



PR 2006/148 - Income tax: AIL Almond Grower Project - Swan Hill 2007 Growers (to 15 June 2007)

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 This document has changed over time. This is a consolidated version of the ruling which was published on 9 May 2007



Product Ruling

Income tax: AIL Almond Grower Project – Swan Hill 2007 Growers (to 15 June 2007)

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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.

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

No guarantee of commercial success

The 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. In this Ruling the scheme is sometimes referred to as the 'AIL Almond Grower Project – Swan Hill' or simply as 'the Project'.

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;
- section 40-880 of the ITAA 1997;
- Subdivision 61-J of the ITAA 1997;
- section 108-5 of the ITAA 1997;
- section 110-25 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 82KZL of the ITAA 1936;
- sections 82KZME and 82KZMF of the ITAA 1936;
- Division 6 of Part III of the ITAA 1936; and
- Part IVA of the ITAA 1936.

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

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. Entities 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 entities in Projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that entities 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 consists of 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 (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 scheme. In this Ruling, these entities are referred to as Growers.

8. The class of entities to whom this Ruling applies does not include Growers 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;
- participate in the Project through offers made other than through the Product Disclosure Statement;
- elect to take and sell their own produce; or

- are accepted to participate in the Project prior to the issue of this Ruling or after 15 June 2007.

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 81 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 18 October 2006, the date this Ruling is made. However, the Ruling does not apply to entities 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).

Note: The Addendum to this Ruling that issued on 9 May 2007, applies on and from 9 May 2007.

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 entities within the specified class which enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, which 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 entities 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 as constituted by documents provided on 5 September 2006, 6 September 2006, 11 September 2006, 12 September 2006, 3 October 2006 and 6 October 2006;
- Additional correspondence, dated 8, 15, 26 and 29 March 2007, 2 and 30 April 2007, and 1 May 2007;
- Draft **Product Disclosure Statement** ('PDS') for the AIL Almond Grower Project – Swan Hill, dated 27 August 2007, prepared for Almond Investors Limited ('AIL'), ('the Responsible Entity of the Project') received on 6 October 2006;
- **'Finance Application' and 'Loan Agreement'** between ABL Nominees and each Grower, undated, received on 15 March 2007;
- Draft **Constitution of the AIL Almond Grower Project – Swan Hill** between the Responsible Entity of the Project and each Grower, as amended, and associated Amendment Deed Poll dated 10 January 2007, received on 15 March 2007;

- Draft **Constitution of the AIL Almond Asset Trust – 2007** between AIL (the Responsible Entity of the Asset Trust), the Initial Unit Holder and each Orchard Asset Owner (Unit Holder), as amended, and associated Amendment Deed Poll dated 10 January 2007, received on 15 March 2007;
- Draft Contract of Sale of Real Estate between the relevant land owner, Purchaser and Almond Investors Ltd, dated 9 February 2007, received on 15 March 2007;
- Draft Compliance Plan for the AIL Almond Grower Project – Swan Hill, undated, received on 5 September 2006;
- Draft Custodian Agreement between AIL ('the Responsible Entity of the Asset Trust' and the 'Responsible Entity of the Project') and Sandhurst Trustees Limited ('the Custodian of the Asset Trust' and 'the Custodian of the Project'), undated, received on 5 September 2006;
- Draft Lease Agreement ('Interim Head Lease') between the relevant land owner and Sandhurst Trustees Limited (or duly appointed subcustodian), undated, received on 5 September 2006;
- Draft Lease Agreement ('Trust Head Lease') between Sandhurst Trustees Limited ('the Custodian of the Asset Trust' (or duly appointed subcustodian), and AIL ('the Responsible Entity of the Project'), undated, received on 5 September 2006;
- Draft Option to Purchase between the relevant land owner and Almond Investors Land Pty Ltd, undated, received on 6 October 2006;
- Draft Contract of Sale of Real Estate between the relevant land owner and Almond Investors Land Pty Ltd, undated, received on 5 September 2006;
- Draft **Allotment Sublease Agreement** between AIL ('the Responsible Entity of the Project'), and Sandhurst Trustees Limited ('the Custodian of Project' (or duly appointed subcustodian), and each Grower, undated, received on 6 October 2006;
- Draft **Allotment Management Agreement** between AIL ('the Responsible Entity of the Project') and each Grower, undated, received on 6 October 2006;
- Draft Orchard Management Agreement between AIL ('the Responsible Entity of the Project') and RMONPRO Developments Pty Ltd, undated, received on 6 October 2006;

- Draft Almond Crop Supply Agreement between Almondco Australia Limited and Almond Investors Limited undated, received on 5 September 2006;
- **Finance Application and Terms of Loan** between Allco Managed Investments Limited as trustee for the Gateway Momentum Funding Trust No. 1 ('Momentum') and each Grower, undated, received on 6 October 2006;
- **Finance Application and Terms of Loan** between Almonds Investors Finance Pty Ltd and each Grower, undated, received on 11 September 2006; and
- Draft **Terms Payment Agreement** between AIL ('the Responsible Entity of the Project') and each Grower, undated, received on 3 October 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 Growers 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 is summarised as follows.

