



PR 2004/97 - Income tax: Lake Powell Almond Project No.2 - Early Growers

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 This document has changed over time. This is a consolidated version of the ruling which was published on *13 October 2004*



Product Ruling

Income tax: Lake Powell Almond Project No.2 – Early Growers

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Preamble

*The number, subject heading, **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 Tax Office **does not** sanction or guarantee this product. 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 participants 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 and how the product fits an existing portfolio. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out 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, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

Terms of use of this Product Ruling

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

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

What this Product Ruling is about

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 'Lake Powell Almond Project No.2' or simply as 'the Project'.

Tax law(s)

2. The tax laws dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 17-5 of the ITAA 1997;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Division 40 of the ITAA 1997;
- Division 328 of the ITAA 1997;
- section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 82KZL of the ITAA 1936;
- section 82KZME to 82KZMF of the ITAA 1936; and
- Part IVA of the ITAA 1936.

Goods and services tax

3. All fees and expenditure referred to in this Ruling include the 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.

Changes in the law

4. Although this Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering participating 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 participants in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

Class of persons

7. The class of persons to whom this Ruling applies is the persons more specifically identified in the Ruling part of this Product Ruling and who enter into the arrangement specified below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (that is, 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:

- intend to terminate their involvement in the Arrangement prior to its completion;
- do not intend to derive assessable income from it;
- elect to manage their Groves;
- enter into finance arrangements with the Responsible Entity or any associate of the Responsible Entity, other than where the Responsible Entity or its associates are acting as an intermediary for an independent financier;
- participate in the Project through offers made other than through the Product Disclosure Statement; or
- enter into this arrangement after 15 June 2005.

Qualifications

9. The Commissioner rules on the precise arrangement identified in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner. The Ruling will be withdrawn or modified.

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Date of effect

11. This Ruling applies prospectively from 13 October 2004, 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 commenced and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2007. 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 arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

14. The arrangement that is the subject of this Ruling is specified below. This arrangement incorporates the following documents:

- Application for a Product Ruling as constituted by documents received on 10 August 2004, and additional correspondence and documents received from Applicant's representative dated 16 August 2004, 27 September 2004, 28 September 2004 and 29 September 2004;

- Draft Product Disclosure Statement ('PDS') for the Lake Powell Almond Project No.2, and Lake Powell Almond Property Trust No.2 ('Land Owner' or 'Property Trust');
- Draft **Constitution** of the Lake Powell Almond Project No.2 ('Project Constitution') dated 21 June 2004;
- Draft **Constitution** of the Lake Powell Almond Property Trust No.2 ('Trust Constitution') dated 21 June 2004;
- Draft **Allotment Agreement** between SAITEysMcMahon AgInvest Limited ('Responsible Entity') and the Grower dated 21 June 2004;
- Draft **Management Agreement** between the 'Responsible Entity' and the Grower dated 21 June 2004;
- Draft Almond Orchard Management Agreement for 'the Project' between the 'Responsible Entity' and Select Harvests Limited ('Select') dated 4 August 2004;
- Draft Compliance Plan of the Lake Powell Almond Project No.2 dated 21 June 2004;
- Draft Compliance Plan of the Lake Powell Almond Property Trust No.2 dated 21 June 2004;
- Draft Custodian Agreement between the 'Responsible Entity' and Sandhurst Trustees Limited ('Custodian') as custodian of assets;
- Draft Lease between 'the Custodian' as Lessor and the 'Responsible Entity' as Lessee;
- Draft **Loan Deed** between SAITEysMcMahon Finance Pty Limited and the Grower dated 15 June 2004;
- Draft Loan Purchase and Servicing Agreement between SAITEysMcMahon Finance Pty Limited and Macquarie Bank Limited dated 23 July 2004;
- Draft Management Agreement and Declaration of Trust between SAITEysMcMahon AgInvest Limited as Responsible Entity of the Trust and SAITEysMcMahon AgInvest Limited in its corporate capacity; and
- Draft Lake Powell Water Supply Agreement between SAITEysMcMahon AgInvest Limited as Responsible Entity of the Trust and SAITEysMcMahon AgInvest Limited in its corporate capacity.

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

15. The documents highlighted are those that Growers may enter into. 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, which are a part of the arrangement. The effect of these agreements is summarised as follows.

16. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of these agreements is summarised as follows.

