



PR 2006/123 - Income tax: Macquarie Almond Investment 2006 - Late Growers (Post 30 June 2006)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *16 August 2006*



Product Ruling

Income tax: Macquarie Almond Investment 2006 – Late Growers (Post 30 June 2006)

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ⓘ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes. If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

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 scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document.

If the scheme 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 scheme 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 scheme has been implemented as described below and to ensure that the participants in the scheme 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 entity(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 Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions 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;
 - section 25-25 of the ITAA 1997;
 - Division 27 of the ITAA 1997;
 - Division 35 of the ITAA 1997;
 - Division 40 of the ITAA 1997;
 - Subdivision 61-J of the ITAA 1997;
 - Division 328 of the ITAA 1997;
 - Division 328 of the *Income Tax (Transitional Provisions) Act 1997*;
 - section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 82KZME and 82KZMF of the ITAA 1936; and
 - Part IVA of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Good 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 entities

7. The class of entities to whom this Ruling applies is the entities more specifically identified in the Ruling part of this Product Ruling and who enter into the scheme specified below on or after the date this Ruling is made. They will have a purpose of staying in the scheme until it is completed (i.e., being a party to the relevant Agreements until their term expires), and deriving assessable income from this involvement. In this Ruling, these entities are referred to as 'Growers'.

8. The class of entities to whom this Ruling applies does not include:

- entities who intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- entities who participate in the scheme through offers made other than through the Product Disclosure Statement or Supplementary Product Disclosure Statement;
- entities who are accepted to participate in the scheme before the date of issue of this Product Ruling and after 15 June 2007;
- entities who finance their participation in the scheme through loans other than those with Macquarie Bank Limited as described at paragraphs 62 to 70 of this Ruling; and
- Macquarie Alternative Assets Management Limited and its associates.

Qualifications

9. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 17 to 71 of this Ruling.

10. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

12. This Ruling applies prospectively from 16 August 2006, 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.

Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

13. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

16. This Product Ruling is withdrawn and ceases to have effect after 30 June 2009. The Ruling continues to apply, in respect of the relevant provisions 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.

Scheme

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

- Application for a Product Ruling dated 19 December 2005 as constituted by documents provided on 21 December 2005 and additional correspondence and emails dated 27 January, 23 February, 9, 14, 15, 27, 28 March 2006, 11 July 2006 and 27 July 2006;
- Product Disclosure Statement ('PDS') prepared for Macquarie Alternative Assets Management Limited ('MAAML') the Responsible Entity, issued 2 March 2006, received 14 March;
- Supplementary Product Disclosure Statement ('SPDS') prepared for 'MAAML' the Responsible Entity of the Macquarie Almond Investment 2006, dated 30 June 2006, received 11 July 2006;
- **Macquarie Almond Investment 2006 – Application Form** contained in the SPDS, received 11 July 2006;
- Constitution of the Macquarie Almond Investment 2006 (the 'Almond Project Constitution'), draft received 14 March 2006;
- Draft Macquarie Almond Project Compliance Plan (the 'Compliance Plan'), dated 19 December 2005, received 21 December 2005;

- Draft Lease between Macquarie Farm Assets and Resources Management Limited ('MacFARM') and MAAML as Responsible Entity for the Scheme (the 'Lease Agreement'), received 14 March 2006;
- Draft Management Agreement 2006 between Macquarie Horticultural Services Pty Limited ('MHSPL') and MAAML (the 'MHSPL Management Agreement'), version received 14 March 2006;
- Draft Almondco Supply Agreement between Almondco Australia Limited ('Almondco') and MAAML as Responsible Entity for the Scheme (the 'Almondco Supply Agreement'), dated 19 December 2005;
- Draft **Loan and Security Agreement and Notice of Mortgage** between Macquarie Bank Limited ('MBL') and the borrowing Grower (the 'Loan Agreement'), received 14 March 2006;
- Notice of Addition to the Custody Agreement between MAAML and Bond Street Custodians Ltd, draft dated 10 March 2006, which amends the Custody Agreement entered into between MAAML and Bond Street Custodians Ltd on 26 March 2003 (the 'MAAML Custody Agreement'); and
- Independent Expert's Report prepared by Scholefield Robinson Horticultural Services, dated 7 February 2006, received 14 March 2006.