Overview

20. The main features of the AIL Almond Grower Project – Swan Hill are as follows:

Location	Swan Hill district, Victoria; approx 45 km north-west of Swan Hill and 5km south-east of Piangil.
Type of business to be carried on by each entity	Cultivating almond Trees on their designated 0.125 hectare Allotments and harvesting the almonds for processing and sale.
Number of hectares offered for cultivation	688 hectares
Size of each interest	0.125 hectares
Minimum allocation	1 Allotment
Number of plants per Allotment	40

Term of the Project	18 years
Initial cost	\$7,300 per Allotment, \$1 per Unit in the Asset Trust.
Ongoing costs and other Grower costs	Growing and Management Fees, Deferred Management Fees, Land and Assets Rent, Incentive Fees, Processing and Marketing Fees, Interest payments and borrowing costs.

21. Both the Project and the Asset Trust will be registered as Managed Investment Schemes within the terms of the *Corporations Act 2001*. Applications to participate in the Project must be made on the Application form shown in the PDS. There is no minimum amount that must be raised under the PDS. The maximum offer under the PDS is for 4,000 Grower Allotments and 4,000 Units in the Asset Trust. The Responsible Entity of the Project may accept oversubscription in the Project at its discretion. A custodian will be appointed under the Custodian Agreements to protect the interests of the Grower and the Orchard Asset Owner in their dealings with the Responsible Entities of the Asset Trust and of the Project.

22. Under a Power of Attorney contained in the Application Form, Applicants that are accepted to participate in the Project will enter into an Allotment Management Agreement and an Allotment Sublease Agreement with the Responsible Entity of the Project.

23. Growers' Applications accepted on or before 15 June 2007 will commence participation from the time their Application is accepted (being the Grower Commencement Date). This Ruling only applies in respect of Growers whose Grower Commencement Date is after the issue of this Product Ruling and on or before 15 June 2007. Growers who are accepted to participate in this Project on or after 16 June 2007 and on or before 30 June 2007 are not covered by any Product Ruling. Such Growers may apply for a private ruling on their participation in the Project.

24. The Grower or a nominee of the Grower must subscribe for the equivalent number of Units in the Asset Trust as Allotments in the Project.

25. The land on which the Project will be conducted is in the Swan Hill District in Victoria, approx 45km north-west of Swan Hill and 5km south-east of Piangil and adjacent to Miralie-Cocamba Road, Algie Road and Hayward Road. The specific details of the land covered by this Product Ruling are Volume 9128 Folio 870, Volume 8060 Folio 660, Volume 6121 Folios 1224114 and 1224115, Volume 3661 Folio 732040, Volume 8055 Folio 735, Volume 8679 Folios 204, 205, 206 and 207, Volume 8649 Folio 695 and Volume 8055 Folio 171. If additional land is acquired for use in the project, AIL will notify the Tax Office and an Addendum to this product ruling will issue to include that land.

26. An Allotment Sublease Agreement will be entered into between the Responsible Entity of the Project, the Custodian of the Project (or duly appointed subcustodian), and each Grower for the purpose of growing, maintaining and harvesting almond Trees. The Term of the Allotment Sublease commences on the Grower Commencement Date and ends on 15 June 2025 unless terminated earlier. Under the Allotment Sublease Agreement AIL will ensure that 40% of each Grower's Trees are planted by 23 June 2007 and the remainder by 30 September 2007. AIL will notify the Tax Office if the Trees are not planted in accordance with these dates.

27. Each Grower will engage the Responsible Entity of the Project to manage their business and to carry out the duties that are usual or necessary for operating an almond orchard on the Grower's Allotment(s).

Constitution of the AIL Almond Grower Project – Swan Hill

28. The Constitution of the Project operates as a deed and is binding on all Growers and the Responsible Entity of the Project (clause 2). AIL is appointed as the responsible entity of the Project and agrees to manage the Project on the terms set out in the Constitution (clause 3).

29. In summary, the Constitution also sets out provisions relating to:

- the application procedure for Allotments, including the holding of Contributions on trust for an Applicant until the Application is accepted or refused (clauses 6 and 7);
- the preparation and execution of the Allotment Sublease Agreement and the Allotment Management Agreement by AIL in its capacity as the Applicant's attorney (clause 7);
- the acceptance, at the Responsible Entity's discretion, that payment of a Grower's Contribution may be made by instalments (clause 7);
- the conditions which must be satisfied before money paid by an Applicant into the Grower's Applications Fund can be transferred to the Responsible Entity of the Project (clause 8);
- the composition of a Grower's Allotment (clause 11);
- the requirement that Project Assets be held on trust and the appointment of a custodian to hold the Project Assets on behalf of the Growers (clause 12);
- the keeping and maintenance of a Register of Growers (clause 13);
- the transfer of a Grower's Allotment(s) (clause 14);

- the powers, rights and liabilities of the Responsible Entity of the Project (clauses 19 and 20);
- the opening of a Growers Proceeds Account at an Australian bank, the payment of proceeds into the Grower's Proceeds Account, deductions that may be made from the Grower's Proceeds Account and distributions to Growers from the Grower's Proceeds Account (clauses 24, 25, 26 and 27); and
- the termination of the Project (clause 29).

Constitution of the AIL Almond Asset Trust – 2007

30. The Constitution of the Asset Trust operates as a deed and is binding on all Orchard Asset Owners and the Responsible Entity of the Asset Trust (clause 1.2). AIL is appointed as the Responsible Entity of the Asset Trust and agrees to manage the Project on the terms set out in the Constitution of the Asset Trust (clause 1.3).

