.

22. The monies will be held by the Custodian, until minimum subscription is met, and upon acceptance of the application and the granting of an Interest, the amounts will then be paid to the Manager.

23. Clause 14 and 15 of the Constitution provides that Growers who enter into a Management Agreement with HPL, will be covered by the Constitution. Growers become a party to and are bound by the terms of the Constitution. After the Initial Period Growers may elect to manage their own Olive Grove. Any Grower who so elects will no longer be entitled to rely on this Ruling.

24. Cardinal will act as Custodian for the Grower, receiving initial application money and releasing this only when both the minimum subscription has been reached and the lease on the land has been registered with the registrar generals office. All future income from the project will be paid to the Custodian who will then pay this to the Growers. The Custodian will be paid an annual fee of \$15,000 (indexed) over the term of the Project.

25. RRAP will lease land required for the Project to the Custodian. Growers in consideration for an annual occupancy fee acquire the right to occupy a defined area of approximately 0.4 hectares (the Olive Grove ) for the purpose of growing olive trees (clause 30.1 of the Constitution). The Manager may, in its utmost discretion, increase the lot size up to .52 hectares in order to accommodate 130 trees seedlings (minimum number) for that particular lot. The right to occupy shall include the entitlement to enter the land (clause 3.5 of management agreement). Each Olive Grove can be physically identified and differentiated from all Olive Groves and Growers will be advised of the exact location of their grove (clauses 1.1 of the Management Agreement). The Manager may from time to time in its absolute discretion allocate and reallocate a Grower's Olive Grove. Where the Grower is reallocated a different Olive Grove the Grower will no longer be entitled to rely on this Ruling.

26. Possible projected returns for Growers are outlined in the Prospectus. These depend upon a range of assumptions made by HPL. There is no assurance or guarantee whatsoever in respect of the future success of or financial returns associated with the Project. Based on the assumptions, the Manager forecasts that a Grower could expect to achieve an average rate of return of 30% or an internal rate of return of 15% with a cash contribution of the full amount upon application. Income of the Project is to be paid into the Scheme Bank

Account. It is to be held for the Growers by the Custodian and to be applied in payment of the Growers' obligations under the Management Agreement. A ledger account shall be established and maintained for each Grower. Any income remaining after the payment of fees is to be distributed to Growers at such intervals as HPL may determine but not later than five months from the end of each Accrual Period\* or 30 June each year as applicable.

27. The Project will conclude on 30 June 2024 unless termination under the constitution occurs earlier.

28. Growers enter into a Management Agreement with the Manager, HPL, to manage their business; plant not less than 130 olive trees seedlings per interest; tend and arrange for the harvest and marketing of the Olives; and sell the fruit on behalf of the Grower.

29. Except as expressly provided by the Constitution, all costs expenses and liabilities incurred or required to be met under the Constitution during the Initial Period for each Participant shall be met by the Manager who shall indemnify the Participants in respect of those costs. Those costs will be met out of the income of the Project during each subsequent Accrual Period\*.

**Note: the 'Accrual Period means, in respect of Interest, each twelve monthly period ending on the last day of the month of June in each year during the term of this Deed provided that the period from the expiration of the Initial Period to and including the next following last day of June shall be an Accrual Period and the period from and including the first day of July immediately prior to the date of termination of this Deed until the date of termination of this Deed shall be an Accrual Period'.**

30. The management services provided are detailed in clause 1.1 of the Management Agreement and include the application of adequate fertiliser; noxious plant, animal and insect control; establishment of the trees; arranging for harvesting of the olives; and marketing of the olives; and effecting, on behalf of Growers, public and product liability insurance. Growers may elect to manage their own Olive Grove. Any Grower who so elects will be outside the arrangement to which this Ruling applies and will be unable to rely on this Ruling.

