

PR 2006/55 - Income tax: 2006 Timbercorp Olive Project - Early Growers (to 15 June 2006)

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *26 April 2006*



Product Ruling

Income tax: 2006 Timbercorp Olive Project – Early Growers (to 15 June 2006)

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ⓘ 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 relevant 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 '2006 Timbercorp Olive Project' or simply as 'the Project'.

Relevant taxation provision(s)

2. The relevant taxation provisions dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 17-5 of the ITAA 1997;
- section 25-25 of the ITAA 1997;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Division 40 of the ITAA 1997;
- Subdivision 61-J of the ITAA 1997;
- Division 328 of the ITAA 1997;
- Division 328 of the *Income Tax (Transitional Provisions) Act 1997*;
- section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- sections 82KZME and 82KZMF of the ITAA 1936; and
- Part IVA of the ITAA 1936.

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

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 consists of the entities more specifically identified in the Ruling part of this Product Ruling 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:

- entities who intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- entities who participate in the Project through offers made other than through the Product Disclosure Statement;
- entities who are accepted to participate in the Project after 15 June 2006;
- entities who finance their participation in the Project through loans with Timbercorp Finance Pty Ltd other than those described at paragraphs 61 to 64 of this Product Ruling; and
- Timbercorp Securities Limited and its associates.

Qualifications

9. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out, is carried out in accordance with the scheme described at paragraphs 17 to 67.

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 26 April 2006, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

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

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

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

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

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

Withdrawal

16. This Product Ruling is withdrawn and ceases to have effect after 30 June 2008. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all entities within the specified class who enter into the scheme 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

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

- Application for a Product Ruling received on 16 December 2005 and additional correspondence and emails dated 3, 10, 27 and 31 January 2006, 23 February 2006, 1, 17, 23 and 29 March 2006, 6, 10 and 11 April 2006;
- Draft Product Disclosure Statement for the 2006 Timbercorp Olive Project ('PDS'), received on 16 December 2005, prepared for Timbercorp Securities Limited ('TSL'), ('the Responsible Entity');
- The **Constitution** of the 2006 Timbercorp Olive Project, received on 16 December 2005;
- Draft Compliance Plan of the 2006 Timbercorp Olive Project, received on 16 December 2005;
- Draft **Grovelot Management Agreement** between each 'Participant Grower' and TSL undated, received on 16 December 2005;
- Draft Management Plan, received on 16 December 2005;
- Draft Management Agreement between TSL and Olivecorp Management Ltd ('OML'), received on 16 December 2005;

- Draft Olive Grove Management Agreement for the 2006 Timbercorp Olive Project between OML, Boundary Bend Estate Management Pty Ltd ('BBEM'), TSL, and B.B. Olives Pty Ltd (Land Owner), received on 16 December 2005;
- Draft Capital Works Agreement for the 2006 Timbercorp Olive Project between the Land Owner, BBEM and Boundary Bend Ltd (BBL), received on 16 December 2005;
- Draft **Sub-Lease** between each Participant Grower, the Land Owner and TSL, received on 16 December 2005;
- Draft Lease between the Land Owner and TSL in relation to that part of the Project land known as 'Kooloonong' on which Grove 58 has been established ('Grove 58 – Kooloonong Head Lease'), received on 16 December 2005;
- Draft Lease between the Land Owner and TSL in relation to that part of the Project land known as 'Kooloonong' on which Grove 452 has been established ('Grove 452 – Kooloonong Head Lease'), received on 16 December 2005;
- Draft Lease between the Land Owner and TSL in relation to that part of the Project land known as 'Anderson' on which Grove 200 has been established ('Grove 200 – Kooloonong Head Lease'), received on 16 December 2005;
- Draft Custody Agreement between TSL and the Trust Company of Australia Limited ('the Custodian'), received on 16 December 2005;
- Draft Distribution Agreement between Boundary Bend Marketing Pty Ltd (BBM), BBL, TSL and OML, received 16 December 2005; and
- 2006 Timbercorp Projects Finance Package, which includes the **Loan Application Form**, and Loan Explanation and Loan Terms, received on 16 December 2005 and amended 1 March 2006.