31. In summary, the Constitution of the Asset Trust also sets out provisions relating to:

- the powers of investment by the Responsible Entity of the Asset Trust (clause 3);
- the purpose, term and vesting of the Asset Trust (clause 4);
- the payment and holding of Contributions by the Responsible Entity of the Asset Trust or Custodian (clause 6);
- the keeping and maintenance of a Register of Orchard Asset Owners (clause 8);
- the purchase of the Property and Water Licences (clause 9.3);
- the amount payable for Units and the circumstances under which an Orchard Asset Owner will be required to contribute further funds to the Trust (clause 11);
- the powers and duties of the Responsible Entity of the Asset Trust (clause 12);
- the income of the Asset Trust (clause 16);
- the transfer of Units in the Orchard Asset Trust (clause 19); and
- the use of Trust Property (clause 27.1).

Compliance Plan

32. As required by the *Corporations Act 2001*, the Responsible Entity of the Project has prepared a Compliance Plan. The purpose of

the Compliance Plan is to ensure that the Responsible Entity of the Project manages the Project in accordance with its obligations and responsibilities that are set out in the Constitution of the Project and that the interests of Growers are protected.

Option to Purchase and Contract of Sale

33. Each land owner will grant a Call Option to Almond Investors Land Pty Ltd to purchase the various titles making up the Land to be used for the Project on the terms of the Contract of Sale of Land (Annexure B of the Option to Purchase Agreement).

34. In order to secure tenure over the Land for the Term of the Project, an Interim Head Lease Agreement or a Contract of Sale of Land will be executed by the relevant parties prior to acceptance of any Applicants to the Project.

Interim Head Lease

35. Where a Contract of Sale has not been executed each land owner will grant a Lease over the Land to Sandhurst Trustees Limited, the custodian of the Asset Trust (or a duly appointed subcustodian), and to ALL, the Responsible Entity of the Asset Trust.

36. The Term of each Interim Head Lease is the term of the Project. Rent is payable under the Interim Head Lease Agreement to the relevant Lessor (clause 3).

37. Each Lessor consents to the works that are permitted to be carried out and will be carried out on the Land in accordance with the Trust Head Lease, including without limitation the planting of the Trees, the installation of the Irrigation System and the construction and maintenance of access roads to the Allotments (clause 7).

38. If settlement under a Contract of Sale occurs, the Interim Head Lease (for that part of the Land that is the subject of the Contract of Sale) is automatically surrendered with effect from midnight on the day immediately before the Settlement Date (clause 15).

Trust Head Lease

39. For the Term of the Project Sandhurst Trustees Limited, the Custodian of the Asset Trust (or a duly appointed subcustodian) will grant to Sandhurst Trustees Limited, the Custodian of the Project (or a duly appointed subcustodian) a lease over the Land and the Trees, together with the right to use the Water Licences (clause 2). The lessor under this lease document will be the same subcustodian entity that is the lessee under the Interim Head Lease.

40. The Annual Rent payable under the Trust Head Lease will be an amount equal to the Annual Sub-Lease Rent for the equivalent period (clause 3 and Schedule 1).

41. ALL, as Responsible Lessor will, at its own cost and expense, procure the grant of the Water Licences and arrange for the Trees to be planted on each Allotment complying with Best Agricultural Practice (clause 10).

Allotment Sublease Agreement

42. Each Grower will enter into an Allotment Sublease Agreement with the Responsible Entity of the Project and Sandhurst Trustees Limited, the Custodian of the Project (or a duly appointed subcustodian).

43. Each Grower is granted a sublease of their Grower's Allotment(s) and the Trees and the right to use the Water Licences. The Grower's Allotment(s) are to be used only for the purposes of growing, maintaining and harvesting the Trees (clause 2).

44. The Term of the Allotment Sublease commences on the Grower Commencement Date and ends on 15 June 2025 unless terminated earlier in accordance with the Allotment Sublease Agreement or the Constitution of the Project (clause 3).

45. The Responsible Entity of the Asset Trust will ensure that the Trustee of the Asset Trust, properly and skilfully prepares each Grower's Allotment(s), plants and establishes the Trees, and acquires Water Licences with sufficient volumes of water to be used to irrigate the Grower's Allotment during the Term of the Project. A minimum of 40% of the Trees are to be planted on each Grower's Allotment(s) by no later than 23 June 2007 and the remaining Trees are to be planted on each Grower's Allotment(s) by no later than 30 September 2007 (clause 4).

46. The Allotment Sublease also sets out:

- the Grower's obligations including, at its own cost, the installation and maintenance of all or part of the Irrigation System (clause 6);
- the Responsible Entity's obligations (clause 7);
- the Annual Land and Assets Rent payable by the Grower (clause 8 and Schedule 3); and
- the termination of the Allotment Sublease by the Grower or Responsible Entity (clause 9).

Allotment Management Agreement

47. Each Grower will enter into an Allotment Management Agreement with the Responsible Entity of the Project whereby the Grower engages the Responsible Entity as an independent contractor to manage the business the Grower conducts on the Grower's Allotment (clause 2).

48. The term of the Allotment Management Agreement begins on the Grower Commencement Date and ends on the earlier of the termination of the Grower's Interest or 15 June 2025 (clause 3).

49. The Responsible Entity of the Project will carry out the Initial Services in the first Financial Year (the Initial Period). The Initial Services are set out in Part 1 of Schedule 3 to the Agreement and include Orchard Management Services, Orchard Maintenance Services, and Administration and Management Services. In the second and subsequent Financial Years the Responsible Entity of the Project will carry out the Services set out in Part 2 of Schedule 3. These Services include Farming Services and Administration and Management Services (clause 4).