31. The agreement terminates on 30 June 2024 unless terminated earlier under the terms of the Constitution. The Grower has the right under the Management Agreement to terminate the arrangement. Under the Constitution the Growers can terminate the services of the Manager and appoint a new manager by calling an extra ordinary general meeting and passing an extraordinary resolution to do so. (In such circumstance this Ruling will cease to have effect.)

32. HPL is authorised to pool the olives harvested from each Olive Grove. Proceeds of pooled sales after deduction of all amounts as provided under the management agreement such as harvesting costs and taxes will be paid to into the Scheme Bank Account for crediting to each Grower. The amount of each Grower's share is calculated on a proportional basis determined by the number of Olive Groves held and taking into account that different farms may have been in existence for different parts of the period to which the sold olive products relate.

### **Fees payable by the Grower**

33. Growers will make a payment of \$25,740, the application money, per 0.4 hectare Olive Grove, being for:

- an olive seedling fee of \$550;
- an initial fee of \$24,365 to HPL for business management and cultivation services to be provided within 12 months and on or before 30 June 2001; and
- an occupation fee of \$825 in respect of the subsequent 12 month period ending on or before 30 June 2001.

34. The Growers will make the following payments, per 0.4 hectare farm, in subsequent Accrual Periods for the remainder of the Project period:

- an occupation fee of the prior year occupation fee increased by the greater of 3% or CPI (per year) paid in advance, on or before the last day of the Accrual Period or Initial Period immediately preceding the Accrual Period for which it relates. This fee shall be invoiced to the Grower and payable within 28 days;
- an ongoing management fee of \$481.25 per quarter (\$1,925 per annum) increased annually by the proportional increase of the CPI from the June quarter of 1998. The fee is to be paid in advance and invoiced to the Grower.
- the Grower's proportion of all harvesting costs; and
- for each year after the Initial Period that Grower's share of the cost of public and product liability insurance and such project management costs as are required to be paid by the Grower.

## Finance

35. Growers can fund their investment in the Project themselves, finance their investment using the HPL instalment plan or borrow from an independent lender.

36. This Ruling does not apply if a Grower enters into a finance agreement, including the agreement with HPL, that includes or has any of the following features:

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

## Ruling

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### Assessable Income

37. A Grower's share of the gross sales proceeds from the Project, less any GST payable on these proceeds, will be assessable income under section 6-5. Section 17-5 excludes from assessable income an amount relating to GST payable on a taxable supply.

**Section 8-1****Deductions where a Grower is not registered nor required to be registered for GST**

38. A Grower may claim tax deductions in the Tables below where the Grower;

- participates in the Project by 5 June 2001 to carry on the business of growing olives;
- incurs the fees shown in paragraphs 33 and 34; and
- is not registered nor required to be registered for GST.

<b>Fee Type</b>	<b>ITAA 1997 Section</b>	<b>Year 1 deductions</b>	<b>Year 2 deductions</b>	<b>Year 3 deductions</b>
<b>Management Fee</b>	8-1	\$19,844 – See Note (i) (below)	\$1,925 - increased by CPI – See Note (i) (below)	\$1,925 - increased by CPI – See Note (i) (below)
<b>Occupation Fee (Rent)</b>	8-1	\$825 – See Note (i) (below)	\$825 - as increased by greater of 3% or CPI - See Note (i) (below)	Year 2 fee as increased by greater of 3% or CPI - See Note (i) (below)
<b>Interest</b>	8-1	As incurred - See Note (ii) (below)	As incurred - See Note (ii) (below)	As incurred - See Note (ii) (below)

**Notes:**

- (i) Where a Grower incurs the management fees and the occupation fees as required by the Management Agreement those fees are deductible in full in the year incurred. However, if a Grower **chooses** to prepay fees for the doing of things (e.g., the provision of management services or the leasing of land) that will not be wholly done in the same income year as the fees are incurred, then the prepayments rules of the ITAA may apply to apportion those fees. In such cases, the tax deduction for the prepaid fee **MUST** be determined using the formula shown in paragraphs 81 to 88 unless the expenditure is 'excluded expenditure'. 'Excluded expenditure', being expenditure of less than \$1,000, is an 'exception' to any prepayment rules that apply and is deductible in full in the year in which it is incurred.
- (ii) The deductibility or otherwise of interest arising from agreements entered into with financiers other than HPL is outside the scope of this Ruling. However, all Growers who finance their participation in the Project other than with HPL should read carefully the discussion of the prepayment rules

in paragraph 57 to 59 below as those rules may be applicable if interest is prepaid.