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

18. The documents highlighted are those that a Participant Grower (referred to in this Ruling as a 'Grower') may enter into. For the purposes of describing the scheme 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 scheme.

19. 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 may be summarised as follows.

Overview

20. All capitalised terms within this Ruling are capitalised terms within the scheme documentation. The main features of the Macquarie Almond Investment 2006 ('the Project') are as follows:

Location	Sunraysia Region, Victoria
Type of business to be carried on by each participant	Commercial growing, cultivation and harvesting of almonds for sale.
Number of hectares offered for cultivation	Up to 500
Size of each interest	0.25 hectares
Minimum allocation	One 'Almond Lot'
Minimum subscription	None
Number of trees per hectare	Approximately 324
Term of the Project	Approximately 20 years
Initial cost per 'Almond Lot'	\$7,500
Ongoing costs	Licence Fees Annual Management Fees and charges
Other costs	Performance Fees

21. The Project is registered as a managed investment scheme under the *Corporations Act 2001*. Macquarie Alternative Assets Management Limited ('MAAML') has been issued with an Australian Financial Service Licence and is the Responsible Entity for the Project.

22. An offer to participate in the Project will be made through the PDS and SPDS. Each participant will be invited to subscribe for at least one Almond Lot of 0.25 hectares, out of the total 500 hectares on offer.

23. Applications to participate in the Project must be made on the application form included in the SPDS. There is no minimum amount to be raised under the SPDS. A Custodian has been appointed under the Custody Agreement to protect the interests of the Growers in their dealings with MAAML.

24. For Applicants who are accepted as Growers in the Project, the Responsible Entity will allocate Almond Lots, place their details in a Register and enter into Agreements on the Grower's behalf in relation to the Almond Lot(s) allocated to the Grower.

25. As an alternative to participation by a Grower as a single entity, the terms of the Constitution, the MHSPL Agreement and the Licence Agreement provide that two entities may enter into a Joint Venture as one Grower.
26. Growers accepted on or after 1 July 2006, will commence participation as Late Growers. This Product Ruling only applies in respect of Late Growers who enter the Project on or after the date of issue of this Product Ruling and on or before 15 June 2007. Growers accepted on or before 15 June 2006 may be covered by Product Ruling PR 2006/36.
27. MAAML, the Responsible Entity, will manage the Scheme and lease the Land for the Project from MacFARM, the Landholder and owner of the Orchard Assets. MacFARM will establish the Almond Orchard.
28. The Responsible Entity will grant Growers a Licence to use and occupy one or more identifiable Almond Lots of 0.25 hectares each for the Term of the Project.
29. Pursuant to the Constitution, Growers will appoint the Responsible Entity to cultivate and maintain the Trees and be responsible for harvesting, procuring the processing and sale of the Growers Produce.
30. The Responsible Entity has subcontract Macquarie Horticultural Services Pty Limited ('MHSPL') to act as Orchard Manager for the Project. The Orchard Manager will provide full farm management services, including ongoing maintenance and management of the Orchard and harvesting of the Almond Lots.
31. Scholefield Robinson Horticultural Services, an independent horticulturalist, has been appointed by the Responsible Entity to provide horticultural and technical advice to the Responsible Entity and the Orchard Manager and review the horticultural practices of the Orchard Manager.
32. The Responsible Entity intends to appoint Almondco Australia Limited under the Almondco Supply Agreement to act as Marketing Agent, to process, market and sell the harvested Almonds.
33. MAAML, as Responsible Entity, has engaged Bond Street Custodians to act as custodian of the Scheme Property.

Constitution

34. The Constitution establishes the Project and operates as a deed binding all of the Growers and MAAML (clause 3(d)). The Constitution sets out the terms and conditions under which MAAML agrees to act as Responsible Entity and to manage the Project.
35. Under clause 6.9, MAAML holds the Application Payment on bare trust. MAAML accounts for the Application Payment in a special trust account and deposits the money into a bank account solely for Application Payments for this Project.