50. The Responsible Entity of the Project also agrees to carry out processing duties relating to the almonds Harvested from the Grower's Allotment and, if elected by the Grower to do so, will also be responsible for the marketing and sale of the almonds attributable to the Grower's Allotment (clause 4). The processing duties are set out in Part 3 of Schedule 3 to the Agreement.

51. The Allotment Management Agreement also:

- provides that each Grower will own the Grower Irrigation (clause 4);
- sets out the fees payable by the Grower to the Responsible Entity of the Project (clause 5 and Schedule 4); and
- sets out when the Allotment Management Agreement may be terminated (clause 10).

Orchard Management Agreement

52. The Responsible Entity of the Project appoints RMONPRO Developments Pty Ltd as the Orchard Manager for the Project. The Orchard Manager is engaged as an independent contractor to provide the Orchard Services and to oversee the hulling and cracking operation and the processing and marketing relationship with the marketing entity.

53. The Orchard Management Agreement commences on the date of its execution and continues until the Project ends in accordance with the Constitution of the Project (clause 2).

54. RMONPRO Developments Pty Ltd must ensure that the Initial Services are provided to each Grower as required by the Allotment Management Agreement and must cultivate, maintain and manage the Almond Trees and the Orchard in a manner consistent with the Management Plan, in a good workmanlike and commercially responsible manner and to a standard consistent with Best Horticultural Practice (clause 5).

Almond Crop Supply Agreement

55. AIL will enter into an agreement with Almondco Australia Limited conferring on Almondco Australia Limited the right to market and sell the Almonds.

56. AIL agrees to supply to Almondco Australia Limited as soon as they can be harvested and prepared for delivery all of the almond crop produced by AIL (clause 1).

57. Almondco Australia Limited agrees to prepare the Almonds for market, market and use its best endeavours to sell the Almonds at the best price available at the time of sale. The proceeds of sale of the Almonds and of other Almonds pooled therewith will be distributed at the same rate per kilogram for like variety, grade and quality in accordance with the provisions of the Constitution of the Project (clause 3).

Pooling of Almonds and distributions from the Growers' Proceeds Account

58. The Constitution of the Project (clause 25), Allotment Management Agreement (clause 4.4) and Almond Crop Supply Agreement (clause 3) provide for the pooling of produce from all Growers' Allotments in the Project.

59. The Constitution of the Project provides that the Responsible Entity of the Project may store, market and sell the produce without having regard to the quantity or quality of the particular produce from the particular Allotments (clause 25). A Grower has an interest in the Growers' Proceeds Account equal to the proportion the Almonds Attributable to the Grower's Allotment bears to the Total (clause 25).

60. The Allotment Management Agreement provides for the aggregation of Almonds from the Grower's Allotment together with Almonds of other Grower's Allotments. The proceeds of the sale of Almonds will be divided pro rata according to the number of Grower's Allotments contributing to the produce. However, a Grower's entitlement is reduced where the Grower's Allotment is totally or partially destroyed, the level of production is otherwise reduced or inadequate, or is otherwise materially different compared to other Grower's Allotments (clause 4).

61. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed Almonds to the sales pool are entitled to benefit from distributions of the Proceeds of sale from the pooled Almonds; and
- any pooled Almonds must consist only of Almonds contributed by 2007 Growers in the Project.

Fees

62. An Orchard Asset Owner is liable to pay the Responsible Entity of the Asset Trust the following amounts under the Constitution of the Asset Trust:

- \$1 per unit on Application (clause 7 and Item 1 of Schedule 3); and
- a maximum amount of \$800 per Unit if the Responsible Entity of the Asset Trust makes Further Calls (clause 11).

63. The Fees payable by a Grower are set out in clause 7 and Schedule 3 of the Constitution of the Project, clause 5 and Schedule 4 of the Allotment Management Agreement, and clause 8 and Schedule 3 of the Allotment Sublease Agreement, as follows:

Allotment Management Agreement

- for the Initial Services and for all other services to be provided in the period from the Grower Commencement Date to 30 June 2007 (the First Financial Year) a fee of **\$4,600** per Allotment is payable upon Application;
- for the Grower Irrigation an Irrigation Charge of **\$2,700** per Allotment is payable upon Application;
- for services to be provided in the Financial Year ended 30 June 2008 (the Second Financial Year) a fee comprised of two components is payable per Allotment. The first component of **\$1,350** is payable on 1 March 2008. The second component is a Deferred Management Fee which totals **3.3% of the Gross Proceeds**. The deferred component of the fee payable for services provided in the Second Financial Year is payable in each Financial Year beginning from and including the Financial Year ended 30 June 2013 (the Seventh Financial Year);
- for services to be provided in the period from 1 July 2008 to 30 June 2009 (the Third Financial Year) a fee comprised of two components is payable per Allotment. The first component of **\$1,350** is payable on 1 March 2009. The second component is a Deferred Management Fee which totals **3.3% of the Gross Proceeds**. The deferred component of the fee payable for services provided in the Third Financial Year is payable in each Financial Year beginning from and including the Financial Year ended 30 June 2013 (the Seventh Financial Year);
- for services to be provided in the Financial Year ended 30 June 2010 (the Fourth Financial Year), a fee of **\$1,350** is payable on 1 March 2010;

- for services to be provided in each subsequent Financial Year beginning from the Financial Year ended 30 June 2011 (the Fifth Financial Year) a fee comprised of two components – the Growing Fees and the Management Fees – is payable per Allotment is payable on 1 March in each of the respective Financial Years:
 - the Growing Fees are based on the **estimated costs** of operating the relevant Allotment(s) (see paragraph 64 of this Ruling for further explanation); and
 - a Management Fee of **\$165** per Allotment will be payable in the Fifth and Sixth Financial Years;
- an **incentive fee equal to 22%** of so much of the annual Net Proceeds payable to the Grower in a Financial Year that exceeds the Incentive Fee Threshold set out in the PDS for that Financial Year; and
- Processing and Marketing Fees as charged.