### ***Tax deductions for capital expenses***

39. A Grower who participates in the Project will also be entitled to the following tax deductions:

<b>Fee type</b>	<b>ITAA 1997 section</b>	<b>Year 1 deductions</b>	<b>Year 2 deductions</b>	<b>Year 3 deductions</b>
Landcare operations	387-55	\$968 - see note (iii) and (v) below		
Irrigation costs	387-125	\$657 - see note (iv) and (v) below	\$656 - see note (iv) and (v) below	\$656 - see note (iv) and (v) below
Establishment of horticultural plants	387-165	Nil - see notes (vi) & (vii) below	Nil	Nil

### **Notes:**

- (iii) A deduction is allowable under section 387-55 for capital expenditure incurred for landcare operations. The deduction is allowed in the year that the expenditure is incurred.
- (iv) A deduction is allowable under section 387-125 for capital expenditure incurred for acquisition and 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.
- (v) A tax offset is available to certain low income primary producers under section 388-55 in respect of expenditure incurred on landcare operations and/or facilities to conserve or convey water. This is an alternative to claiming deductions under sections 387-55 and 387-125.
- (vi) A deduction is allowable under section 387-165 for capital expenditure incurred for the acquisition and establishment of the olive trees for use in a horticultural business. The deduction is allowable when the olive trees, as horticultural plants, enter their first commercial season. If the olive trees have an 'effective life' for the purposes of section 387-185 of greater than 30 years', this results in a write-off rate of 7% prime cost. The Project's manager will inform Growers of when the olive trees enter their first commercial season.
- (vii) The amount of the deduction is calculated on the basis that \$550 is dedicated to the cost of seedlings and \$1,584 is the 'establishment expenditure' component of the undissected initial management fee. The total amount being \$2134.

**Deductions where a Grower is registered or is required to be registered for GST**

40. Where a Grower who is registered or is required to be registered for GST:

- participates in the Project by 30 June 2001 to carry on the business of growing olives;
- incurs the fees shown in paragraphs 33 and 34 and
- is entitled to an input tax credit for the fees,

then the tax deductions shown in the Tables above will exclude any amounts of input tax credit (Division 27 of the ITAA). See Example 1 at paragraph 99.

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

41. For a Grower who is an individual and who enters the Project during the year ended 30 June 2001 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 will decide for the income years ending 30 June 2001 to 30 June 2003 that the rule in section 35-10 does not apply to this activity provided that the Project is carried out in the manner described in this Ruling.

42. 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 (see paragraph 73 in the Explanations part of this ruling, below).

43. 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.

44. 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 this perspective has not been made.

**Sections 82KZM, 82KZMB – 82KZMD, 82KZME – 82KZMF, 82KL and Part IVA**

45. For a Grower who participates in the Project and incurs expenditure as required by the Management Agreement the following provisions of the ITAA 1936 have application as indicated:

- expenditure by the Grower does not fall within the scope of section 82KZM (but see paragraphs 81 to 88);
- expenditure by the Grower does not fall within the scope of sections 82KZMB-82KZMD (but see paragraphs 81 to 88);
- expenditure by the Grower does not fall within the scope of sections 82KZME-82KZMF (but see paragraphs 81 to 88);
- 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.