36. The Grower appoints MAAML as its agent, representative and attorney (clause 6.1 of Schedule 1 to the Constitution).

Schedule 1 to the Constitution – Licence and Management Arrangements

37. The terms of the Licence and Management Arrangements are set out in Schedule 1 to the Almond Project Constitution.

38. Clause 2 of Schedule 1 specifies that MAAML will grant each Grower a non-exclusive Licence for the term of the Project. The Licence allows the Grower to occupy the Grower's Almond Lot and access and use the Irrigation Infrastructure for the sole purpose of conducting their almond growing business. Each Grower must pay annual Licence Fees as per clause 3.1.

39. Under the Licence it is acknowledged that all right, title and interest in the Produce vest with the Grower. However, the terms of the Licence do not confer ownership of the Trees to the Grower. Ownership of the Trees remains with the Landlord.

40. Under clause 6.1 Growers engage MAAML as an independent contractor to manage and conduct the Project and to perform the orchard services on their behalf in accordance with good horticultural and environmental practices during the Term of the Project.

41. MAAML will provide the following orchard services in the period ending 30 June 2007:

- (i) Orchard Management services including control and/or eradication of vermin, pest and disease control, pruning, fertilising and irrigation (clause 7.4(c));
- (ii) Reporting, Review and Certification and General Services which include the commission of an expert report by 30 June 2007 that the Orchard has been established appropriately by the Landlord and all services required of the manager have been performed to the appropriate standard (clause 7.4(a), (b) and (e)); and
- (iii) Maintenance and Repairs of all assets and resources on, and used on the Growers' Lots including fences, access roads, irrigation infrastructure, irrigation and pumping equipment, fire breaks and farm equipment (clause 7.4(d)).

42. In each subsequent year during the project, MAAML will provide the Orchard Services listed in clause 7.4, test the produce, harvest any Trees ready for harvesting and deliver the harvested Produce for processing and sale (clauses 8 and 9).

43. MAAML, as agent for the Grower, will process, market and sell the Grower's Produce along with that of other Growers for as high a price as it can reasonably achieve. Each Grower is entitled to receive a share of the sale proceeds proportional to their interest in the project (clause 9).

Pooling of amounts and distribution of Proceeds

44. The Constitution (clause 16) sets out provisions relating to the pooling of amounts from the sale of the Grower's Produce and the distribution of Total Proceeds from that sale or from insurance proceeds. **This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:**

- only Growers who have contributed Produce or insurance proceeds to the pool making up the Total Proceeds are entitled to benefit from distributions of those Total Proceeds; and
- any pools of Produce, or other Total Proceeds must consist only of Produce or other Total Proceeds contributed by Growers in the Macquarie Almond Investment 2006.

Joint Venture

45. As an alternative to participation by a single entity as a Grower, the terms of the Constitution provide that two entities may enter into a Joint Venture. The Constitution defines Joint Venturer as an entity notified in the Grower's Application as a Joint Venturer.

46. Joint Venturers are known as First Joint Venturer and Second Joint Venturer, and are apportioned specific responsibilities, rights and entitlements under clause 32 of the Constitution.

47. The First Joint Venturer is responsible for the Application Payment, while the Second Joint Venturer is responsible for all periodic fees up to the year ended 30 June 2010. Thereafter, until the completion of the Project, all other costs (except the Deferred Management Fee – which is payable by the Second Joint Venturer) are shared equally.

48. The First Joint Venturer is entitled to a Fractional Interest of 50% in the Licence granted to each Grower in relation to that Interest and the notification to the Grower of the Almond Lot for that Interest. The Second Joint Venturer is entitled to a Fractional Interest of 50% in the Licence granted to each Grower in relation to that Interest and the notification to the Grower of the Almond Lot for that Interest.

Head Lease

49. The Project Land is situated 18 km south east of Robinvale and 7 km from the Murray River in the Sunraysia region of North West Victoria. The Project Land, Almond Trees, Irrigation Infrastructure and Water Licences are owned by MacFARM (the Landlord).