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

18. The documents highlighted are those that a 'Participant Grower' (referred to in this Ruling as a 'Grower') may enter into. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a 'Grower', or any associate of a 'Grower', will be a party to, which are a part of the scheme. The effect of these agreements is summarised below.

19. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

Overview

20. The salient features of the 2006 Timbercorp Olive Project are as follows:

Location	North West Victoria
Type of business to be carried on by each participant	Commercial growing and cultivation of olive trees for the purpose of harvesting and selling the olives to be processed and sold as olive oil.
Number of hectares offered for cultivation	710
Size of each Grovelot	0.25 hectares, of which approximately 8.2% will be located on Grove 58, approximately 63.6% will be located on Grove 452 and approximately 28.2% will be located on Grove 200.
Minimum allocation	2 'Grovelots' (TSL may allocate less at its absolute discretion).
Minimum subscription	None
Number of trees per hectare	Approximately 417
Term of the Project	23 years
Initial cost per 'Grovelot'	\$5,800
Initial cost per hectare	\$23,200
Ongoing costs	Annual 'Rent'; Annual management 'fees and charges'
Other costs	Deferred management fees; Incentive fees; Marketing and sales costs; and Insurance.

21. The Project will be registered as a managed investment scheme under the *Corporations Act 2001*. Timbercorp Securities Limited ('TSL') has been issued with an Australian Financial Services Licence and will be the Responsible Entity for the Project.
22. An offer to participate in the Project will be made through a Product Disclosure Statement ('PDS'). The offer under the PDS is for 710 hectares in the Project. Participants will be invited to subscribe for at least two 'Grovelots'. The area of each 'Grovelot' is 0.25 hectares. However, TSL reserves the right to accept 'Applications' for less than two 'Grovelots'.
23. The Project will be conducted on two properties which are situated near Boundary Bend, in North West Victoria ('Land'). TSL will enter into Head Lease agreements with the Land Owner for the 'Land' and the 'Water Licences'.
24. To participate in the Project 'Applicants' must complete the Application and Power of Attorney form at the back of the PDS, lodge the completed Application Form together with the relevant 'Application Monies' on or before 15 June 2006.
25. Under the Power of Attorney, TSL will execute a Sub-Lease and a Grovelot Management Agreement on behalf of 'Applicants' who are accepted to participate in the Project as 'Growers'. TSL will allocate 'Grovelots' to the 'Grower' and place the 'Grower's' details in a 'Register'.
26. As an alternative to participation by a 'Grower' as a single entity, the terms of the Constitution, the Grovelot Management Agreement, and the Sub-lease provide that two entities may participate in the Project as Joint Venturers on the terms specified in the Constitution.
27. A 'Grower' accepted on or before 15 June 2006, will commence participation as an 'Early Grower'. **This Ruling only applies in respect of 'Early Growers' who are accepted into the Project from the date this Product Ruling issued to 15 June 2006. Note that a separate Product Ruling PR 2006/56 will issue for 'Growers' accepted into the Project from 1 July 2006 to 15 June 2007.**

Constitution

28. The Constitution establishes the Project and operates as a deed binding all of the 'Growers' and TSL as 'Responsible Entity' (clause 8.6).and sets out the terms and conditions under which the 'Responsible Entity' agrees to act and thereby manage the Project.
29. Under clause 4, TSL holds the 'Application Money' on bare trust. TSL accounts for the 'Application Money' in a special trust account and deposits the money into a bank account solely for 'Application Money' for this Project. Once TSL is satisfied that all documents have been executed and any finance has been approved for an 'Applicant', the 'Application Money' is released and applied against the fees due to TSL (clause 9.3).