Overview

17. The salient features of the Lake Powell Almond Project No.2 follow:

Location	Robinvale, Victoria
Type of business to be carried on by each Grower	Commercial growing and cultivation of almond trees for the purpose of harvesting almonds for sale
Nature of Growers' participation in the Project	Stapled interest – interest as a Grower plus Unit(s) in the Property Trust that owns the Project Land
Number of hectares offered for cultivation	Up to 200 when fully developed
Size of each Allotment	0.4 hectares
Minimum allocation	1
Minimum subscription	10
Number of trees per Allotment	120
Number of trees per hectare	300
Term of the Project	14 years
Initial cost per 'Allotment'	\$6,008.80
Ongoing costs	Annual licence fee, and annual management fees and charges (refer to paragraphs 54 to 67)
Other fees and costs	Insurance

18. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Offers for Entitlements in the Project will be made under a Product Disclosure Statement. For the purposes of this Ruling no Project Interests will be allotted or issued under the PDS between 16 June 2005 and 30 June 2005 (inclusive).

19. The project involves establishing, planting, cultivating almond trees and harvesting almonds for sale. An entity that participates in the project will do so by acquiring an 'Entitlement' in the Project which will consist of two components:

- a 'Grower' Interest' consisting of a 0.4 hectare Grower's Allotment'; and
- a 'Landowner's Interest' consisting of parcel of 2,700 units in the Property Trust at \$1.00 per unit.

20. Units in the Property Trust cannot be subscribed to separately but may be held either by the Grower or an associate of the Grower.

21. Under terms of the PDS the interests in Growers' Allotments and units in the Property Trust will be issued after a minimum subscription of 10 'Entitlements' has been achieved.

22. The Responsible Entity has purchased land for the project. The land is described as Lot 3 of Crown Allotment 24 Parish of Nenandie being the whole of the land contained in Certificate of Title Volume 10434, Folio 954.

23. The Property Trust will own both the land on which the almond trees will be planted and the water licences for the Project's needs.

24. The Responsible Entity may appoint an agent to hold Trust Property. The terms of the appointment will be determined by the Responsible Entity and the agent (clause 2.1 Trust Constitution). To do so the Responsible Entity may enter into the 'Custodian Agreement' with the 'Custodian' as custodian of assets.

25. It is anticipated that 200 hectares will be developed which corresponds to subscriptions of 500 'Entitlements', i.e. 500 Growers' Allotments and the issue of 1,350,000 units in the Property Trust.

26. Applicants who are accepted into the Project and who execute the Allotment Agreement and the Management Agreement on or before 15 June 2005 will become 'Early Growers'.

27. Each Grower will use the Grower's Allotment(s) for the purpose of carrying on a business of cultivating and harvesting almonds and the sale of harvested produce.

Project Constitution

28. The Constitution establishes a Managed Investment Scheme known as 'Lake Powell Almond Project No.2' and operates as a deed binding on all Growers and the Responsible Entity.

29. The Constitution sets out the terms and conditions under which the Responsible Entity will operate and manage the Project and perform the functions conferred on it by this Constitution and the *Corporations Act 2001*.

30. Under clause 13.1, the Responsible Entity holds the Application Money on trust for the Applicants in an Application Fund. Under clause 14.1 the Responsible Entity may transfer money paid by an Applicant from the Application Fund if the Responsible Entity has issued an interest to the Applicant. The Responsible Entity will only do so where it is ready, willing and able to perform its duties under the Allotment Agreement and the Management Agreement.

31. Under clause 15.2 the Responsible Entity must collect, receive and pay into the Proceeds Fund all gross proceeds from the sale of almonds, and the proceeds of any income protection insurance, that is attributable to the Growers' Allotments.

32. Under clause 15.3, a Grower is entitled to the money in the Proceeds Fund, which represents the gross income from that Grower's Almonds Attributable to the Grower's Allotment for a particular Production Period, less:

- (i) all fees payable under the Allotment Agreement;
- (ii) all fees payable under the Management Agreement; and
- (iii) any other amounts payable by the Grower under this Constitution, the Allotment Agreement or the Management Agreement.

33. The Constitution also sets out in detail the following:

- the duration and termination of the Project (clause 3);
- register of Growers (clause 8);
- transfer of Grower's interests (clause 9);
- duties of Responsible Entity (clause 18);
- powers of Responsible Entity (clause 19);
- rights of Responsible Entity (clause 20);
- complaints handling (clause 21);
- retirement or removal of Responsible Entity (clause 23.2);
- meetings of Growers (clause 25);
- liability and indemnity of Responsible Entity (clause 27);
- winding up the Project (clause 28);
- dispute resolution (clause 29); and
- modification of Agreements (clause 30).