50. The Responsible Entity will lease the Land, and acquire rights to access and use the Almond Trees, Irrigation Infrastructure and Water Licences according to the terms and conditions set out in the Lease.

51. Under the Lease, the Landlord was required (subject to certain conditions beyond its control, such as the weather) to:

- carry out Pre-planting Capital Works by 15 May 2006 so that the Land was in the required condition for planting; and
- to plant all of the trees on Part A, being no less than 40% of each Almond Lot, by 23 June 2006.

52. The remaining part of each Almond Lot will be planted by the end of the 2006 Planting Season, being no later than 30 September 2006.

53. The Landlord is also required to ensure that all rights under the Water Licences are fully exploited to maximise the benefits to the Responsible Entity and its sub-lessees, licencees or sub-licencees, which includes the Growers.

MHSPL Management Agreement

54. Under this agreement, MAAML engages MHSPL to provide Orchard Operational Services and subcontracts MHSPL to provide certain of its management obligations, for the Term of the Project (clauses 4 and 5). These services include ongoing maintenance and management of the Orchard and harvesting the Almond Lots.

Compliance Plan

55. The Project has a Compliance Plan in accordance with the *Corporations Act 2001*. Under the Compliance Plan, a Compliance Committee monitors MAAML's conduct of the Project to ensure it meets its obligations and responsibilities contained in the Constitution and to ensure the rights of Growers are protected.

Fees

56. Growers will pay the annual fees, charges and Licence Fees per Almond Lot, set out in the Almond Project Constitution. These are as follows:

- (i) on application, a Fixed Management Fee of \$6,750 for services to be provided from date of entry into the Project up to 30 June 2007; and
- (ii) a Fixed Management Fee of \$1,250 payable on 31 October 2007.

57. In each subsequent year:

- (i) Deferred Management Fee of 4.95% of all Sale Proceeds at the time they are received by MAAML, for services to be provided from 1 July 2007 to 30 June 2008;
- (ii) for each Financial Year following 30 June 2008, the annual fee will consist of an amount for the costs of operating the Almond Lot. This Operating Fee will include an adjustment for the difference between the estimated costs and the actual costs of managing the Almond Lot during the preceding Financial Year; and
- (iii) for each Financial Year from and including 30 June 2011 a Performance Fee calculated as 22.0% of the excess of any Net Sale Proceeds above the Performance Fee Threshold, payable on the next 31 October following the end of the Financial Year to which the Performance Fee relates.

58. The Licence Fees payable are as follows:

- (i) on application, \$750 for the Financial Year ended 30 June 2007;
- (ii) for the Financial Years ended 2008-2011, \$750; payable on 31 October of that Financial Year; and
- (iii) from the Financial Year ended 30 June 2012 to Maturity, \$1,000, \$1,200 or \$1,400 depending on whether the Sale Proceeds exceed certain thresholds, with the base amounts to be Indexed on 31 October 2012 and on each 31 October thereafter during the Term of the Project. The amounts for each Financial Year are payable on 31 October of the Financial Year.

59. For Joint Venturers these Fees are apportioned as prescribed in clause 32.2 of the Constitution.

60. The First Joint Venturer is solely responsible for paying:
- (i) 100% of the Application Payment; and
 - (ii) 50% of the Operating Fee, Licence Fee, Performance Fee and any other costs payable in relation to the Scheme in all financial years commencing from and including the 2011 financial year.
61. The Second Joint Venturer is solely responsible for paying:
- (i) 100% of the Fixed Management Fee, Operating Fee and Licence Fee in the 2008-2010 financial years; and
 - (ii) all other amounts that are not payable by the First Joint Venturer.