30. Among other things, the Constitution sets out details of the following:

- invitations and offers under the PDS (clause 2);
- appointment of the 'Responsible Entity' as the 'Grower's' irrevocable agent, representative and attorney (clause 3);
- how the 'Responsible Entity' is to hold property of the 'Grower' (clause 5);
- procedures relating to 'Applications' (clause 6);
- the discretion of the 'Responsible Entity' to refuse an 'Application' (clause 7);
- the effect of an 'Applicant's' 'Application' being accepted by the 'Responsible Entity' (clause 8);
- preparation and execution of the Sub-lease, and Grovelot Management Agreement by the 'Responsible Entity' and release of the 'Application Moneys' (clause 9);
- preparation and issuing of 'Grovelot' Statements' to a 'Grower' and the setting up and maintenance of a 'Register' of 'Growers' (clause 10);
- the 'Responsible Entity's' powers (clause 11);
- the keeping of a separate 'Agency Account' for the holding of 'Proceeds and any other money', apart from 'Application Money' and interest thereon, that the 'Responsible Entity' may hold for the 'Grower' (clause 12);
- procedures relating to processing and the sale of 'Crop' and distributions from the 'Agency Account' of 'Proceeds' and pooling of amounts (clause 13);
- the right of the 'Responsible Entity' to be paid fees and other expenses (clause 14);
- authority to use money in the 'Agency Account' and powers of investment of the money standing in the 'Agency Account' (clauses 15 and 16);
- the status, the retention by the 'Responsible Entity', and termination by the 'Responsible Entity' or the 'Grower', of the Grovelot Management Agreement, or Sub-lease (clause 18). This includes the right of 'Grower' to obtain a copy of the above agreements by written request to the 'Responsible Entity' (clause 18.2);
- Termination of 'Agreements' and consequences of termination in the event of default and procedures relating to sale of 'Defaulting Growers' Grovelots (clauses 18.3 and 18.4);

- the right of a 'Grower' to inspect certain documents related to their participation in the Project and to offer and give opinions to TSL (clause 19.1);
- the assignment and transmission of 'Grovelots' (clause 20) and restrictions on such assignments and transmissions (clause 21);
- procedures for calling a meeting of 'Growers' (clause 22).
- resolution of complaints made by the 'Grower' in relation to the Project or the 'Responsible Entity' (clause 25); and
- termination of the Project (clause 26).

Joint Venture

31. The Constitution also provides for two entities to participate in the Project as 'Joint Venturers' (clause 29).

32. The 'First Joint Venturer' will be solely responsible for paying the following fees and other amounts:

- (i) 100% of the management fees payable for the Financial Year ended 30 June 2006 (which fees are included in the Application Money);
- (ii) 50% of the management fees (other than the deferred management fees) in respect of management services provided in all Financial Years commencing on and from the 2011 Financial Year;
- (iii) 50% of the deferred management fees; and
- (iv) 50% of the rent payable under the Sub-lease in all Financial Years, commencing on and from the 2011 Financial Year.

33. The 'Second Joint Venturer' will be solely responsible for paying the following fees and other amounts:

- (i) 100% of the management fees (other than the deferred management fees) payable in respect of management services provided in the 2007-2010 Financial Years;
- (ii) 50% of the management fees payable in respect of management services provided in all Financial Years, commencing on and from the 2011 Financial Year;
- (iii) 50% of the deferred management fees;
- (iv) 100% of the rent payable in respect of leasehold rights granted in the 2007-2010 Financial Years; and
- (v) 50% of the rent payable under the Sub-lease in respect of all leasehold rights granted in all Financial Years, commencing on and from the 2011 Financial Year.

34. The 'Joint Venturers' will be responsible for paying their 'Prescribed Proportion' of any incentive fees payable by the 'Joint Venture' under the Grovelot Management Agreement and each will be entitled to a 'Prescribed Proportion' of the 'Joint Venture Assets' and 'Joint Venture Proceeds'. Any losses realised will be shared by each 'Joint Venturer' as tenants in common in accordance with their 'Prescribed Portions'. For 'Joint Venturers' who participate in the Project on or before 15 June 2006, each of 'Joint Venturers' has a 'Prescribed Proportion' of 50% (clause 29.4).