Allotment Sub-lease Agreement

- for the period from the Grower Commencement Date until 30 June 2007 (the First Financial Year), **no** Land and Assets rent is payable;
- for the Financial Years ended 30 June 2008, 30 June 2009, and 30 June 2010 (the Second, Third and Fourth Financial Years), Land and Assets rent of **\$1,050** is payable on 1 March 2008, 2009 and 2010 respectively; and
- for each subsequent Financial Year beginning from the Financial Year ended 30 June 2011 (the Fifth Financial Year), an amount equal to the Land and Assets rent paid in the proceeding Financial Year, indexed by the increase in the CPI, is payable on 1 March of the relevant Financial Year.

64. As noted above, from the Financial Year ended 30 June 2011 (the Fifth Financial Year) the annual fee payable by a Grower under the Allotment Management Agreement will consist of an amount for the estimated costs of operating the Grower's Allotment(s). The estimated costs of operating the Grower's Allotment(s) for a Financial Year will include an adjustment for the difference between the actual costs and the estimated costs of managing the Grower's Allotment(s) during the preceding Financial Year.

65. Fees payable by a Grower under the Allotment Management Agreement and Allotment Sublease Agreement are to be paid when due. If gross income attributable to the Grower's Allotment is insufficient to meet these fees, no portion of these fees may be carried forward to the subsequent Financial Year.

Custody Agreements for the Project and the Asset Trust

66. The Responsible Entity of the Asset Trust and the Project will engage Sandhurst Trustees Limited to act as custodian. The Custodian will be responsible for holding the Scheme Assets on the terms and conditions set out in the Agreements. Assets are defined as assets of a Scheme as may be transferred or delivered to the Custodians by the Responsible Entity.

Finance

67. A Grower can fund their participation in the Project by:

- using their own funds;
- borrowing from Momentum or ABL Nominees, independent third party financiers not associated with AIL.
- borrowing from Almond Investors Finance Pty Ltd, a financier associated with AIL; or
- borrowing from Momentum, an independent third party financier not associated with AIL.

Terms Payment Agreements with AIL

68. Where the Responsible Entity agrees to accept payment of the Grower's Contribution in instalments, the Grower will enter into a Terms Payment Agreement.

69. The Grower may pay the Application Amount (the Grower's Contribution) for each Grower Allotment by 12 equal monthly instalments payable in arrears on the last day of each month with the first such instalment due on 15 July 2007 (clause 2.1(b)). The Responsible Entity of the Project may charge the Grower interest on overdue amounts (clause 3).

70. The Terms Payment Agreement also requires that, at the time of Application, the Grower pay a terms administration fee of \$50.00 for each Grower Allotment (clause 2.1(a)).

71. As security for the payment of amounts due to the Responsible Entity of the Project, the Grower charges in favour of the Responsible Entity of the Project all the Grower's present and future rights, title, interest, assets and undertakings in the Grower Project (clause 4).

Loans provided by Almond Investors Finance Pty Ltd

72. Almond Investors Finance Pty Ltd will provide loans to fund:

- the Grower's Contribution due in the First Financial Year on or before 15 June 2007 (this is referred to in the Loan Terms as the Initial Loan Amount); and/or
- Land and Assets rent under the Allotment Sublease Agreement in the Financial Years following the First Financial Years up to and including amounts payable in the Fifth Financial Year (these are referred to in the Loan Terms as the Further Loan Amounts).

73. The Loans offered will have:

- a maximum term of 10 years repayable by equal monthly interest and principal instalments; and
- the establishment fee (see below) may be added to the Loan amount.

74. **Note: Growers who enter into loans with Almond Investors Finance Pty Ltd that include any interest only period are not covered by this Product Ruling.**

75. Common features contained in all loans offered by Almond Investors Finance Pty Ltd are:

- the current indicative interest rate is 11.0%;
- all Loans are full recourse to the Grower and Almond Investors Finance Pty Ltd will pursue legal action against any defaulting borrowers;
- an Applicant incurs an establishment fee of \$250 plus 0.5% of the Borrowed Sum;
- interest is payable on the balance of the Loan Account monthly in arrears (clause 3);
- repayments are to be made in monthly instalments (clause 4);
- as security for the Secured Obligations, the Grower grants a fixed charge over the Charged Property to Almond Investors Finance Pty Ltd (clause 6);
- if the Grower Defaults, all amounts owing by the Grower under the agreement are immediately due and payable to Almond Investors Finance Pty Ltd on request (clause 7); and
- a third party Guarantor must unconditionally and irrevocably guarantee to pay Almond Investors Finance Pty Ltd all amounts due by the Grower to Almond Investors Finance Pty Ltd under the Loan Agreement (clause 9).

