PR 2006/24 - Income tax: RFM Almond Fund 2006 - Early Growers Pre 16 June 2006

Product Ruling

Income tax: RFM Almond Fund 2006 – Early Growers Pre 16 June 2006

Contents Para

This Ruling 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 'taxation 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 this scheme is referred to as the 'RFM Almond Fund 2006 – Early Growers Pre 16 June 2006' or simply as 'the Project'.

Relevant taxation provision(s)

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

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 17-5 of the ITAA 1997;
- 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 70 of the ITAA 1997;
- Part 3-1 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.

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. 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 (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling, these 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 arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it;
- entities who are accepted to participate in the Project after 15 June 2006; and
- entities who finance their participation in the project through loans with Gateway Momentum Funding Trust No. 1 (Momentum) other than those described at paragraphs 49 to 51 of this Product Ruling.

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 15 to 53.

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.

Date of effect

12. This Ruling applies prospectively from 29 March 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 (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

13. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not commenced and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

14. This Product Ruling is withdrawn and ceases to have effect after 30 June 2009. The Ruling continues to apply, in respect of the tax laws ruled upon, to all entities within the specified class who enter into the arrangement specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, who entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entity's involvement in the scheme.

Scheme

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

- Application for a Product Ruling dated 7 October 2005 as constituted by documents provided on 7 October 2005, 2 November 2005 and additional correspondence and documents dated 12 December 2005, 18 January 2006, 2 February 2006, 19 February 2006, 22 February 2006, 7 March 2007, 10 March 2006 and 14 March 2006;
- Draft **Product Disclosure Statement** for The RFM Almond Project 2006, received on 10 March 2006;
- Draft **Constitution** of the RFM Almond Fund 2006, received on 31 January 2006;
- Constitution of RFM Riverbank dated 11 February 2005;
- Draft **Farm Management Agreement** between Rural Funds Management Ltd ('the Responsible Entity ') as Manager, Rural Funds Management Ltd (the Responsible Entity) as Licensor and the Grower, received on 10 March 2006;
- Draft **Licence to Occupy Agreement** between Rural Funds Management Ltd (the Responsible Entity) as Licensor, Rural Funds Management Ltd (the Responsible Entity) and the Grower, received on 8 March 2006;
- Draft Compliance Plan for the RFM Almond Fund 2006, received on 19 February 2006;
- Custodian Agreement between Australian Executor Trustees Limited and Rural Funds Management Ltd (the Responsible Entity), received on 30 January 2006;

- Memorandum of Understanding between Lachlan Farming Ltd and Australian Executor Trustees Ltd as custodian of the RFM Riverbank Fund, received on 7 October 2005;
- Draft Special Conditions To The Contract For Sale Of Land, received on 18 January 2006;
- Lease Agreement between Australian Executor Trustees Ltd as custodian of the RFM Riverbank and Rural Funds Management Limited as Responsible Entity of the RFM Almond Fund 2006, received on 10 March 2006;
- Lease Agreement between Lachlan Farming Limited and Australian Executor Trustees Limited as Custodian of RFM Riverbank, received on 2 February 2006;
- Deed of Option Number 1, 2 and 3 between Lachlan Farming Limited and Australian Executor Trustees Limited Custodian of RFM Riverbank, received on 18 January 2006;
- Crop Supply Agreement between Rural Funds Management Ltd and Almondco Australia Ltd, received on 7 October 2005; and
- Gateway Momentum Funding Trust No. 1 (Momentum) Finance Agreement, which includes the **Finance Application Form and Terms of Loan Agreement**, received on 30 January 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.

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

17. 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

18. The main features of the RFM Almond 2006 Project are as follows:

Location	Hillston, New South Wales
Type of business to be carried on by each participant	Commercial growing, cultivation and harvesting almonds for sale.
Number of hectares offered for cultivation	Up to 550 hectares with a capacity for oversubscription.
Size of each interest	0.25 hectares
Minimum allocation	One 'Grove'
Minimum subscription	600 'Groves'
Number of trees per hectare	290
Term of the Project	20 Years
Initial cost per Grove	$9,750
Other ongoing costs	Annual 'Management Fees' Annual 'Licence Fees' Annual 'Operating Costs'

19. The Project has been registered as a Managed Investment Scheme under the *Corporations Act 2001*. Rural Funds Management Limited ('RFM') has been issued with an Australian Financial Services Licence and will be the Responsible Entity for the Project. An offer to participate in the Project will be made through a Product Disclosure Statement ('PDS'). The offer under the PDS is for 550 hectares in the Project, with capacity for oversubscription. Participants will be invited to subscribe for at least one Grove comprising of 0.25 hectares per Grove.