Trust Constitution

34. The Trust Constitution establishes the Trust to purchase and hold the Property. The Responsible Entity agrees to manage the Trust subject to terms contained in this Constitution which operates as a deed binding on all Landowners' and the Responsible Entity.

35. The Responsible Entity may appoint an agent to hold Trust Property separately from any other property. The terms of the appointment will be determined by the Responsible Entity and the agent, however, the terms must be consistent with the provisions of this Constitution.

Compliance Plan

36. As required by the *Corporations Act 2001*, the Responsible Entity has prepared Compliance Plans for both the Project and the Property Trust. Each Compliance Plan sets out the measures the Responsible Entity must apply in operating the Scheme to ensure compliance with the *Corporations Act 2001* and the Constitution.

Custodian Agreement

37. Under this Agreement the Responsible Entity will appoint Sandhurst Trustees Limited as custodian of assets. All assets and property delivered to the Custodian will be held and dealt with in accordance with this Agreement. The Custodian agrees to exercise all due care, act honestly in good faith, and without negligence or default in carrying out obligations under this Agreement.

Lease Agreement

38. Under this Agreement the Lessor (Custodian) leases to the Lessee (Responsible Entity) the land for the term. The Agreement sets out the terms and conditions under which the Lessor will lease the Land to the Lessee. In addition the Lessor grants to the Lessee licences:

- of the almond trees to be grown, cultivated and harvested on the Allotments;
- to draw water made available under the Water Licences and use that water to irrigate the Allotments; and
- to use the horticulture infrastructure on the Land.

Allotment Agreement

39. Each Grower will execute an Allotment Agreement with the Responsible Entity. The Responsible Entity will grant a non-exclusive licence to a Grower to use and occupy the land for the purpose of cultivating almond trees and harvesting almonds. This Agreement will commence on the date the Responsible Entity accepts the Grower's application under the PDS and shall continue until the earlier of 30 June 2019 or the date of termination of the Grower's interest in the Allotment.

40. Under clause 2.1 of the Allotment Agreement, the Responsible Entity grants each Grower a licence:

- to use and occupy the Grower's Allotment for growing, maintaining and harvesting the almond trees;
- to draw water made available to the Allotment from the Water Licences to the extent required to irrigate the trees; and
- to use in common with all other Growers the horticultural infrastructure on the Land required for the Project.

41. In addition the Responsible Entity licenses the almond trees to the Grower for the term of this Agreement (clause 2.2). The Responsible Entity must ensure these trees are planted by 1 October 2005 (clause 5(b)(ii)).

42. The Responsible Entity's obligations are set out in detail in clause 5. The Responsible Entity agrees that it will ensure at the date of commencement of this Agreement, that the Land Owner has, or will cause the Land Owner to:

- prepare the Allotment for the planting and cultivation of the Trees;
- develop and install mainline irrigation works up to the boundary of the Allotment and to ensure the Allotment has adequate drainage; and
- construct and continue to maintain suitable access roads and pathways to and from the Allotment.

43. The Responsible Entity will use reasonable endeavours to:

- develop and install the Allotment Irrigation System on the Grower's Allotment by 1 September 2005; and
- plant the optimum number of Trees on the Allotment by 1 October 2005.

44. The Grower's obligations are set out in detail in clause 4 under which the Grower agrees to use the Grower's Allotment solely for the purpose of cultivating, maintaining, tending and harvesting the almond trees in accordance with sound horticultural practices.

45. Under clause 3.2 upon the termination of this Agreement, the Grower will have no further interest in the Grower's Allotment, the Trees or the Allotment Irrigation System on the Grower's Allotment. The Grower and the Responsible Entity acknowledge and agree all right and interest in these items will vest in the Land Owner.

Management Agreement

46. Under the Management Agreement the Grower appoints the Responsible Entity to manage the Grower's Allotment and to carry out the management services subject to the terms and conditions of this Agreement. This Agreement shall commence on the date the Responsible Entity accepts the Grower's application under the PDS and shall continue until the earlier of 30 June 2019 or the date of termination of the Grower's interest.