35. Clause 29.5 also sets out certain obligations and rights of the 'Joint Venturers'.

Compliance Plan

36. As required by the *Corporations Act 2001*, the 'Responsible Entity' has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that the 'Responsible Entity' manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of a 'Grower' are protected.

Head Leases

37. The Project will be conducted on two properties, one known as 'Kooloonong' and the other known as 'Anderson' (the 'Land'). The Land and 'Water Licences' for the Project are owned or acquired by B.B. Olives Pty Ltd (the 'Landowner' and the 'Lessor').

38. The 'Land' consists of 3 distinct areas: Grove 58 (an area of 58 hectares on Kooloonong planted to Olive Trees in 2004), Grove 452 (an area of 452 hectares on Kooloonong planted to Olive Trees in 2005) and Grove 200 (an area of 200 hectares on Anderson to be planted to Olive Trees in 2006).

39. Under three separate leases (the 'Head Leases'), each of which includes a licence over the 'Water Licences', the 'Land' will be leased by the Landowner to TSL (the 'Lessee') for the term of the Project.

40. Under the terms and conditions contained in the Head Leases, the Lessee must only use the 'Land' in accordance with the Constitution, the Grovelot Management Agreement and the Sub-lease (clause 5.1). The Lessor consents and authorises the Lessee to enter into Sub-leases with the 'Growers' (clause 9.2).

Sub-lease

41. 'TSL will divide the 'Land' into allotments, known as 'Grovelots'. Each Grovelot is defined as a stapled lot consisting of a separately identifiable area of 0.25 hectares and will be located partly on Grove 58 (approximately 8.2%), partly on Grove 452 (approximately 63.6%) and partly on Grove 200 (approximately 28.2%). A 'Grovelot' includes the 'Olive Trees' planted or to be planted, the 'Capital Works' and the 'Water Licences' attributed to the Project.

42. Effective from the 'Commencement Date' TSL grants a Sub-Lease to the Grower to use and occupy their Grovelots for growing, cultivating and harvesting 'Olives' to be processed into olive oil for sale (clause 3.1).

43. Under clause 3.2, the Land Owner must fully exploit its 'Water Licences' to enable water to be supplied to the 'Grovelots' by TSL for the benefit of all the 'Growers' during the 'Term' of the Project.

44. The Grower acknowledges that the 'Capital Works', 'Olive Trees' on and the 'Water Licences' attaching to, the Grower's Grovelot, are, and will remain the property of the Land Owner (clause 2.3).

45. In summary, the Sub-lease also sets out provisions relating to:

- its 'Term' (clause 4.1);
- a condition precedent that the 'Grower' enters into the Grovelot Management Agreement with TSL (clause 6.1);
- the 'Rent' payable by a 'Grower' (clause 7);
- the obligations and rights of TSL (clause 5) the 'Grower's obligations (clause 8), and the Land Owner's obligations and rights (clause 9); and
- events which may trigger early termination of the 'Sub-lease' by the 'Grower' or TSL (clauses 10 and 12).

Grovelot Management Agreement

46. Under the Grovelot Management Agreement, a Grower will engage TSL as an independent contractor to carry out the 'Grove Services' in accordance with the 'Management Plan' and 'Best Horticultural Practice'.

47. TSL will carry out the following 'Grove Services' in the period ending 30 June 2006:

- Infrastructure Management Services, to be carried out on those parts of the 'Grovelots' situated on Grove 58 and Grove 452 from the 'Commencement Date' (clause 5.2(a) to (f)(iii));

- Administrative and other Management Services, commencing from the 'Commencement Date' (clause 5.2(g) to (m)); and
- Olive Tree Management Services. These services are related to the maintenance of established olive trees on the 'Grovelots' situated on Grove 58 and Grove 452 from the 'Commencement Date' (clause 5(n) to y(iii)).