20. Applications to participate in the Project must be made on the application form shown in the PDS. RFM will issue Grove licences when a minimum subscription of 600 groves has been received. A Custodian will be appointed under the Custody Agreement to protect the interests of the Growers in their dealings with RFM.

21. For Growers, who are accepted as Growers in the Project, RFM will allocate Groves, place their details in a Register and enter into Agreements in relation to the Groves allocated to the Grower with RFM and its associates.

22. Under the Product Disclosure Statement offer, Growers can enter the Project during the period from the date of this Ruling to 15 June 2006 or during the period 1 July 2006 to 15 June 2007. No applications will be accepted into the Project between 16 June 2006 and 30 June 2006 and after 15 June 2007. **This Product Ruling applies to Growers who enter the Project during the period 29 March 2006 and 15 June 2006. Growers accepted between 1 July 2006 and 15 June 2007 may be covered by Product Ruling PR 2006/25.**

23. The Project land on which the Participant Growers will be growing and cultivating Almond trees for the production of Almonds is on a property known as Brooklyn which is situated near Hillston, in New South Wales. RFM will enter into a Lease Agreement with the Land Owner for the Land and Water Licences.

24. RFM will grant Growers a Licence to Occupy to use and occupy one or more identifiable Groves of 0.25 hectares each, for the term of the Project.

25. A Grower will also enter into a Farm Management Agreement with RFM to cultivate and maintain the Almond Trees and be responsible for harvesting, the processing of and selling the Grower's Almonds.

Constitution

26. The RFM Almond Fund 2006 Constitution establishes the Project and operates as a deed binding on the Project's Growers and the Manager. Upon entering into a Farm Management Agreement, Growers become bound by the provision of the RFM Almond Fund 2006 Constitution. The Manager, Rural Fund Management Ltd, is the Responsible Entity for the Project and will have the primary responsibility for managing the project, ensuring compliance with the Corporations Law, the Scheme Constitution and the Farm Management Agreement.

27. In summary, the Constitution sets out procedures for dealing with:

- application for Interests (clause 3);
- the Application Moneys (clause 3 and 5);
- the issue of Certificates relating to those Interests (clause 4);
- preparation and execution of the Scheme Agreements and the preparation of a Grove Plan (clause 6);
- responsibilities, powers and duties of the Manager and its Employees and Officers (clause 7 and 8);
- collection and distribution of income of the scheme (clause 12);

- the establishment and maintenance of a Growers Register and the right of Growers or their representative to inspect and copy the Register of Growers (clause 17);
- termination of the Scheme and procedures for calling and holding meetings of Growers (clauses 13 and clauses 18 to 23); and
- the right of Growers to remove the Manager and the consequence of that removal (clauses 27 and 28).

Compliance Plan

28. As required by the *Corporations Act 2001,* a Compliance Plan has been adopted by RFM for the Project. The purpose of the Compliance Plan is to ensure that RFM manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

Head Lease Agreement

29. The Project will be conducted on land that is part of a property called Brooklyn. Initially the land for the Project will be leased by Lachlan Farming Limited (Lessor) the owner of the land to Australian Executor Trustees Limited as Custodian of RFM Riverbank (Lessee). In addition, the Lease gives RFM Riverbank the right to use a portion of Lachlan Farming Limited's bore water allocations for the term of the Lease.

30. When certain conditions attached to the contract for sale of the land and water are met Australian Executor Trustees Limited, as custodian of RFM Riverbank will acquire the land and water and will be granted an Easement by the Vendor over bores and delivery infrastructure. The Vendor and the Purchaser as part of the contract for sale of the land will also enter into a Joint Water Authority to assure each party has sufficient access to water infrastructure to enable their farming operations to continue.

31. Once the conditions have been met and the land has been transferred to Australian Executor Trustee Limited, as custodian of RFM Riverbank the lease between Lachlan Farming Ltd and Australian Executor Trustees Ltd as custodian of RFM Riverbank Fund will be extinguished.

Sublease Agreement

32. Australian Executor Trustee Limited as custodian of RFM Riverbank Fund (Lessor) will lease the land to Rural Funds Management Ltd (Lessee) as Responsible Entity of the RFM Almond Fund 2006.