47. The Responsible Entity agrees to carry out initial management services by 30 June 2005. The Responsible Entity undertakes to:

- prepare all agreements and documents to allow the Grower to occupy the Grower's Allotment pursuant to the Allotment Agreement;
- cause the Grower's Allotment to be identified, marked out and assigned to the Grower on application;
- prepare a management file, receive and process initial fees and allocate the Allotment to the Grower;
- prepare work programs for the first year's development of the block;
- eradicate any weeds or pests from the Allotment; and
- provide for the provision of adequate machines and manpower to manage the Grower's Allotment.

48. The Responsible Entity agrees to carry out subsequent management services by 30 June 2006. Among other things the Responsible Entity undertakes to:

- confirm the establishment of the Trees and Grower's Allotment in a proper and skilful manner;
- provide suitable irrigation, fertilisation and nutrients to the Trees, and keep proper and accurate records of fertilisers and nutrients applied;
- as far as reasonably possible keep the Grower's Allotment free from competitive weeds;
- maintain in good repair and condition existing buildings, machinery, fire-breaks, wind-breaks, access roads, tracks and fences;
- combat land and soil degradation on the Allotments and maintain soil quality on the Allotment;

- eradicate, as far as reasonably possible, any insects, pests or diseases;
- destroy any Trees which a reasonable horticulturist would destroy having regard to the best interests of the remaining unaffected Trees; and
- ensure the Land Owner replaces any Trees which fail to take in the first 13 months after planting.

49. The Responsible Entity agrees to carry out ongoing management and harvesting services until the end of this Agreement. Among other things the Responsible Entity undertakes to:

- monitor and ensure that adequate water is supplied to the Grower's Allotment and the Allotment has adequate drainage;
- prune the Trees at least once each calendar year;
- test the maturity of a sample of almonds at the appropriate time to determine whether the Trees are ready for harvesting;
- harvest the Trees on the Grower's Allotment at or around the time that maximises the return of produce;
- transfer the harvested almonds to available facilities for processing;
- market and sell the Almonds attributable to the Grower's Allotment using reasonable endeavours to obtain the maximum price available; and
- account to the Grower for the proceeds of such sale.

Processing duties

50. The Responsible Entity agrees to carry out ongoing processing services in accordance with sound processing and environmental practices until the end of this Agreement. Among other things the Responsible Entity undertakes to:

- size the almond kernels according to acceptable market size brackets;
- adequately fumigate the almonds to ensure they are free of insects and other pests;
- separately weigh all processed almonds;
- store the almond kernels in a secure dry environment until moved for grading;
- grade the almonds based on size, variety and quality; and

- transport the processed almonds to markets and purchasers, ensuring that at all times acceptable and applicable industry standards are met for preserving the quality of the processed almonds.

Pooling of Almonds

51. Clause 4.7 of the Management Agreement sets out provisions relating to the pooling of Almonds held by the Responsible Entity on behalf of Growers. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers in the Project who have contributed almonds to the pool making up the proceeds are entitled to benefit from distributions from those proceeds; and
- in the event of partial or total destruction of the Grower's Allotment or if the level of a Grower's production is otherwise reduced or inadequate compared to other Growers, the Grower's share of the sale proceeds may be adjusted to reflect these events.

Insurance

52. The Responsible Entity will insure or cause to be insured the Land Owner, the Grower, the Custodian, itself and such other persons it deems necessary against public risk for an amount of not less than five million dollars (\$5,000,000.00), and against risks and damage to the Trees and Almonds attributable to the Grower's Allotment. The Responsible Entity may charge the cost of insurance in respect of the later to the Grower at cost and in proportion to the Grower's interest in the Project.

Almond Orchard Management Agreement

53. The Responsible Entity will subcontract its obligations under the Management Agreement by entering into an Almond Orchard Management Agreement with Select. In consideration for payment of the fees set out in clauses 10, 11 and 12 of the Agreement Select will commence the orchard management services on notification in writing by the Responsible Entity. Subject to the terms and conditions set out in this Agreement Select will carry out the management services during the term of the Project.