Finance

62. Growers can fund their involvement in the Project themselves, borrow from Macquarie Bank Limited (the Financier), a lender associated with the Responsible Entity or borrow from an independent lender.
63. The Financier will offer Investment Loans on a commercial basis and approve Loan Facility Amounts of up to 100% of the Application Payment (excluding any GST Component of the Application Payment) and in the case of the 5 and 7 year loans, a proportion of certain subsequent project costs. The Financier will provide Growers with loans on a full recourse basis and will pursue legal action against any defaulting borrowers. Details of the loans that will be offered to Growers by the Financier are set out in the Loan Agreement.
64. If two investors choose to participate in the Project as Joint Venturers by nominating a First Joint Venturer and a Second Joint Venturer in their application, an Investment Loan will only be available to the First Joint Venturer.
65. Common features contained in the Loan Agreement are:
- The Grower irrevocably directs the Financier to apply the proceeds of the Facility drawdowns towards paying, in whole or in part, the amounts due to MAAML in respect of the Interests applied for in the Application.
 - Financial Accommodation under the Loan Agreement will not be provided unless the Financier has received all documents necessary to enable it to register a Security Interest in respect of the Project Interests, and the Financier is satisfied that no Event of Default has occurred and is continuing or would result from the accommodation being provided.
 - The Grower agrees to make monthly payments of principal and interest in respect of the Facility.

- The Grower agrees to mortgage in favour of the Financier by way of equitable mortgage all of its present and future right, title and interest in and to its Project Interests including the right to receive all moneys under or in respect of the Project.

66. The terms specific to each optional Loan term offered by the Financier are summarised below:

- 12 month term, interest free;
- 5 year term with an indicative interest rate of 9.05%;
- 7 year term with an indicative interest rate of 9.75%; and
- 10 year term with an indicative interest rate of 10.75%.

67. The interest rate applicable to the 5, 7 and 10 year loans will be the rate displayed on the website www.macquarie.com/almonds on the date on which the Loan Application is accepted.

68. The 12 month interest free loan is repayable in 12 equal payments of the principal amount.

69. Growers cannot rely on this Product Ruling if they enter into a finance arrangement with the Financier, which is different from that set out in 'Loan Application Form' and 'Loan Explanation and Loan Terms' provided to the Tax Office by MAAML with the application for this Product Ruling.

70. Growers also cannot rely on this Product Ruling if the Application Payment otherwise remains unpaid by 15 June 2007. 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 15 June 2007.

71. This Ruling does not apply if the finance arrangement entered into by the Grower includes 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 of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;
- the loan or rate of interest is non-arms 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, other than the Financier, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

72. Subject to paragraph 8, this Ruling applies only to a Grower who is accepted to participate in this Project on or after the date of issue of this Product Ruling and on or before 15 June 2007.

73. The Growers participation in the Project must constitute the carrying on of a business of primary production. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the project is accepted and all relevant agreements are executed.

The Simplified Tax System (STS)

Division 328

74. To be an 'STS taxpayer', a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328 of the ITAA 1997). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower who was an 'STS taxpayer' prior to 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method') – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

75. For such Growers, a reference in this Ruling to an amount being deductible when 'incurred' will mean that amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

25% entrepreneurs tax offset**Subdivision 61-J**

76. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides for a tax offset of up to 25% of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

Assessable income**Section 6-5**

77. 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.

78. The Grower recognises ordinary income from carrying on the business of horticulture at the time that income is derived.

Deductions for Fixed Management Fees, Deferred Management Fees, Operating Fees, Licence Fees, Interest, Borrowing Costs and Almond Trees**Section 8-1, section 25-25 and Division 40**

79. A Grower who is accepted to participate in the Project on or after the date of issue of this Product Ruling and on or before 15 June 2007 may claim deductions, on a per Almond Lot basis, for the expenditure set out in the Table below.

80. Each Grower will also be entitled to a tax deduction relating to the Almond trees, as set out in the Table below.

Fee Type	Year ended 30 June 2007	Year ended 30 June 2008	Year ended 30 June 2009
Fixed Management Fee	\$6,750 See Notes (i), (ii) & (v)	\$1,250 See Notes (i), (ii) & (v)	
Deferred Management Fee			As incurred See Notes (i), (ii) & (v)
Operating Fee			As incurred See Notes (i), (ii) & (v)
Licence Fee	Must be Calculated See Notes (i), (iii), & (v)	\$750 See Notes (i), (iv) & (v)	\$750 See Notes (i), (iv) & (v)