33. The Lessor under the Lease Agreement must perform at its own cost the following services:

- ground preparation for 2200 Groves to be completed by 17 March 2006;
- cause the installation of the irrigation system in accordance with industry best practice, sufficient to irrigate an area of planted Trees equal to 0.25 hectares for every Licence issued by the Lessee;
- cause the planting and establishment of the Trees in accordance with industry best practice on the land being at least 70 Trees per 0.25 hectares of land for every Licence issued by the Lessee;
- minimum of 70 Trees per Grove will be planted for every licence issued by the Lessee immediately after the initial subscription of 600 Groves has been received and before 30 June 2006;
- lessor following execution of the lease must replace any trees on the land that fail or otherwise die up until 30 June 2007; and
- lessor's obligation to replace the Trees is considered to be satisfied in full upon the replacement of trees equal to 2% of the total number of Trees.

34. The Lease will be executed once the Almond Fund reaches minimum subscription and shall continue until 30 June 2026, a term of approximately 20 years.

35. The Lease gives RFM, as Responsible Entity of the Almond Fund, the right to occupy and cultivate the land, grants the full benefit of all water entitlements, and confers the full benefit of any infrastructure on the land. It also imposes the obligation on the Responsible Entity to maintain the land in a good and proper state, and to make annual rent payments to the Lessor. The approval of the Lessor is not required for the Responsible Entity to grant a licence over part of the land for the purpose of growing almonds.

Licence to Occupy Agreement

36. Each Grower enters into a Licence to Occupy Agreement ('the Agreement') with RFM who is the Responsible Entity and the Licensor of the Land. The Licence to Occupy Agreement between the Grower and RFM is until 30 June 2026 (clause 3.3). Under the Agreement, RFM grants the Grower a licence to occupy a Grove on the Land for the purpose of conducting the Grower's Business (clause 5.1). The Growers Business is defined as cultivating, harvesting, marketing and sale of almonds.

37. Each Grove is 0.25 hectare in size and will have 70 almond trees planted on it (clause 3 and Schedule 1). Each Grove will constitute a distinct area of Land which will be identified by the licensor on a Plan maintained for that purpose (clauses 4.2 and 4.3).

38. The licence also provides the Grower with a right to use any dam or irrigation system on the Land, any road or track on the Land for the purpose of access to the Grove and any other agricultural infrastructure located on the land (clause 3.4).

39. A Grower who enters in the 2005-06 income year is not required to pay a Licence Fee for the 2005-06 income year. The Grower will be required to pay an annual Licence Fee for each year of the Agreement commencing in the 2006-07 income year. The Licence Fee for the 2006-07 income year and the 2007-08 income year is incorporated in the Management Fee (clause 8). From the 2008-09 income year onwards, the annual fee will be the Grower's proportionate share of the overall Lease Payment payable by RFM to the Landowner in accordance with the formula in clause 8.3.

40. In summary, the Licence to Occupy also sets out provisions relating to:

- a requirement that the 'Grower' enters into a Management Agreement (clause 3.2);
- licensor will use its best endeavours to maintain any access roads or tracks on the Land in good repair;
- licensor will obtain and maintain throughout the term of this Licence all necessary permits, licences and consents necessary for the conduct of the Grower's Business on the land;
- growers are not entitled to assign the licence, except as set out in the Scheme Constitution (clause 10);
- the Agreement may be terminated prior to 30 June 2026, where either party defaults or does not fulfil its obligations (clause 11); and
- upon termination of the Agreement, Growers are not required to remove the trees or restore the Allotment to its original condition (clause 11.4).

Farm Management Agreement

41. Growers contract under the Farm Management Agreement with RFM the Responsible Entity to carry out management services in relation to the conduct of the Grower's Business on the Land consistent with responsible agricultural practice.

42. The Farm Management Agreement will terminate on 30 June 2026 being the time of termination of the Licence to Occupy.

43. Throughout the term of the Farm Management Agreement, the Responsible Entity agrees to do all things necessary to manage the Grower's Grove. These duties include, but are not limited to:

- tend to the Trees in the Grove in a proper and workmanlike manner;
- use its best endeavours to minimise soil erosion and maintain soil quality on each Almond Farm;
- use its best endeavours to keep each Almond Farm Tree free from vermin and vegetation;
- use its best endeavours to keep the trees free from insects and diseases, which might damage or inhibit the growth of the trees;
- use its best endeavours to destroy, abandon or leave to rot any Trees which a reasonable agriculturalist would destroy, abandon or leave to rot;
- subject to any requirement of any other party to replace trees which fail to grow, the Responsible Entity will replace any trees which otherwise fail to grow or mature during the period from the date of this agreement until 30 June 2021;
- maintenance and cultivation of the Almond Trees including growing, watering, weeding, selecting, procuring and applying appropriate fertilisers, nutrients and herbicides;
- harvest the trees and process the Almonds on each Almond farm in such manner and at such time as will maximise the yield from the trees;
- market and sell the almond (including the almonds harvested from the Grove) in such manner to achieve the maximum reasonable price therefore, and account to the Grower for the net proceeds thereof; and
- diligently carry out quality control and other reasonable practice procedures to ensure the production of high quality Almonds.