48. During each subsequent 'Financial Year' of the Project TSL will carry out the 'Grove Services', listed in clause 5.2A(a) to (ff), also test the 'Olives' and, where they are ready for harvesting, harvest the 'Olives' and deliver the harvested 'Olives' to delivery point(s) for processing into 'Olive Oil' and sale.

49. As agent for the Growers, TSL will process, market and sell the Growers' share of the 'Olives', the 'Corp' and the 'Product' for the highest price it can reasonably achieve (clause 7).

50. The Grower agrees that the 'Product' and 'Crop' and the proceeds of sale of the 'Product' or 'Crop' will be divided pro rata according to the 'Participating Interest' of each of the Growers in the Project in the 'Product' or 'Crop' (clause 7.3(a)).

51. TSL will be responsible for obtaining and keeping policies of insurance on behalf of the 'Growers' in the Project with a reputable insurer against damage to the 'Grove' provided that the cost of any such insurance is economically justified. Insurance over the 'Grove' does not include crop insurance unless specifically agreed between TSL and the Grower from year to year (clause 12).

52. Among other things, the Grovelot Management Agreement also sets out details of the following:

- certain administrative services to be provided to the Growers during the 'Term' of the Project (clauses 5, 6, 7 and 8);
- the requirement for TSL to provide an annual report to Growers no later than 4 months after the end of each financial year of the Project (clause 13);
- events that may trigger early termination of this Agreement (clause 15);
- provisions dealing with damage to or reduction in the viability of the Growers' 'Grovelots' (clause 16); and
- dispute resolution procedures (clause 18).

Management Agreement

53. Under the Management Agreement TSL engages OML as an independent contractor to manage and administer the Project and, to manage, direct and conduct the 'Project Operations' on behalf of the 'Grower' and to perform the 'Grove Services'.

Olive Grove Management Agreement

54. Under the Olive Grove Management Agreement, OML engages BBEM as an independent contractor to perform or procure the performance of the 'Grove Management Services' (set out in clause 4), 'Harvesting' (set out in clause 5), 'Olive Oil Processing Services' (set out in clause 6) and 'Technical Services' (set out in clause 7). BBEM must carry out the provision of these services in accordance with an 'Olive Grove Management Plan'. A draft 'Olive Grove Management Plan' prepared by BBEM for the 'Financial Year' ending 30 June 2006 is provided.

Distribution Agreement

55. Under the Distribution Agreement, OML appoints BBM as an exclusive distributor to market, distribute and resell the 'Olive Oil' sourced from, or produced from the 'Supplier Groves'. The agreement provides for BBM to sell the produce on a back-to-back basis, that is BBM will source and enter into agreements with purchasers for the sale of the 'Olive Oil' and will complete its obligations under its agreements by purchasing 'Olive Oil' produced by the Project.

Capital Works Agreement

56. Under the Capital Works Agreement, B. B. Olives Pty Ltd (the Landowner) engages BBEM as an independent contractor to undertake the 'Capital Works' necessary to establish Grove 452 (which has been completed) and Grove 200. The 'Capital Works' include, but are not limit to, preparation of the 'Land', the installation of the 'Irrigation Infrastructure' and the 'Internal Irrigation System', and planting and staking of the 'Olive Trees' at a density of approximately 417 trees per hectare on the Growers' 'Grovelots'.

57. Under clause 4.2 (d), BBEM will replace and replant, at its cost, any 'Olive Trees' which fail in the first 6 months after planting and where such failure is due to any breach or default by BBEM under the agreement, or caused by BBEM; but not those 'Olive Trees' that fail due to an event of 'Force Majeure'.