Interest on loans with Macquarie Bank Limited	As incurred See Notes (ii), (v) & (vi)	As incurred See Notes (ii), (v) & (vi)	As incurred See Notes (ii), (v) & (vi)
Borrowing costs for loans with Macquarie Bank Limited	Must be calculated See Note (vii)	Must be calculated See Note (vii)	Must be calculated See Note (vii)
Establishment of Almond Trees			See Note (viii)

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.
- (ii) The Fixed Management Fee, Deferred Management Fee, Operating Fee and interest on loans with Macquarie Bank Limited are deductible in full in the year that they are incurred.
- (iii) Late Growers who enter the Project on or after 1 August 2006, Licence Fee of \$750 incurred in the 2006-07 income year will not be deductible in full under section 8-1. The deduction will be reduced at the rate of \$62.50 per month or part month that the Grower is not in the project in the 2006-07 income year.
- (iv) Licence Fee for 2007-08 income year and 2008-09 income year will be fully deductible under section 8-1 in the year that they are incurred.
- (v) This Ruling does not apply to a Grower who chooses to prepay fees or who chooses, or is required to prepay interest under a loan agreement (see paragraph 103 to 109 of this Ruling). 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 section 82KZME and 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.
- (vi) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than MBL, the internal financier, is outside the scope of this Ruling. A Grower who borrows from a lender other than MBL may request a private binding ruling on the deductibility of interest incurred.

- (vii) Borrowing costs payable to MBL by Growers who borrow from MBL to fund their participation in the project are deductible under section 25-25. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than MBL is outside the scope of this Ruling.
- (viii) 'Almond trees' are a 'horticultural plant' as defined in subsection 40-520(2). As Growers holds a non exclusive licence over the land, 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. The deduction for the 'almond trees' is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. Since the Almond Trees have an 'effective life' greater than 13 but fewer than 30 years, for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the Almond Trees enter their first commercial season (section 40-530, item 2). MAAML will notify the Grower when their Almond Trees enter their first commercial season and the amount that may be claimed.

81. A Joint Venture Grower may claim deductions, on a per Almond Lot basis, for the following expenditure set out in the Table and Notes in paragraph 80 of this Ruling:

First Joint Venture Grower

- in the year ending 30 June 2007, \$6,750 for the Fixed Management Fee;
- in the year ending 30 June 2007, the Licence Fee as outlined in notes (iii) & (v) to the Table above; and
- 50% of the Operating Fee, Licence Fee Performance Fee and any other costs payable in relation to the scheme in all financial years commencing from and including the 2011 financial year.

A First Joint Venture Grower who borrows from MBL to finance participation in the Project can also claim:

- a deduction for the interest incurred, under section 8-1 as outlined in Note (ii) to the Table above; and
- the borrowing costs payable to MBL, under subsection 25-25(1), as outlined in Note (vii) to the Table above.

Second Joint Venture Grower

- for each of the Financial Years ending 30 June 2008 to 30 June 2010 the Fixed Management Fee, the Operating Fee and Licence Fee;
- 50% of the Operating Fee, Licence Fee and Performance Fee commencing from and including the 2011 financial year; and
- 100% of the Deferred Management Fees.

82. Each Joint Venturer can also claim deductions for its proportional share of the horticultural plant write-off as explained in Note (viii) to the Table above.

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

83. A Grower who is an individual accepted into the Project on or after the date of issue of this Product Ruling and on or before 15 June 2007 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 2007 to 30 June 2012. 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, 82KZMF and 82KL and Part IVA

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

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 106 to 109 of this Ruling);
- 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.

Appendix 1 – Explanation

❶ ***This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.***

Is the Grower carrying on a business?

85. For the amounts set out in the Tables above to constitute allowable deductions the Grower's horticultural activities as a participant in the Macquarie Almond Investment 2006 must amount to the carrying on of a business of primary production.

86. 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.

87. For schemes such as that of the Macquarie Almond Investment 2006, 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.