44. The Manager will pool for sale Almonds produced from the Grower's Business with that of each other Grower and market and sell the Almonds. The proceeds of the sale of all almonds will be paid into the RFM Almond Fund 2006 Scheme Accounts by the Manager. The Sale Proceeds will be distributed to the Growers in accordance with the terms of the Constitution. In certain circumstances if the Growers contribution to the Almond pool for that particular harvest is reduced the Grower's Sale Proceeds may be reduced.

45. The Manager will establish and maintain a Grower's Account for each Grower, which will specify the amount of Sale Proceeds attributable to that Grower, and the amount of fees and costs deducted from the Grower's account in accordance with the terms of this Agreement.

Crop Supply Agreement

46. RFM the Responsible Entity for the Project has entered into a 20 year agreement with Almondco Australia Limited ('Almondco') for the marketing and sale of Almonds supplied by RFM. Subject to the almonds produced being of a suitable condition, Almondco has agreed to market and sell all available almonds supplied by RFM.

Grower Fees

47. Growers will pay the annual management fees and charges per Grove, set out in clause 12 and Schedule 2 of the Farm Management Agreement, and the annual licence fees, set out in clause 8 of the Licence to Occupy Agreement. These fees are as follows:

- for the Management Services to be provided in the period from the commencement date of the Farm Management Agreement to 30 June 2006, $9,750 is payable on Application;
- for the Management Services to be provided and Licence Fee for the period from 1 July 2006 to 30 June 2007, $2,100 is payable on 31 October 2006;
- for the Management Services to be provided and Licence Fee for the period from 1 July 2007 to 30 June 2008, $2,100 is payable on 31 October 2007;
- for the Management Services and all other services in the period from 1 July 2008 to 30 June 2009, $195 is payable on 31 October 2008;
- on 31 October of each subsequent Financial Year during the Term an amount equal to the Management Fee payable on the immediately preceding 31 October, indexed at 2.5% per annum;
- grower's percentage of the Costs and Expenses incurred in tending the 'Grove' will be invoiced by 30 June of each financial year, commencing in the 2009 financial year; and
- for each Financial Year, commencing from the Financial Year ending 30 June 2009 a Licence Fee is payable by 31 October of that Financial Year.

Units in RFM Riverbank

48. A Grower may also purchase units in RFM Riverbank (Riverbank), which will acquire and hold the land, water, almond trees, and irrigation infrastructure used by Growers in their business. The Constitution of RFM Riverbank establishes the Trust and operates as a deed under which the Manager holds assets on trust for the unit holders. The purchase of units in Riverbank by Growers who enter the RFM Almond Fund 2006 is optional.

Finance

49. Growers can fund their involvement in RFM Almond Fund 2006 themselves, borrow from Gateway Momentum Funding Trust No. 1 (Momentum) a financier RFM has an arrangement with to provide finance or borrow from an independent lender.

50. Gateway Momentum Funding Trust No. 1 (Momentum) provides finance to Growers under the following finance arrangement. Four types of loans will be offered to potential participants in the project. Four loan terms available are:

- 3 years principle and interest;
- 5 years principle and interest;
- 2 years interest only followed by 5 years principle and interest; or
- 3 years interest only followed by 7 years principle and interest.

51. A Loan Establishment Fee of $250 plus stamp duty will comprise part of the total loan amount.

52. Growers cannot rely on this Product Ruling if a different finance arrangement, to that described in this Ruling is entered into with Gateway Momentum Funding Trust No. 1 (Momentum) or if application monies otherwise remain unpaid by 30 June in the year of application. Where an application is accepted subject to finance approval by any lending institution, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by 30 June.

53. 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' 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-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Gateway Momentum Funding Trust No. 1 (Momentum), are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

54. Subject to paragraph 8, this Ruling applies only to Growers who are accepted to participate in the Project on or before 15 June 2006 and who have executed a Farm Management Agreement and a Licence to Occupy Agreement on or before that date. The Grower's participation in the Project must constitute the carrying on of a business of primary production.