Pooling of amounts and distribution of 'Proceeds'

58. Both the Constitution (clause 13) and the Grovelot Management Agreement (clause 7.3) set out provisions relating to the pooling of amounts from the sale of the 'Grower's 'Olives', 'Olive Oil', 'Crop' or 'Product' and the distribution of 'Proceeds' from that sale or from insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only a 'Grower' who has contributed 'Olives', 'Olive Oil', 'Crop' or 'Product' or insurance proceeds to the pool making up the 'Proceeds' is entitled to benefit from distribution from those 'Proceeds'; and
- any pool of 'Olives', 'Olive Oil', 'Crop' or 'Product' or other 'Proceeds' must consist only of 'Olives', 'Olive Oil', 'Crop' or 'Product' or other 'Proceeds' contributed by a 'Grower' in the 2006 Timbercorp Olive Project.

Fees

59. A 'Grower' will pay the annual fees and charges **per Grovelot**, set out in clause 11 of the Grovelot Management Agreement and the 'Rent', set out in clause 7 of the Sub-lease. These are as follows:

Grovelot Management Agreement

- for services to be provided in the period from the Commencement Date to 30 June 2006 a fee of **\$5,800** is payable upon 'Application';
- for services to be provided in the period from 1 July 2006 to 30 June 2007 a fee comprised of two components is payable. The first component of **\$1,200** payable on 31 October 2006. The second component is a deferred fee calculated as **2.2% of the 'Net Sale Proceeds'** of the sale of 'Crop' and 'Product'. The deferred component is payable in every 'Financial Year' of the Project that 'Proceeds' are paid;
- for services to be provided in the period from 1 July 2007 to 30 June 2008 a fee comprised of two components is payable. The first component is **\$1,200** payable on 31 October 2007. The second component is a deferred fee calculated as **2.2% of the 'Net Sale Proceeds'** of the sale of 'Crop' and 'Product'. The deferred component is payable in every 'Financial Year' of the Project that 'Proceeds' are paid and is additional to the 2.2% of the 'Net Sales Proceeds' payable for the period from 1 July 2006 to 30 June 2007;

- for services to be provided in each subsequent 'Financial Year' after 30 June 2008 a fee based on the **estimated costs** of operating the 'Grovelot' is payable on 31 October 2008 and 31 October each year thereafter;
- an **incentive fee of 27.5%** of 'Net Proceeds' in excess of the 'Incentive Fee Threshold' is payable in each 'Financial Year' that the 'Incentive Fee Threshold' is exceeded; and
- the 'Marketing and Sale Costs' associated with the sale of 'Product' or 'Corp' is payable in each year in which 'Product' or 'Corp' is sold.

Sub-lease

- for the period from the 'Commencement Date' until 30 June 2006 no 'Rent' is payable;
- for the 'Financial Year' ending 30 June 2007 and 2008, '**Rent**' of \$500 is payable on 31 October 2006 and 2007 respectively;
- for the 'Financial Year' ending 30 June 2009, '**Rent**' of **\$600** is payable on 31 October 2008;
- for the 'Financial Year' ending 30 June 2010, '**Rent**' of **\$687** is payable on 31 October 2009;
- for the 'Financial Year' ending 30 June 2011, '**Rent**' of **\$879** is payable on 31 October 2010; and
- for each subsequent 'Financial Year' during the Term an amount equal to the 'Rent' payable on the immediately preceding 31 October, '**Indexed**' is payable on 31 October of the relevant 'Financial Year'.

60. As noted above, from the 2009 'Financial Year', the annual fee will consist of an amount for the estimated costs of operating the 'Grovelot'. The estimated costs of operating the 'Grovelot' for a 'Financial Year' will include an adjustment for the difference between the actual costs and the estimated costs of managing the 'Grovelot' during the preceding 'Financial Year'.

Finance

61. A 'Grower' can fund their involvement in the Project by borrowing from independent sources or borrowing from Timbercorp Finance Pty Ltd ('the Financier'), a lender associated with the Responsible Entity.