Fees

54. The amounts payable per Allotment for the first three years of the Project for Growers who are accepted on or before 15 June 2005 ('Early Growers') are shown in the following table:

PR 2004/97

Early Grower Fees Growers accepted on or before 15 June 2005	Year 1 (to 30 June 2005)	Year 2 (to 30 June 2006)	Year 3 (to 30 June 2007)
Allotment Agreement			
Water licence fees	-	\$34	\$58.30
Land licence fee	-	\$1,532.30	\$1,817.20
Irrigation	\$2,139.50	\$2,139.50	\$2,139.50
Management Agreement			
Management fee	\$1169.30	\$550	\$550
Maintenance fee		\$4,624.40	\$2,420
Subscription for units in Property Trust	\$2,700	-	-
Total amount payable	\$6,008.80	\$8,880.20	\$6,985

55. The amounts payable for Year 1 must be paid as follows:
- \$2,700 payable on application; and
 - \$3,308.80 being the balance, by 30 June 2005.
56. The fees for Years 2 and 3 are payable as follows:
- Year 2 fees are payable in equal instalments of \$4,440.10 by 31 December 2005 and 30 June 2006; and
 - Year 3 fees are payable in equal instalments of \$3,492.50 by 31 December 2006 and 30 June 2007.

Project Fees for Year 4

57. Fees under the Allotment Agreement for Growers in Year 4 will be the sum of:
- (i) Land licence fee of \$1,817.20; and
 - (ii) Water licence fee of \$100.10.
58. The fees under the Allotment Agreement for Year 4 are payable in equal instalments of \$958.65 by 31 December 2007 and 30 June 2008.
59. Fees under the Management Agreement for Year 4 will be the sum of:
- (i) Maintenance fee for the Grower's Allotment of \$2,915; and
 - (ii) Management and administration fee of \$550.

60. The fees under the Management Agreement for Year 4 are payable in equal instalments of \$1,732.50 by 31 December 2007 and 30 June 2008 respectively.

Project Fees from Year 5 onwards

61. Fees under the Allotment Agreement from Year 5 onwards will be the sum of:

- (i) Land licence fee for each year equal to the previous year's fee increased by 5%; and
- (ii) Water licence fee for each year equal to the previous year's fee increased by the CPI, and any actual water usage increase.

62. Fees under the Management Agreement from Year 5 onwards will be the sum of:

- (i) for maintaining, managing, cultivating, harvesting and processing duties in each year, the cost the Responsible Entity reasonably expects to incur for the year, multiplied by 110%; and
- (ii) an amount equal to 5% of net income from the sale of Almonds attributable to the Grower's Allotment for each year.

63. Fees payable under the Allotment Agreement and the Management Agreement from Year 5 onwards will be paid from the gross income attributable to the Grower's Allotment. If the gross income attributable to the Grower's Allotment is insufficient to pay the fees in any year, then the unpaid fees may be carried forward to the following year and offset against that year's gross income.

Processing fees

64. The Responsible Entity will charge a fee for processing of almonds in each Production Period that includes processing. The fee in the first Production Period will be calculated on the basis that it is \$871 per tonne at the commencement date of the Management Agreement and increased annually in accordance with the CPI. For each subsequent Production Period the processing fee will be the processing fee for the previous Production Period increased in accordance with the CPI.

65. However, if the Almonds Attributable to the Grower's Allotment have a hull moisture of 15% or more, then there will be a corresponding increase in the processing fee in accordance with clause 6.4(c) of the Management Agreement.

66. The kernel derived from the Almonds Attributable to the Grower's Allotment will require drying if it has a high moisture content. A drying fee of \$0.07 per kilogram will be payable by the Grower to the Responsible Entity if the moisture content of the kernel is more than 6% but less than 10%. If the moisture content of the kernel is 10% or more, then the Grower will have to pay the Responsible Entity the fee that the Responsible Entity is charged by its contractor or agent for carrying out the drying.

Marketing fees

67. The Responsible Entity will charge the Grower a marketing fee equal to 100% of the costs actually incurred by it for the marketing of Almonds Attributable to the Growers Allotment.

Finance

68. Growers can fund their involvement in the Project themselves or borrow from an independent lender.

69. Growers cannot rely on this Product Ruling if application monies remain unpaid by 30 June in the year of application. Where an application is accepted subject to finance approval by any lending institution, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by 30 June in the year of application.

70. This Ruling also does not apply if the finance arrangement entered into by the Grower 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;

- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project are involved or become involved in the provision of finance to Growers for the Project, other than where the Responsible Entity or its associates are acting as an intermediary for an independent financier.

Ruling

Application of this Ruling

71. This Ruling applies only to Growers who are accepted to participate in the Project and who have executed an Allotment Agreement and Management Agreement after this Ruling is made and on or before 15 June 2005 ('Early Growers').

72. The Grower's participation in the Project must constitute the carrying on of a business of primary production.

Minimum subscription

73. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of the Product Disclosure Statement, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 10 'Entitlements' is achieved.