Loans provided by Momentum or ABL Nominees

(i) Loans to finance Management and Growing Fees in the Application Year (the Financial Year ended 30 June 2007)

76. The Loans offered are:

- maximum loan Terms of up to 10 years repayable by equal monthly interest and principal instalments;
- maximum loan Terms of up to 10 years with an initial interest only period, as follows:
 - 3 years of interest only payments followed by 7 years of principal and interest repayments;
 - 2 years of interest only payments followed by 8 years of principal and interest repayments; or
 - 1 year of interest only payments followed by 9 years of principal and interest repayments; and
- the application fee (see below) may be added to the Loan amount.

(ii) Loans to finance Ongoing Land and Asset rent (in Financial Years after the Financial Year ended 30 June 2007 up to and including amounts payable in the Financial Year ended 30 June 2011, the Fifth Financial Year)

77. The Loans offered are:

- maximum loan Terms of 10 years repayable by equal monthly interest and principal instalments; and
- the application fee (see below) may be added to the Loan.

78. Common features contained in both Loans are that:

- the current indicative interest rate is 11.25%;
- all Loans are full recourse to the Grower and Momentum will pursue legal action against any defaulting borrowers;
- the maximum Loan will be \$250,000 from Momentum;
- the maximum Loan will be \$1,000,000 from ABL Nominees;
- an Applicant incurs an application fee of \$250 plus 0.5% of the Borrowed Sum;
- interest is payable on the balance of the Loan Account Monthly in arrears (clause 3);
- repayments are to be made in monthly instalments (clause 4);

- as security for the Secured Obligations, the Grower grants a fixed charge over the Charged Property to Momentum or ABL Nominees (clause 6);
- if the Grower Defaults, all amounts owing by the Grower under the agreement are immediately due and payable to Momentum or ABL Nominees on request (clause 7); and
- a third party Guarantor must unconditionally and irrevocably guarantee to pay Momentum or ABL Nominees all amounts due by the Grower to Momentum or ABL Nominees under the Loan Agreement (clause 9).

79. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with Almond Investors Finance Pty Ltd or with Momentum or ABL Nominees that materially differs from that set out in the documentation provided to the Tax Office by AIL with the application for this Product Ruling and set out above. Finance arrangements with third party financiers other than Momentum are not covered by this Product Ruling.

80. Other than Growers who are subject to a Terms Payment Agreement, a Grower cannot rely on this Product Ruling if the full amount of the Grower's Contribution, including all loan monies, are not provided to AIL by the Grower or by the Grower's financier (either Momentum or ABL Nominees or Almond Investors Finance Pty Ltd) on the Grower's behalf, by 15 June 2007. Where an application is accepted subject to finance approval by any lending institution other than Almond Investors Finance Pty Ltd, Growers cannot rely on this Ruling if written evidence of that approval has not been given to AIL by the lending institution by 15 June 2007.

81. This Ruling 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' 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-arm's length;
- repayments of the principal and 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) back to the lender or any associate;
- 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 Almonds Investors Finance Pty Ltd are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

82. Subject to paragraph 8, and the specific exclusions set out in the Scheme part of this Product Ruling, 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.

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

84. 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

85. 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*.

86. 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

87. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides for a tax offset of 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

88. 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 in the income year in which that income is derived.

Deductions for Growing and Management Fees, Land and Assets Rent, Interest, borrowing costs and the Terms Payment Agreement administration fee

Section 8-1, section 25-25 and section 40-880

89. A Grower who is accepted to participate in the Project on or before 15 June 2007 and whose Grower's Contribution is paid in full on or before that date or who has executed a Terms Agreement on or before that date, may claim, on a per Allotment basis, tax deductions for the expenses set out in the Table below.

Fee Type	Year ended 30 June 2007	Year ended 30 June 2008	Year ended 30 June 2009
Growing and Management Fees	\$4,600 See Notes (i), (ii) and (iii)	\$1,350 See Notes (i), (ii) and (iii)	\$1,350 See Notes (i), (ii) and (iii)
Land and Assets Rent	Nil	\$1,050 See Notes (i), (ii) and (iii)	\$1,050 See Notes (i), (ii) and (iii)
Interest paid to Momentum or ABL Nominees or to Almond Investors Finance Pty Ltd	As incurred See Notes (i), (iii) and (iv)	As incurred See Notes (i), (iii) and (iv)	As incurred See Notes (i), (iii) and (iv)
Borrowing costs paid to Momentum or ABL Nominees or to Almond Investors Finance Pty Ltd	Must be calculated See Note (v)	Must be calculated See Note (v)	Must be calculated See Note (v)
Administration	Must be	Must be	Must be

Fee payable under a Terms Payment Agreement	calculated See Note (vi)	calculated See Note (vi)	calculated See Note (vi)
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Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoings would need to be adjusted as relevant for GST: Division 27.
- (ii) The Growing and Management Fees and the Land and Assets Rent are deductible in the year in which they are incurred.
- (iii) 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 paragraphs 122 and 123 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 sections 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.
- (iv) The deductibility of interest arising from agreements entered into with financiers other than Momentum or ABL Nominees or Almond Investors Finance Pty Ltd is outside the scope of this Ruling.
- (v) The Loan Application Fee payable to Momentum or ABL Nominees or the Loan Establishment Fee payable to Almond Investors Finance Pty Ltd is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. 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 Momentum or ABL Nominees or Almond Investors Finance Pty Ltd is outside the scope of this Ruling.
- (vi) The administration fee payable to AIL in respect of a Terms Payment Agreement is not deductible in full when it is incurred. Under section 40-880 it is deductible on a straight line basis over five income years (see paragraphs 120 and 121 of this Ruling).