Minimum subscription

55. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of the Product Disclosure Statement, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 600 interests is achieved.

The Simplified Tax System (STS)

Division 328

56. 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*.

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

Qualification

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

25% entrepreneurs tax offset

Subdivision 61-J

59. 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

60. 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.

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

Trading stock

Section 70-35

62. A Grower who is not an 'STS taxpayer' may, in some years, hold almonds that will constitute trading stock on hand. Where, in an income year, the value of trading stock on hand at the end of an income year exceeds the value of trading stock on hand at the start of an income year a Grower must include the amount of that excess in assessable income.

63. Alternatively , where the value of trading stock on hand at the start of an income year exceeds the value of trading stock on hand at the end of an income year, a Grower may claim the amount of that excess as an allowable deduction.

Section 328-285

64. A Grower who is an 'STS taxpayer' may, in some years, hold almonds that will constitute trading stock on hand. Where, for such a Grower, for an income year, the difference between the value of all their trading stock at the start and a reasonable estimate of it at the end, is less than $5,000, they do not have to account for that difference under the ordinary trading stock rules in Division 70 (subsection 328-285(1)).

65. Alternatively, a Grower who is an 'STS taxpayer' may instead choose to account for trading stock in an income year under the provisions of Division 70 (subsection 328-285(2)).

Deductions for Initial Management Fees, Licence Fees, Interest & Borrowing Costs

Sections 8-1 & 25-25

66. A Grower may claim tax deductions under section 8-1 of the ITAA 1997, for the revenue expenses in the Table below.

Fee Type	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Initial Management Fees	$9,750 See Notes (i), (ii) & (iii)	$1,433 See Notes (i), (ii) & (iii)	$1,285 See Notes (i), (ii) & (iii)
Licence Fees	Nil	$667 See Notes (i), (ii) & (iii)	$815 See Notes (i), (ii) & (iii)
Interest on loans with Gateway Momentum Funding Trust No. 1 (Momentum)	As incurred See Notes (iii) & (iv)	As incurred See Notes (iii) & (iv)	As incurred See Notes (iii) & (iv)

Loan Application Fee for loans with Gateway Momentum Funding Trust No. 1 (Momentum)	Must be calculated See Note (v)	Must be calculated See Note (v)	Must be calculated See Note (v)

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 Initial Management Fees and Licence Fees shown in the Farm Management Agreement are deductible under section 8-1 in the year that they are incurred.

(iii) This Ruling does not apply to Growers who choose to prepay Management Fees or Licence Fees or who choose, or who are required to prepay interest under a loan agreement (see paragraphs 95 to 98). 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 or otherwise of interest arising from loan agreements entered into with financiers other than Gateway Momentum Funding Trust No. 1 (Momentum), the preferred financier, is outside the scope of this Ruling. A Grower who borrows from a lender other than Gateway Momentum Funding Trust No. 1 (Momentum) may request a private binding ruling on the taxation consequences of their participation in the Project.

(v) The Loan Application Fee payable to Gateway Momentum Funding Trust No. 1 (Momentum) 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 Gateway Momentum Funding Trust No. 1 (Momentum) is outside the scope of this Ruling.

Deductions for capital expenditure

Division 40

67. Each Grower will also be entitled to tax deductions relating to the Almond Trees planted on the Grove.

Fee Type	ITAA 1997 Section	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Establishment of horticultural plant Almond Trees	40-515	Nil See Note (vi)	Nil See Note (vi)	Nil See Note (vi)

Notes:

(vi) Almond Trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a licence, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the Almond trees is determined using the formula in section 40-545 and is based on the capital expenditure of $689 incurred that is attributable to their establishment. If the almond trees have an 'effective life' of 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 Project Manager will inform Growers of when the almond trees enter their first commercial season.

Units in RFM Riverbank

68. The units in Riverbank are CGT Assets (section 108-5) and the amounts payable by the investor are outgoings of a capital nature and not allowable as a deduction.

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

70. Income distributions by RFM Riverbank are included in the assessable income of a Grower who is a Unit holder, in accordance with Division 6 of Part III of the ITAA 1936.

71. The deductibility of expenses which may be incurred by unitholders is beyond the scope of this Ruling.

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

Section 35-55 – exercise of Commissioner's discretion

72. A Grower who is an individual accepted into the Project by 15 June 2006 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 2006 to 30 June 2011**. 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

73. For a Grower who participates in the Project and incurs expenditure as required by the Farm Management Agreement and the Licence to Occupy 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 (but see paragraphs 95 to 98);
- 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 Taxation
29 March 2006

Appendix 1 – Explanation

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?