The Simplified Tax System ('STS')

Division 328

74. For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower is an 'STS taxpayer'. To be an 'STS taxpayer' a Grower:

- must be eligible to be an 'STS taxpayer'; and
- must have elected to be an 'STS taxpayer'.

Qualification

75. This Product Ruling assumes that a Grower who is an 'STS taxpayer' is so for the income year in which their participation in the Project commences. A Grower may become an 'STS taxpayer' at a later point in time. Also, a Grower who is an 'STS taxpayer' may choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer', during the term of the Project. These are contingencies relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

Assessable Income**Section 6-5**

76. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

77. A Grower who is not an 'STS taxpayer' recognises ordinary income from carrying on the business of horticulture at the time that income is derived.

78. A Grower who is an 'STS taxpayer' recognises ordinary income from carrying on the business of horticulture at the time that income is received (paragraph 328-105(1)(a)).

Deductions for Management Fees and Licence Fees**Section 8-1 and section 328-105**

79. A Grower may claim tax deductions for revenue expenses under section 8-1 of ITAA 1997, on a per Allotment basis, as shown in the Table below.

80. However, if for any reason, an amount is not fully paid in the year in which it is incurred by a Grower who is an 'STS taxpayer' then the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower. Any amount or part of an amount which is not paid in the year in which it is incurred will be deductible in the year in which it is actually paid.

Allowable Deductions for an 'Early Grower'

Allowable Deductions	Year ended 30 June 2005	Year ended 30 June 2006	Year ended 30 June 2007
Management fee	\$1169.30 - See Notes (i), (ii) & (iii)	\$550 - See Notes (i), (ii) & (iii)	\$550 - See Notes (i), (ii) & (iii)
Maintenance Fee	nil	\$4,624.40 - See Notes (i), (ii) & (iii)	\$2,420 - See Notes (i), (ii) & (iii)
Land licence fee	nil	\$1,532.30 – See Notes (i), (ii) & (iii)	\$1,817.20 – See Notes (i), (ii) & (iii)
Water licence fee	Nil	\$34 – See Notes (i), (ii) & (iii)	\$58.30 – See Notes (i), (ii) & (iii)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27. See Example at paragraph 123;
- (ii) The Management fee, the Maintenance fee, the Land licence fee and the Water licence fee shown in the Management and Allotment Agreements are deductible under section 8-1 in full in the year that they are incurred (where the Grower is not an 'STS taxpayer') or, under paragraph 328-105(1)(b) in the year in which they are paid (where the Grower is an 'STS taxpayer');
- (iii) This Ruling does not apply to Growers who choose to prepay fees or who choose or who are required to prepay interest under a loan agreement (see paragraph 110). Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME to 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project; and

Deductions for Capital Expenditure***Division 40***

81. Each Grower will also be entitled to tax deductions relating to irrigation, and the almond trees planted on the Allotment. If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27. See example at paragraph 123.

Deduction for Irrigation System

82. An irrigation system is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. A deduction is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one third of the capital expenditure incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one third in each of the next 2 years of income (section 40-540).

83. An 'Early Grower' incurs the expenditure of \$6,418.50 on irrigation system in year ending 30 June 2005, therefore, an Early Grower is entitled to a deduction of **\$2,139.50** in each of the years ending **30 June of 2005, 2006 and 2007**.

Deduction for Horticultural Plants

84. An almond tree is a 'horticultural plant' as defined in subsection 40-520(2). A Grower holds a licence to cultivate almond trees on a designated area of land called an 'Allotment' for the growing of almonds for commercial gain. As a Grower holds the 'Allotment' under a licence, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value.

85. The deduction is determined using the formula in section 40-545. Almond trees have an 'effective life' of greater than 13 but fewer than 30 years and, for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13% of the 'establishment expenditure'. The deduction is allowable when the almond trees enter their first commercial season (section 40-530, item 2). The Responsible Entity will notify the Growers when their almond trees enter their first commercial season and the amount that may be claimed annually.

Interest

86. The deductibility or otherwise 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. However, all Growers who borrow funds in order to participate in the Project, should read the discussion of the prepayment rules in

paragraphs 110 to 113 as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.

Units in Property Trust

87. The units in the Lake Powell Almond Property Trust No.2 are CGT assets (section 108-5 of the ITAA 1997) and the amount of \$2,700 payable upon subscription by a Grower constitutes an outgoing of capital and is not an allowable deduction.