## **Explanations**

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**Section 8-1**

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

- the outgoing in question must have 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 in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

### **Is the Grower carrying on a business?**

47. An Olive scheme can constitute the carrying on of a business. Where there is a business, or a future business, the Gross Harvest Proceeds each year from olives from Olive Groves comprising the Project will constitute gross assessable income in their own right. 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, maintaining and harvesting of the olives each year from the Olive Groves. Generally, a Grower will be carrying on a business of an Olive Grove where:

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

48. For this Project Growers have rights under the Occupation Agreement in the form of a licence over an identifiable area of land consistent with the intention to carry on a business of growing olives. Under the Management Agreement Growers engage the Project Manager to acquire olive seedlings and plant out the seedlings on the leased land and to provide ongoing services to care and maintain the olive trees. Growers are considered to have control of their operations.

49. The Occupation Agreement provides Growers with more than a chattel interest in the olive trees. The Project documentation contemplates Growers will have an ongoing interest in the olive trees.

50. Growers have the right to use the land in question for horticultural purposes and to have the Project Manager come onto the land to carry out its obligations under the Management Agreement. The Growers' degree of control over the Project Manager as evidenced by the Management Agreement, and supplemented by the Corporations Law, is sufficient. Under the Project, Growers are entitled to receive regular progress reports on the Project Manager's

activities. Growers are able to terminate arrangements with the Project Manager in certain instances, such as cases of default or neglect. The Olive Grove activities described in the Management Agreement are carried out on the Growers' behalf.

51. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the arrangement's description for all the indicators. 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.

52. Growers will engage the professional services of a manager with appropriate credentials. There is a means to identify which trees Growers have an interest in. These services are based on accepted horticulture practices and are of the type ordinarily found in Olive Grove ventures that would commonly be said to be businesses.

53. Growers have a continuing interest in the trees from the time they are acquired until the cessation 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' horticultural activities will constitute the carrying on of a business.

54. The occupation fees and management fees associated with the horticulture activities will relate to the gaining of income from this business, and hence have a sufficient connection to the operations by which income (from the regular sale of olives) is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. There is no capital component of the management fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

### **Interest deductibility**

#### ***(i) Growers who use HPL as the finance provider***

55. Some Growers may finance their participation in the Project through an instalment facility with HPL. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of occupation and management fees.

56. The interest incurred for the year ended 30 June 2001 and in subsequent years of income will be in respect of a loan to finance the Project business operations of growing olives and is therefore directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

***(ii) Growers who DO NOT use HPL as the finance provider***

57. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than HPL is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

58. While the terms of any finance agreement entered into between relevant Growers and such financiers are subject to commercial negotiation, those agreements may require interest to be prepaid for a period that is wholly or partly outside the income year in which the interest is incurred. Unless such prepaid interest is 'excluded expenditure' any tax deduction that may be allowable will be subject to the relevant prepayments provisions of the ITAA. 'Excluded expenditure' is an amount of expenditure of less than \$1,000.

59. The prepayments provisions are discussed in detail at paragraphs 81 to 88 of this Ruling. However, in broad terms, where interest is prepaid and the period to which the interest relates is wholly or partly outside the income year in which it is incurred, then any tax deduction that is allowable must be determined using the following formula;

$$\text{Interest} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

In the formula, the 'eligible service period' means, generally, the period to which the interest relates.

**Expenditure of a capital nature**

60. Any part of the expenditure of a Grower entering into a horticultural 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. In this Project, the costs of landcare, irrigation and the establishment of horticultural plants are considered to be capital in nature. The fees for these expenditures are not deductible under section 8-1. However,

some of this expenditure falls for consideration under specific write-off provisions of the ITAA 1997.

## **Subdivision 387-A - Expenditure for landcare operations**

61. Section 387-55 allows a taxpayer a deduction for capital expenditure incurred on a landcare operation for land used to carry on a primary production business. Growers need not own the land to qualify for the deduction, so long as it is used by them to carry on a primary production business.

62. 'Landcare operation for land' includes the eradication of plant growth detrimental to the land as per subsection 387-60(1).