62. The Financier will offer 'Loan Terms' on a commercial basis and approve 'Loan Amounts' up to 90% of the 'Application Money'. The Financier will provide a 'Grower' with loans on a full recourse basis and will pursue legal action against any defaulting borrowers. Details of the loans that will be offered to a 'Grower' by the Financier are set out in the 'Loan Application Form' and 'Loan Explanation and Loan Terms'.

63. Common features contained in the 'Loan Terms' are:

- the Financier will lend to the Grower the 'Loan Amount' by paying it to TSL as payment of the Grower's balance of the 'Application Money' for 'Grovelots' and the 'Loan Application Fee' as described in the 'Application Form';
- the 'Grower' is entitled to repay the whole or part of the 'Total Amount Owing' without penalty for early repayment;
- in the event that any amount is overdue, the Financier may charge interest at the 'Higher Interest Rate'; and
- during the 'Loan Term' the 'Grower' will assign and transfer over to the 'Financier' by way of fixed charge, all its rights, title, and interest in the Project, including the 'Grovelots' and the 'Project Agreements'.

64. The terms specific to the 'Loan Term' offered by the Financier are summarised below. Rates shown are indicative.

Type A – Loans with equal monthly instalments of principal and interest

- 3 year term with an interest rate of 9.0%p.a;
- 4 year term with an interest rate of 9.95%p.a;
- 5 year term with an interest rate of 10.50%p.a;
- 7 year term with an interest rate of 10.95%p.a;
- 8 year term with an interest rate of 11.00%p.a;
- 9 year term with an interest rate of 11.25%p.a;
- 10 year term with an interest rate of 11.50%p.a; and
- an application and administration fee of \$250 is payable plus stamp duty, if any, on the 'Loan Amount'.

Type B –Principal repayments over 12 months, interest free

- these loans are for a term of 12 months repayable by 12 equal monthly instalments of principal; and
- an application and administration fee of \$250 is payable plus stamp duty, if any, on the 'Loan Amount'.

65. A 'Grower' cannot rely on this Product Ruling if they enter into a finance arrangement with the Financier that materially differs from that set out in the 'Loan Application Form' and 'Loan Explanation and Loan Terms' provided to the Tax Office by TSL with the application for this Product Ruling.

66. Growers cannot rely on any part of this Ruling if the 'Application Money', is not paid in full on or before 15 June 2006 by the Grower or, on the Grower's behalf, by any lending institution, including the 'Financier'. Where an application is accepted by TSL, and that application is 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 TSL by the relevant lending institution on or before 15 June 2006.

67. 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 the 'Financier', are involved or become involved in the provision of finance to a 'Grower' for the Project.

Ruling

Application of this Ruling

68. Subject to paragraph 8, this Ruling applies only to a 'Grower' who is accepted to participate in the Project and who has executed a Grovelot Management Agreement and a Sub-lease on or before 15 June 2006.

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

70. 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.

The Simplified Tax System (STS)

Division 328

71. 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 under the STS where a 'Grower' who was an 'STS taxpayer' prior to the 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*.

72. For such a 'Grower', 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

73. 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**

74. 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.

Deductions for 'Management Fees', 'Rent', interest, borrowing costs and capital expenditure**Section 8-1, section 328-105, section 25-25 and Division 40**

75. On a per Grovelot basis, a 'Grower' who is accepted to participate in the Project on or before 15 June 2006 may claim the deductions set out in the Table below.

Fee Type	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
'Management Fee'	\$5,800 See Notes (i), (ii) & (iii)	\$1,200 See Notes (i), (ii) & (iii)	\$1,200 See Notes (i), (ii) & (iii)
'Rent'	Nil	\$500 See Notes (i), (ii) & (iii)	\$500 See Notes (i), (ii) & (iii)
Interest on loans with Timbercorp Finance Pty Ltd	As incurred See Notes (iii) & (iv)	As incurred See Notes (iii) & (iv)	As incurred See Notes (iii) & (iv)
'Loan Application Fee' for loans with Timbercorp Finance Pty Ltd	Must be calculated See Note (v)	Must be calculated See Note (v)	Must be calculated See Note (v)
Establishment of 'Olive Trees'		See Notes (vi) & (vii)	See Notes (vi) & (vii)

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 'Management Fees' and the 'Rent' shown in the Grovelot Management Agreement and the Sub-lease are deductible in full in the year that they are incurred.