Deductions for capital expenditure for Irrigation and the Almond Trees (non-STS taxpayers)***Division 40***

90. A Grower who is not an 'STS taxpayer' will be entitled to tax deductions relating to Irrigation and the establishment and decline in value of the almond Trees. All deductions shown in the following Table are determined under Division 40.

Fee Type	Year ended 30 June 2007	Year ended 30 June 2008	Year ended 30 June 2009
Irrigation Fee	\$900 See Notes (i) and (vii)	\$900 See Notes (i) and (vii)	\$900 See Notes (i) and (vii)
Establishment of the Almond Trees	See Notes (i) and (viii)	See Notes (i) and (viii)	See Notes (i) and (viii)

Notes:

- (vii) An irrigation system, dam or bore 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 for water facilities 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).
- (viii) Almond Trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold a Sublease 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). The Responsible Entity of the Project will notify the Grower when their almond Trees enter their first commercial season and the amount that may be claimed.

Deductions for capital expenditure for Irrigation and the Almond Trees (STS taxpayers)***Subdivision 328-D and Subdivisions 40-F and 40-G***

91. A Grower who is an 'STS taxpayer' will be also entitled to tax deductions relating to capital expenditure for water facilities (for example Irrigation) and for the almond trees. An 'STS taxpayer' may claim deductions in relation to water facilities under Subdivision 40-F. Alternatively, if the water facility is on a depreciating asset used to carry on the business, they may choose instead to claim deductions under Division 328. Deductions for the almond trees must be determined under Subdivision 40-F.

92. The deductions shown in the following Table assume, for representative purposes only, that a Grower has either chosen to or can only claim deductions for expenditure on water facilities under Subdivision 40-F and not under Division 328. If the expenditure has been incurred on depreciating assets and is claimed under Division 328, the deduction is determined as discussed in Note (viii).

93. Under Division 328, if the cost of a depreciating asset at the end of the income year is less than \$1,000 (a low-cost asset), it can be claimed as an immediate deduction when first used or installed ready for use. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to hold the asset and the income year in which it first uses the asset or has it installed ready for use to produce assessable income.

Fee Type	Year ended 30 June 2007	Year ended 30 June 2008	Year ended 30 June 2009
Irrigation Fee	\$900 See Notes (i) and (ix)	\$900 See Notes (i) and (ix)	\$900 See Notes (i) and (ix)
Establishment of the Almond Trees	See Notes (i), and (viii)	See Notes (i), and (viii)	See Notes (i), and (viii)

Notes:

- (ix) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. If the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-F. For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a depreciating asset. If the cost apportionable to that deemed depreciating asset is less than \$1,000, the deemed asset is treated as a low-cost asset and that

amount is deductible in full when the underlying asset is first used or held ready for use. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to hold the asset and the income year in which it first uses the asset or has it installed ready for use to produce assessable income. If the deemed asset is not treated as a low-cost asset, the tax deduction allowable in the year ended 30 June 2007 is determined by multiplying its cost by half the relevant STS pool rate. At the end of the year, it is allocated to the relevant STS pool and in subsequent years the full pool rate will apply. If the expenditure is not on a depreciating asset, or if they choose to use Subdivision 40-F, Growers must claim deductions 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 two years of income (section 40-540).

Units in the Asset Trust

Part 3-1 of the ITAA 1997 and Division 6 of Part III of the ITAA 1936

94. Growers or the nominees of Growers will acquire Units in the Asset Trust. The Units are CGT Assets (section 108-5) and the amounts payable for Units in the Asset Trust upon subscription constitute an outgoing of capital and are not allowable as a deduction.

95. The amount paid for each Unit will represent the first element of the cost base of the units (subsection 110-25(2)). Any disposal of the Units by the Unit Holder will be a CGT Event and may give rise to a capital gain or loss.

96. Income distributions by the Asset Trust are included in the assessable income of a Grower who is an Orchard Asset Owner in accordance with Division 6 of Part III of the ITAA 1936.

Division 35 – deferral of losses from non-commercial business activities

Section 35-55 – exercise of Commissioner's discretion

97. A Grower who is an individual accepted into the Project by 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 each Grower 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.

Prepayment provisions and anti-avoidance provisions***Sections 82KZME, 82KZMF and 82KL and Part IVA***

98. For a Grower who participates in the Project and incurs expenditure as required by the Allotment Management Agreement and the Allotment Sublease 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 and 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.

Commissioner of Taxation18 October 2006

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?

99. For the amounts set out in the Tables above to constitute allowable deductions the Grower's horticultural activities as a participant in the AIL Almond Growers Project – Swan Hill must amount to the carrying on of a business of primary production.

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

101. For schemes such as that of the AIL Almond Growers Project – Swan Hill, 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 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.

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

- the Grower has an identifiable interest (by lease) or rights over (by licence) 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.