63. Under the Management Agreement a Grower incurs expenditure for the eradication of plant growth detrimental to the land on the Olive Groves. In this Project there will be no delay between the execution of the relevant agreements and the commencement of 'business operations' on the Growers' behalf. Accordingly, a Grower's primary production business will have commenced at the time the expenditure in question has been incurred, and the requirements of section 387-55 will have been satisfied.

64. However, a deduction under section 387-55 is denied where the Grower is entitled to claim a landcare tax offset under section 388-55 and chooses to do so. A Grower can only choose a landcare tax offset where:

- had the Grower chosen a deduction instead of the tax offset, the Grower's taxable income for the income year would have been \$20,000 or less; and
- the expenditure is incurred before the end of the 2000-01 income year.

## **Subdivision 387-B – Irrigation expenditure**

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

66. As the taxpayer who can claim the deduction does not have to actually own the land but can be a tenant, a lessee or licensee who is conducting a primary production business on land in Australia, a

deduction would be available to a Grower in the Project at a rate of 33.3 per cent per annum for the cost of the irrigation system.

67. 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 chooses to do so. A Grower can only choose a water facility tax offset where:

- had the Grower chosen a deduction instead of the tax offset, the Grower's taxable income for the income year would have been \$20,000 or less; and
- the expenditure is incurred before the end of the 2000-01 income year.

### **Subdivision 387-C - Vines and horticultural provisions**

68. Section 387-165 allows capital expenditure on establishing horticultural plants owned and used, or held ready for use, in Australia in a business of horticulture to be written off for tax purposes. A lessee or licensee of land carrying on a business of horticulture is taken to own the plants growing on that land rather than the actual owner of the land (section 387-210).

69. Under this Subdivision, if the effective life of the plant is less than three years, the expenditure can be written off in full. If the effective life of the plant is more than three years, an annual deduction is allowable on a prime cost basis during the plant's maximum write-off period. The period starts from the time the plant enters its first commercial season. The write-off rate is detailed in section 387-185. For a plant, such as the olive trees in this Project, with an effective life of 30 years or more, that rate is 7%.

### **Division 35 – Deferral of losses from non-commercial business activities**

70. Under the rule in subsection 35-10(2) a deduction for a loss incurred by an individual (including an individual in a general law partnership) from certain business activities will not be allowable in an income year unless:

- the 'Exception' in subsection 35-10(4) applies;
- one of four objective tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or
- if one of the objective tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

71. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer's allowable deductions

attributable to the business activity over that taxpayer's assessable income from the business activity.

72. Under the loss deferral rule in subsection 35-10(2) the relevant loss is not able to be taken into account in the calculation of taxable income in the year that loss arose. Instead, in a later year it may be offset against any income from the same or similar business activity, or, if one of the objective tests is passed, or the Commissioner's discretion exercised, against other income.

73. For the purposes of applying the objective tests, subsection 35-10(3) allows taxpayers to group business activities 'of a similar kind'. Under subsection 35-10(4), there is an 'Exception' to the general rule in subsection 35-10(2) where the loss is from a primary production business activity and the individual taxpayer has other assessable income for the income year from sources not related to that activity, of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

74. In broad terms, the objective tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);
- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year)(section 35-35);
- (c) at least \$500,000 of real property is used on a continuing basis in carrying on the business activity in that year (section 35-40); or
- (d) at least \$100,000 of certain other assets are used on a continuing basis in carrying on the business activity in that year (section 35-45).

75. A Grower who participates in the Project will be carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling indicates that a Grower who acquires the minimum investment of one interest in the Project is unlikely to pass one of the objective tests until the income year ended 30 June 2004. Growers who acquire more than one interest in the Project may however, pass one of the tests in an earlier income year.

76. Therefore, prior to this time, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

77. The first arm of the discretion in paragraph 35-55(1)(a) relates to ‘special circumstances’ applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, for an individual Grower who acquires an interest(s) in the Project, the Commissioner will decide that it would be unreasonable not to exercise the second arm of the discretion in paragraph 35-55(1)(b) for the term of this Product Ruling.