88. The amount paid for each unit will represent the first element of the cost base of the unit (subsection 110-25(2) of the ITAA 1997). Any disposal of the unit(s) by a Grower will be a CGT event and may give rise to a capital gain or loss.

89. Distributions by the Lake Powell Almond Property Trust No.2 are included in the assessable income of a Grower or an associate of the Grower who is a unit holder, in accordance with Division 6 of the ITAA 1936.

Deferral of losses from non-commercial business activities

Division 35

Section 35-55 – Commissioner's discretion

90. A Grower who is an individual accepted into the Project by 15 June 2005 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for these Growers for the income years ending **30 June 2005 to 30 June 2009**. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

Sections 82KZME to 82KZMF, 82KL and Part IVA

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

- expenditure by a Grower does not fall within the scope of sections 82KZME to 82KZMF;
- 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.

Explanation

Is the Grower carrying on a business?

92. For the amounts set out in the Ruling section above to constitute allowable deductions the Growers' activities of cultivating almond trees and harvesting the almond produce for eventual sale as a participant in the Lake Powell Almond Project No.2 must amount to the carrying on of a business of primary production.

93. Where there is a business, or a future business, the gross proceeds from the sale of the almonds 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.

94. For schemes such as the Lake Powell Almond Project No.2, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As Taxation Ruling TR 2000/8 sets out, these circumstances have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

95. Generally, a Grower will be carrying on a business of growing almonds, and hence primary production, if:

- the Grower has an identifiable interest in the land (by lease) or rights over the land (by licence) on which the Grower's almond trees are established;
- the Grower has a right to harvest and sell the almonds;
- the cultivation of the almond trees and harvesting of the almonds are carried out on the Growers' behalf;
- the activities of the Grower are typical of those associated with a business of cultivating almond trees and harvesting the almonds for commercial gain; and
- the weight and influence of general indicators point to the carrying on of a business.

96. In this Project, each Grower enters into an Allotment Agreement and a Management Agreement.

97. Under the Allotment Agreement each individual Grower will have rights over a specific and identifiable area of 0.4 hectares of land, referred to as an Allotment. The Agreement provides the Grower with an ongoing interest in the specific almond trees on the licensed area for the term of the Project. Under the Allotment Agreement the Grower must use the land in question for the purpose of cultivating almond trees and harvesting the almonds, and for no other purpose. The Allotment Agreement allows the Responsible Entity or its agents to come onto the land to carry out its obligations under the Allotment Agreement and the Management Agreement.

98. Under the Management Agreement, the Responsible Entity is engaged by the Grower to establish and maintain the Allotment on the Grower's Allotment during the term of the Project. The Responsible Entity has sub-contracted management services to Select Harvests Limited under the Almond Orchard Management Agreement. Select Harvests Limited holds the appropriate professional skills and credentials to provide the services to establish and maintain the Allotment during the term of the Project.

99. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the almonds grown on the Grower's Allotment(s).

100. 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 Project's description for all the indicators.

101. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of the almonds that will return a before-tax profit, i.e. a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

102. The pooling of the almonds grown on the Grower's Allotment with the almonds of other Growers in the Project is consistent with general horticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled almonds will reflect the proportion of the almonds contributed from their Allotment.

103. The management services are also consistent with general horticultural practices. They are of the type ordinarily found in almond growing ventures that would commonly be said to be businesses. While the size of an individual Allotment is relatively small, it is of a size and scale to allow it to be commercially viable.

104. The Grower's degree of control over the Responsible Entity as evidenced by the Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, the Responsible Entity will provide the Grower with regular progress reports on the Grower's Allotment and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Responsible Entity in certain instances, such as cases of default or neglect.

105. The activities of cultivating almond trees and harvesting the almonds, 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. For the purposes of this Ruling, the Grower's activities of cultivating almond trees and harvesting the almonds for eventual sale in the Lake Powell Almond Project No.2 will constitute the carrying on of a business.

The Simplified Tax System

Division 328

106. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

107. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductibility of Management Fees and Licence Fees

Section 8-1

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

- the 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 is contractually committed 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.