103. In this Project, each Grower enters into an Allotment Sublease Agreement and an Allotment Management Agreement.

104. Under the Allotment Sublease Agreement each individual Grower will have rights over one or more specific and identifiable areas of land, each known as an Allotment. The Allotment Sublease provides the Grower with an ongoing interest in the specific trees on the subleased area for the term of the Project. Under the Allotment Sublease the Grower must use the land in question for the purpose of growing, maintaining and harvesting almond Trees and for no other purpose. The Allotment Sublease allows the Responsible Entity of the Project to come onto the land to carry out its obligations under the Allotment Management Agreement.

105. Under the Allotment Management Agreement the Responsible Entity of the Project is engaged by the Grower to manage and maintain the Grower's Allotment during the term of the Project. The Responsible Entity of the Project will subcontract the management services to RMONPRO Developments Pty Ltd under the Orchard Management Agreement.

106. The Grower engages the Responsible Entity of the Project to maintain the Trees on the Grower's Allotment according to principles of sound horticulture practice. The Responsible Entity of the Project is also engaged to harvest and sell, on the Grower's behalf, the almonds grown on the Grower's Allotment.

107. 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.

108. 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, that is, a profit in cash terms that does not depend in its calculation on the fees on question being allowed as a deduction.

109. The pooling of almonds from the Trees grown on the Grower's Allotment with the almonds of other Growers is consistent with general horticultural practices. Each grower's proportionate share of the sale of proceeds will reflect the proportion of the almonds contributed from the Grower's Allotment.

110. The services to be provided by RMONPRO Developments Pty Ltd are also consistent with general horticultural practices. They are of the type ordinarily found in carrying on a business of cultivating almond Trees and harvesting almonds for processing and sale. While the size of a Grower's Allotment is relatively small, it is of a size and scale to allow it to be commercially viable (see Taxation Ruling IT 360).

111. The Grower's degree of control over the Responsible Entity of the Project as evidenced by the Constitution of the Project and Allotment Management Agreement and supplemented by the *Corporations Act 2001* is sufficient. During the term of the Project, the Responsible Entity of the Project is required to 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 of the Project in certain instances, such as cases of default or neglect.

112. The horticultural 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 Grower's horticultural activities in the AIL Almond Grower Project – Swan Hill will constitute the carrying on of a business.

The Simplified Tax System

Division 328

113. 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.

114. Changes to the STS rules apply from 1 July 2005. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). 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 the Growing and Management Fees and the Land and Assets Rent

Section 8-1

115. Consideration of whether the Growing and Management Fees and Land and Assets Rent 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.

116. The fees for Growing and Management Fees and Land and Assets Rent associated with the horticultural 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 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) Growers who use Almond Investors Finance Pty Ltd or Momentum or ABL Nominees as the finance provider

117. Some Growers may finance their participation in the Project through a loan facility with Almond Investors Finance Pty Ltd or Momentum or ABL Nominees. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of fees for Growing and Management Fees and Land and Assets Rent under the Allotment Sublease Agreement and Allotment Management Agreement.

118. The interest incurred will be in respect of a loan to finance the Grower's business operations – the cultivation and growing of trees 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. In the absence of any application of the prepayment provisions (see paragraph 122 of this Ruling) interest is deductible in the income year in which it is incurred.

(ii) Growers who DO NOT use Almond Investors Finance Pty Ltd or Momentum or ABL Nominees as the finance provider

119. 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 Almond Investors Finance Pty Ltd or Momentum or ABL Nominees 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.

Administration Fee payable under the Terms Payment Agreement

Section 40-880

120. Growers who elect to pay their Grower's contribution under the Terms Payment Agreement must pay an administration fee of \$50. This expenditure does not constitute a borrowing expense and is therefore not deductible under section 25-25. As it is capital in nature it is also not deductible under section 8-1.

121. However, section 40-880 will allow the Application Fee to be deducted on a straight line basis over five income years. Section 40-880 applies to capital expenditure that is incurred in relation to a business and which is not taken into account elsewhere or denied deductibility under another provision of income tax law.

Prepayment provisions

Sections 82KZL to 82KZMF

122. 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 growing and 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 income year, then it is not expenditure to which the prepayment rules apply.

123. For this Project, only section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 are relevant. These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

Application of the prepayment provisions to this Project***Sections 82KZME and 82KZMF***

124. Under the Scheme to which this Product Ruling applies Growing and Management Fees and Land and Assets Rent are incurred annually and interest payable to Momentum or ABL Nominees or Almond Investors Finance Pty Ltd is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this Scheme.

125. 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 Allotment Management and/or Allotment Sublease Agreements, or prepays interest under a loan agreement (including loan agreements with lenders other than Momentum or ABL Nominees or Almond Investors Finance Pty Ltd). 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.

126. 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***

127. 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 Irrigation system and the establishment of the Almond Trees is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328.

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

129. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 90 to 93 of this Ruling.

Division 35 – deferral of losses from non-commercial business activities

Section 35-55 – exercise of Commissioner’s discretion

130. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income year ending **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; and
- 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.

131. Therefore, 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.

132. 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

133. 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 of the ITAA 1936. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA – general tax avoidance provisions

134. 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).

135. The AIL Almond Grower Project – Swan Hill 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 89 to 93 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.

136. 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) 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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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/11; TR 98/22; TR 2000/8;
TR 2001/14; TR 2002/6;
TR 2002/11; IT 360

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- carrying on a business
- commencement of business
- fee expenses
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- non-commercial business activities
- primary production
- primary production expenses
- producing assessable income
- product rulings
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- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
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NO: 2006/16498
ISSN: 1441-1172
ATOlaw topic: Income Tax ~~ Product ~~ crops - other