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

75. 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.

76. For schemes such as that of the RFM Almond Fund 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 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.

77. 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 Almond Trees are established;
- the Grower has a right to harvest and sell the 'Almonds' from those Almond 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.

78. In this Project, each Grower enters into a Farm Management Agreement and a Licence to Occupy Agreement.

79. Under the Licence to Occupy Agreement each individual Grower will have rights over a specific and identifiable area of 0.25 hectares of land. The Licence to Occupy Agreement provides the Grower with an ongoing interest in the specific trees on the licensed area for the term of the Project. Under the licence the Grower must use the land in question for the purpose of carrying out horticulture activities, and for no other purpose. The licence allows the Manager to come onto to the land to carry out its obligations under the Farm Management Agreement.

80. Under the Farm Management Agreement, the Manager is engaged by the Grower to establish and maintain a grove on the Grower's identifiable area of land during the term of the Project. The Manager has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to maintain the grove on the Grower's behalf.

81. The Manager is also engaged to harvest and sell, on the Grower's behalf, the almonds grown on the Grower's grove.

82. 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.

83. 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 in question being allowed as a deduction.

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

85. The Manager'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 a grove is relatively small, it is of a size and scale to allow it to be commercially viable.

86. The Grower's degree of control over the Manager as evidenced by the Farm Management Agreement, 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 grove 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.

87. 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 RFM Almond Fund 2006 will constitute the carrying on of a business.

The Simplified Tax System

Division 328

88. 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.

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

Deductibility of Management Fees and Licence Fees

Section 8-1

90. Consideration of whether the initial 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.

91. The 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 almonds is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. There is no capital component of the 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) Growers who use Gateway Momentum Funding Trust No. 1 (Momentum) as the finance provider

92. Some Growers may finance their participation in the Project through a loan facility with Gateway Momentum Funding Trust No. 1 (Momentum). Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of management fees and licence fees.

93. The interest incurred for the year ended 30 June 2006 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) Growers who DO NOT use Gateway Momentum Funding Trust No. 1 (Momentum) as the finance provider

94. 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 Gateway Momentum Funding Trust No. 1 (Momentum) 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 82KZL to 82KZMF

95. 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

96. Under the Arrangement to which this Product Ruling applies Management and Licence Fees are incurred annually and interest payable to Gateway Momentum Funding Trust No. 1 (Momentum) is incurred monthly. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this Arrangement.

97. 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 Farm Management Agreement and the Licence to Occupy Agreement or prepays interest under a loan agreement (including loan agreements with lenders other than Gateway Momentum Funding Trust No. 1 (Momentum)). 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.

98. 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

99. 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.

100. The tax treatment of capital expenditure has been dealt with in a representative way in paragraph 67 in the Table and accompanying notes.

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

Section 35-55 – exercise of Commissioner's discretion

101. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2006 to 30 June 2011** 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 2006 up to and including 30 June 2011:

- 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.

102. 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

103. 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.

Part IVA – general tax avoidance provisions

104. 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).

105. The RFM Almond Fund 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 66 to 67 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.

106. 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.

Appendix 2 – Detailed contents list

107. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

PR 2006/25; TD 93/34;
TR 92/20; TR 97/11; TR 98/22;
TR 2000/8; TR 2001/14

Subject references:

- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- tax avoidance
- 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 82KZL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt III Div 6
- 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 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
- ITAA 1997 40-515(1)(b)
- ITAA 1997 40-520(2)
- ITAA 1997 40-525(2)
- ITAA 1997 40-530
- ITAA 1997 40-545
- ITAA 1997 Subdiv 61-J
- ITAA 1997 Div 70
- ITAA 1997 70-35
- ITAA 1997 Pt 3-1
- ITAA 1997 108-5
- ITAA 1997 110-25(2)
- ITAA 1997 Div 328
- ITAA 1997 328-285
- ITAA 1997 328-285(1)
- ITAA 1997 328-285(2)
- ITAA 1997 Subdiv 328-F
- ITAA 1997 Subdiv 328-G
- IT(TP)A 1997 Div 328
- IT(TP)A 1997 328-120
- IT(TP)A 1997 328-125
- TAA 1953
- Copyright Act 1968
- Corporations Act 2001

Case references:

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

ATO references

NO: 2005/10872
ISSN: 1441-1172
ATOlaw topic: Income Tax ~~ Product ~~ crops - other