109. The management fees and the licence fees will relate to the gaining of income from the Grower's business of growing almonds, and hence have a sufficient connection to the operations by which income (from the harvesting and sale of almonds) 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 fees. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Prepayment provisions

Sections 82KZL to 82KZMF

110. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (for example, the performance of management services or the leasing/licensing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

Application of the prepayment provisions to this Project

111. Under the Arrangement to which this Product Ruling applies management fees and licence fees are incurred annually. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF have no application to this Arrangement. A Grower who is an 'STS taxpayer' can, therefore, claim a deduction for each of the relevant amounts in the income year in which the amount is paid. A Grower who is not an 'STS taxpayer' can claim a deduction for each of the relevant amounts in the income year in which the fee is incurred.

112. However, sections 82KZME and 82KZMF may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Allotment and Management Agreements or prepays interest under a loan agreement. Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

113. As noted in the Ruling section above, Growers who prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

Expenditure of a capital nature

Division 40 and Division 328

114. Any part of the expenditure of a Grower 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, expenditure attributable to water facilities and the establishment of the almond trees is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328 of the ITAA 1997.

115. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is an 'STS taxpayer'.

116. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 81 to 85.

Deferral of losses from non-commercial business activities

Division 35

Section 35-55 – Exercise of Commissioner's discretion

117. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years 30 June 2005 to 30 June 2009 the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years ended 30 June 2005 up to and including 30 June 2009:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35;
- there is an objective expectation that within a period that is commercially viable for the almond industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit; and
- a Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

118. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Section 82KL – recouped expenditure

119. 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

120. 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).

121. The Lake Powell Almond Project No.2 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 80 to 85 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.

122. 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 almonds. 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 at arm’s length or, if any parties are not dealing 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**Entitlement to GST input tax credits**

123. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her viticulture business. Her manager is registered for GST and charges her a management fee payable every six months in advance. On 1 December 2003, Susan receives a valid tax invoice from her manager requesting payment of a management fee in advance, and also requesting payment for an improvement in the connection of electricity for her vineyard that she contracted him to carry out. The tax invoice includes the following details:

Management fee for period 1/1/2004 to 30/6/2004	\$4,400*
Carrying out of upgrade of power for your vineyard as quoted	<u>\$2,200*</u>
Total due and payable by 1 January 2004 (includes GST of \$600)	<u>\$6,600</u>

***Taxable supply**

Susan pays the invoice by the due date and calculates her input tax credit on the management fee (to be claimed through her Business Activity Statement) as:

$$\frac{1}{11} \times \$4,400 = \$400.$$

Hence her outgoing for the management fee is effectively \$4,400 less \$400, or \$4,000.

Similarly, Susan calculates her input tax credit on the connection of electricity as:

$$\frac{1}{11} \times \$2,200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2,200 less \$200, or \$2,000.

In preparing her income tax return for the year ended 30 June 2004, Susan is aware that the management fee is deductible in the year incurred. She calculates her management fee deduction as \$4,000 (not \$4,400).

Susan is aware that the electricity upgrade is deductible 10% per year over a 10-year period. She calculates her deduction for the power upgrade as \$200 (one tenth of \$2,000 only, not one tenth of \$2,200).

Detailed contents list

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Commissioner of Taxation

13 October 2004

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Not previously released in draft form	- advance deductions and expenses for certain forestry expenditure
	- carrying on a business
<i>Related Rulings/Determinations:</i>	- commencement of business
PR 1999/95; TR 92/1; TR 97/16;	- fee expenses
TR 92/20; TD 93/34; TR 98/22;	- forestry agreement
TR 2000/8; TR 97/11	- interest expenses
	- management fees
<i>Other Rulings/Determinations:</i>	- non commercial losses
TR 2001/14	- producing assessable income
	- product rulings
	- public rulings

- seasonally dependent agronomic activity
- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

Legislative references:

- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 Div 6
- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1936 318
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)

- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 40
- ITAA 1997 40-515(1)(a)
- ITAA 1997 40-515(1)(b)
- ITAA 1997 40-520(1)
- ITAA 1997 40-520(2)
- ITAA 1997 40-525
- ITAA 1997 40-525(2)
- ITAA 1997 40-530 item 2
- ITAA 1997 40-540
- ITAA 1997 40-545
- ITAA 1997 108-5
- ITAA 1997 110-25(2)
- ITAA 1997 Div 328
- ITAA 1997 328-105
- ITAA 1997 328-105(1)(a)
- ITAA 1997 328-105(1)(b)
- ITAA 1997 Subdiv 328-F
- ITAA 1997 Subdiv 328-G
- TAA 1953 Pt IVAAA
- Copyright Act 1968
- Corporations Act 2001

Case references:

- Commissioner of Taxation v. Lau (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55

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