78. The second arm of the discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where:

- (i) the business activity has started to be carried on; and
- (ii) there is an objective expectation that the business activity of an individual taxpayer will either pass one of the objective tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

79. This Product Ruling is issued on a prospective basis (i.e., before an individual Grower’s business activity starts to be carried on). Therefore, if the Project fails to be carried on during the income years specified above (see paragraph 41), in the manner described in the Arrangement (see paragraphs 15 to 36), the Commissioner’s discretion will not have been exercised, because one of the key conditions in paragraph 35-55(1)(b) will not have been satisfied.

80. In deciding that the second arm of the discretion in paragraph 35-55(1)(b) will be exercised on this conditional basis, the Commissioner has relied upon:

- the report of the independent agriculturalist and additional expert or scientific evidence provided with the application by the Responsible Entity; and
- independent, objective, and generally available information relating to the olive industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity.

**Prepayments provisions – sections 82KZM, 82KZMA – 82KZMD, and 82KZME – 82KZMF**

81. The prepayments provisions of the ITAA operate 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. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (e.g., the performance of management services or the leasing of land) that is

not wholly done within the same year of income as the year in which the expenditure is incurred.

82. In this Project, the Management Fee of \$24,365 and a Occupation Fee of \$825 per grove will be incurred on execution of the Management Agreement. The Management Fee and the Occupation Fee are charged for providing management services or leasing land to a Grower by 30 June of the year of execution of the Agreements. In particular, the Management Fee is expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the description of the arrangement that the Management Fee has been inflated to result in reduced fees being payable for subsequent years.

83. There is also no evidence that might suggest the management 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, it can be accepted that no part of the initial fee is for the Manager doing 'things' that are not to be wholly done within the year of income of the fee being incurred. On this basis, provided a Grower incurs expenditure as required by the agreements as set out in paragraphs 33 and 34 then the basic precondition for the operation of the prepayment provisions is not satisfied and fees will be deductible in the year in which they are incurred.

#### **Growers who choose to pay fees for a period in excess of that required by the Project's agreements**

84. Although not required under the Management Agreement a Grower participating in the Project may choose to prepay fees for a number of years. Where this occurs, contrary to the conclusion reached in paragraph 83 above, the prepayments provisions of the ITAA will operate to apportion the expenditure and allow an income tax deduction over the period that the prepaid benefits are provided.

85. The amount and timing of tax deductions for any prepaid Management Fees or prepaid Occupation Fees otherwise deductible under section 8-1 will depend upon when the respective amounts are incurred and what the 'eligible service period' is, as defined in subsection 82KZL(1), in relation to these amounts. The 'eligible service period' means generally, the period over which the services are to be provided. The relevant provision of the ITAA will depend on a number of factors including the amount and timing of the prepayment and, where the 'eligible service period' exceeds 13 months, whether the Grower is a 'small business taxpayer'.

86. Where a Grower participating in this Project incurs expenditure in respect of an eligible service period that ends 13 months or less from the time the expenditure was incurred, but also in

respect of the doing of a thing not to be wholly done within the income year in which that expenditure has been incurred, and the other tests in section 82KZME are met, then section 82KZMF will apply in the manner set out in the formula below.

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

In the formula, the ‘eligible service period’ means, generally, the period to which the services are to be provided.

87. Where a Grower participating in this Project incurs expenditure in respect of a period that ends more than 13 months after that expenditure has been incurred, then section 82KZM will apply if the Grower is a ‘small business taxpayer’ or section 82KZMD if the Grower is not a ‘small business taxpayer’. For a ‘small business taxpayer’ (see paragraphs 92 to 94) the amount and timing of the allowable deductions will then be calculated using the formula in subsection 82KZM(1) and for non-small business taxpayers using the formula in subsection 82KZMD(2). Both formulae are the same, or effectively the same as that shown in paragraph 86 above, concerning section 82KZMF.