88. Generally, a Grower will be carrying on a business of horticulture, and hence primary production, if:

- the Grower has an identifiable interest (by lease or by licence) in the land on which the Grower's Trees are established;
- the Grower has a right to harvest and sell the Produce from those Trees;
- the horticultural activities are carried out on the Grower's behalf;
- the horticultural activities of the Grower are typical of those associated with a horticulture business; and
- the weight and influence of general indicators point to the carrying on of a business.

89. In this Project, each Grower appoints MAAML as Manager and receives a Licence to the Land pursuant to the Almond Project Constitution.

90. Under the Almond Project Constitution each individual Grower will have rights over a specific and identifiable area of 0.25 hectares of land. The Licence granted pursuant to the Almond Project Constitution provides the Grower with an ongoing interest in the specific Trees on the licensed area for the Term of the Project. The Grower must use the land in question for the purpose of carrying out horticulture activities, and for no other purpose. The Lease allows the Manager to come onto the land to carry out its obligations under the Almond Project Constitution.

91. Under the Almond Project Constitution the Responsible Entity is engaged by the Grower to cultivate and maintain the Trees on the Grower's identifiable area of land during the Term of the Project. The Responsible Entity has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to cultivate and maintain the Trees on the Grower's behalf.

92. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the Produce grown on the Grower's Trees.

93. 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.

94. 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 Produce that will return a before-tax profit, that is, a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

95. The pooling of Produce from Trees grown on the Grower's Almond Lot with the Produce of other Growers is consistent with general horticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled Produce will reflect the proportion of the Produce contributed from their Almond Lot.

96. The Responsible Entity's services are also consistent with general horticultural practices. They are of the type ordinarily found in horticulture ventures that would commonly be said to be businesses. While the size of an Almond Lot is relatively small, it is of a size and scale to allow it to be commercially viable.

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

98. 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. For the purposes of this Ruling, the Growers' horticultural activities in the Macquarie Almond Investment 2006 will constitute the carrying on of a business.

The Simplified Tax System

Division 328

99. 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.

100. 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 Fixed Management Fees, Operating Fees, Deferred Management Fees and Licence Fees

Section 8-1

101. Consideration of whether the Fixed Management Fees, Operating Fees, Deferred 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.

102. The Fixed Management Fees, Operating Fees, Deferred Management Fees and Licence Fees associated with the horticulture activities will relate to the gaining of income from the Grower's business of horticulture (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of Produce) 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

Section 8-1

(i) A Grower who uses Macquarie Bank Limited as the finance provider

103. A Grower may finance their participation in the Project through a loan facility with Macquarie Bank Limited. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of Management and Licence Fees.

104. The interest incurred for the year ended 30 June 2007 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations – the cultivation and growing of Almond Trees and the licence of the land on which the Almond Trees will have been planted – that will continue to be 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) A Grower who does NOT use Macquarie Bank Limited as the finance provider

105. 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 Macquarie Bank Limited 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.

Prepayment provisions

Sections 82KZME and 82KZMF

106. 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 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

107. Under the Scheme to which this Product Ruling applies Management and Licence Fees are incurred annually and interest payable to Macquarie Bank Limited is incurred monthly. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

108. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Almond Project Constitution or prepays interest under a loan agreement (including loan agreements with lenders other than Macquarie Bank Limited). 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.

109. 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

110. 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 the establishment of the Almond Trees is of a capital nature. This expenditure falls for consideration under Division 40.

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

111. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years 30 June 2007 to 30 June 2012 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 2007 up to and including 30 June 2012:

- 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.

112. 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

113. The operation of section 82KL of the ITAA 1936 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 of the ITAA 1997.

Part IVA – general tax avoidance provisions

114. For Part IVA of the ITAA 1936 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).

115. The Macquarie Almond Investment 2006 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 79 to 82 of this Ruling 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.

116. 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 Produce. 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) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/11; TR 98/22; TR 2000/8;
TR 2001/14

Subject references:

- carrying on a business
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5
- ITAA 1997 8-1

- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 25-25(1)
- 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)(b)
- ITAA 1997 40-520(2)
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- ITAA 1997 40-530
- ITAA 1997 40-545
- ITAA 1997 Subdiv 61-J
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