88. A prepaid management fee and/or a prepaid occupation fee of less than \$1,000 incurred in an expenditure year is ‘excluded expenditure’ as defined in subsection 82KZL(1). Subsections 82KZM(1), 82KZME(7) and 82KZMA(4) all provide that ‘excluded expenditure’ is an exception to the prepayment rules discussed above. Therefore, a prepaid fee of less than \$1,000 is deductible in full in the year in which it is incurred. However, where a Grower acquires more than one interest in the Project and the quantum of a prepaid management fee or a prepaid occupation fee is \$1,000 or more, then the amount and timing of the deduction allowable must be determined using the formula shown above.

### **Small business taxpayers**

89. 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.

90. ‘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).

91. Whether a Grower is a ‘small business taxpayer’ depends upon the circumstances of each Grower and is beyond the scope of this Product Ruling. It is the responsibility of each Grower to determine

whether or not they are within the definition of a 'small business taxpayer'.

**Interest deductibility**

92. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or other financier is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

93. While the terms of any finance agreement entered into between relevant Growers and such financiers are subject to commercial negotiation, those agreements may require interest to be prepaid. Under the prepayment rules contained in sections 82KZME, 'agreement' (defined in subsection 82KZME(4)) is a broad concept and will encompass activities such as a loan to finance participation in the Project and that loan is not described in the Arrangement or otherwise dealt with in the Product Ruling.

94. Therefore, unless the prepaid interest is 'excluded expenditure', where such a loan facility requires interest to be prepaid and the requirements of section 82KZME are met, relevant Growers will be required to determine any tax deduction using the formula in subsection 82KZMF(1). Where a prepayment is for a more than 13 months, any tax deduction must be determined under section 82KZM (for a 'small business taxpayer') or section 82KZMD (for a taxpayer who is not a 'small business taxpayer'). The relevant formula is the same, or effectively the same as that shown above in paragraph 86 above.

**Section 82KL - recouped expenditure**

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

**Part IVA - general tax avoidance provisions**

96. 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).

97. The Heydon Park Olive Project will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 38 and 39

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.

98. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the olives. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing with each other at arm's length, or, if any parties are not at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

## **Example**

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### **Example 1 – Entitlement to ‘input tax credit’**

99. Margaret, who is registered for GST, invests in the Green Circle Bluegums Project. The management fees are payable on 1 July each year for management services to be provided over the following 12 months. On 1 July 2000 Margaret pays her first year's management fees of \$5,500 and is eligible to claim a tax deduction for the fees in the income year ended 30 June 2001. The extent of her deduction for the management fees however, is reduced by the amount of any ‘input tax credit’ to which she is entitled. The Project Manager provides Margaret with a ‘tax invoice’ showing its ABN and the ‘price of the taxable supply’ for management services as \$5,500. Using the details shown on the valid tax invoice, Margaret calculates her input tax credit as:

$$1/11 \times \$5,500 = \$500$$

Therefore, the tax deduction for management fees that she can claim in her income tax return for the year ended 30 June 2001 is \$5,000 (\$5,500 less \$500).

**Detailed contents list**

100. Below is a detailed contents list for this Product Ruling:

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Tax law(s)	2
Goods and Services Tax	3
Business Tax Reform	4
Note to promoters and advisers	6
Class of persons	7
Qualifications	9
<b>Date of effect</b>	<b>11</b>
<b>Withdrawal</b>	<b>13</b>
<b>Previous Rulings</b>	<b>14</b>
<b>Arrangement</b>	<b>15</b>
Overview	16
Fees payable by the Grower	33
Finance	35
<b>Ruling</b>	<b>37</b>
Assessable Income	37
Section 8-1	38
Deductions where a Grower is not registered nor required to be registered for GST	38
Tax deductions for capital expenses	39
Deductions where a Grower is registered or is required to be registered for GST	40
Division 35 - Deferral of losses from non-commercial business activities	41
Section 35-55 – Commissioner’s discretion	41
Sections 82KZM, 82KZMB - 82KZMD, 82KZME - 82KZMF, 82KL and Part IVA	45
<b>Explanations</b>	<b>46</b>
Section 8-1	46
Is the grower carrying on a business?	47
Interest deductibility	55

<i>(i) Growers who use HPL as the finance provider</i>	55
<i>(ii) Growers who DO NOT use HPL as the finance provider</i>	57
Expenditure of a capital nature	60
Subdivision 387 - A - Expenditure for landcare operations	61
Subdivision 387 - B - Irrigation expenditure	65
Subdivision 387 - C - Vines and horticultural provisions	68
Division 35 - Deferral of losses from non-commercial business activities	70
Prepayments provisions - sections 82KZM, 82KZMA – 82KZMD and 82KZME - 82KZMF	81
Growers who choose to pay fees for a period in excess of that required by the Project's agreements	84
Small business taxpayers	89
Interest deductibility	92
Section 82KL - recouped expenditure	95
Part IVA - general tax avoidance provisions	96
<b>Example</b>	<b>99</b>
Example 1 - Entitlement to 'input tax credit'	99
<b>Detailed contents list</b>	<b>100</b>

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## **Commissioner of Taxation**

4 April 2001

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### *Previous draft:*

Not previously issued in draft form

### *Related Rulings/Determinations:*

PR 1999/95; TD 93/34; TR 92/1;  
TR 92/20; TR 97/11; TR 97/16;  
TR 97/D17; PR2000/34

### *Subject references:*

- afforestation expenses
- carrying on a business
- commencement of business
- fee expenses
- forestry
- interest expenses
- management fees expenses
- plantation forestry
- product rulings

- public rulings

- primary production
- primary production expenses
- producing assessable income
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

### *Legislative references:*

- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 Div 27
- ITAA 1997 27-5
- ITAA 1997 27-30
- ITAA 1997 35-10

# PR 2001/33

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|-------------------------|-----------------------|
| - ITAA 1997 35-10(2)    | - ITAA 1997 960-355   |
| - ITAA 1997 35-10(3)    | - ITAA 1936 82KH(1)   |
| - ITAA 1997 35-10(4)    | - ITAA 1936 82KL      |
| - ITAA 1997 35-30       | - ITAA 1936 82KL(1)   |
| - ITAA 1997 35-35       | - ITAA 1936 82KZL     |
| - ITAA 1997 35-40       | - ITAA 1936 82KZL(1)  |
| - ITAA 1997 35-45       | - ITAA 1936 82KZM     |
| - ITAA 1997 35-55(1)    | - ITAA 1936 82KZM(1)  |
| - ITAA 1997 35-55(1)(a) | - ITAA 1936 82KZMA    |
| - ITAA 1997 35-55(1)(b) | - ITAA 1936 82KZMA(4) |
| - ITAA 1997 42-15       | - ITAA 1936 82KZMB    |
| - ITAA 1997 387-55      | - ITAA 1936 82KZMC    |
| - ITAA 1997 387-60      | - ITAA 1936 82KZMD    |
| - ITAA 1997 387-60(1)   | - ITAA 1936 82KZMD(2) |
| - ITAA 1997 387-125     | - ITAA 1936 82KZME    |
| - ITAA 1997 387-165     | - ITAA 1936 82KZME(4) |
| - ITAA 1997 387-170(3)  | - ITAA 1936 82KZME(7) |
| - ITAA 1997 387-185     | - ITAA 1936 82KZMF    |
| - ITAA 1997 387-210     | - ITAA 1936 82KZMF(1) |
| - ITAA 1997 Subdiv387-A | - ITAA 1936 Pt IVA    |
| - ITAA 1997 Subdiv387-B | - ITAA 1936 177A      |
| - ITAA 1997 Subdiv387-C | - ITAA 1936 177C      |
| - ITAA 1997 Subdiv960-Q | - ITAA 1936 177D      |
| - ITAA 1997 388-55      | - ITAA 1936 177D(b)   |
| - ITAA 1997 960-335     |                       |
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