- (iii) This Ruling does not apply to a 'Grower' who chooses to prepay 'Management Fees' or 'Rent' or who chooses, or who is required to prepay interest under a loan agreement (see paragraphs 102 to 105). Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME to 82KZMF of the ITAA 1936. Any 'Grower' who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.
- (iv) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd, is outside the scope of this Ruling. A 'Grower' who borrows from a lender other than Timbercorp Finance Pty Ltd may request a private binding ruling on the deductibility of the interest incurred.
- (v) The 'Loan Application Fee' payable to Timbercorp 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 Timbercorp Finance Pty Ltd is outside the scope of this Ruling.
- (vi) An olive tree is a 'horticultural plant' as defined in subsection 40-525(2). As 'Growers' hold the 'Grovelots' under a sub-lease, the condition in item 3 of 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.
- (vii) The deduction for 'Olive Trees' is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. As the 'Olive Trees' have an 'effective life' of 30 years or more, for the purposes of section 40-545, a straight-line write-off at a rate of 7% will be applied. The deduction is allowable when the 'Olive Trees' enter their first commercial season (section 40-530, item 2). TSL will notify the 'Grower' when their 'Olive Trees' enter their first commercial season and the amount that may be claimed.

76. A 'Joint Venturer' may claim deductions, on a per Grovelot basis, for the following expenditure set out in the Table and the Notes in paragraph 75:

First Joint Venturer

- 100% of the management fee payable for the 'Financial Year' ended 30 June 2006, which is described in subparagraph 33(i);
- 50% of the management fees and the 'Rent' described in subparagraph 33(ii) and 33(iv) commencing on and from the 2011 'Financial Year';
- 50% of all of the deferred management fees described in subparagraph 33(iii); and
- any interest incurred on funds borrowed from Timbercorp Finance Pty Ltd.

Second Joint Venturer

- 100% of the management fees and the 'Rent' described in subparagraphs 34(i) & (iv) during the 2007 – 2010 'Financial Years';
- 50% of the 'Management Fee' and 'Rent' described in subparagraph 34(v) commencing on and from the 2011 'Financial Year'; and
- 50% of all of the deferred Management Fees described in subparagraph 34(vi).

77. A 'First Joint Venturer' can also claim under subsection 25-25(1), in the income years ending 30 June 2006, 2007 and 2008, the 'Loan Application Fee' payable to Timbercorp Finance Pty Ltd.

78. Each 'Joint Venturer' can claim deductions for its proportional share of the incentive fees, 'Marketing and Sale Costs' and write-off of the establishment of the 'Olive Trees'.

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

Section 35-55 – exercise of Commissioner's discretion

79. 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 a 'Grower' 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

80. For a 'Grower' who participates in the Project and incurs expenditure as required by the Grovelot Management Agreement and the Sub-lease, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a 'Grower' does not fall within the scope of sections 82KZME to 82KZMF (but see paragraph 104);
- 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 Taxation26 April 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?

81. For the amounts set out in the Tables above to constitute allowable deductions the Grower's horticultural activities as a participant in the 2006 Timbercorp Olive Project must amount to the carrying on of a business of primary production.

82. Where there is a business, or a future business, the gross proceeds from the sale of the 'Olive', 'Crop' or 'Product' 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.

83. For schemes such as that of the 2006 Timbercorp Olive Project, 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.

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

- the 'Grower' has an identifiable interest in land (by lease) or rights over the land (by licence) on which the 'Grower's' 'Olive Trees' are established;
- the 'Grower' has a right to harvest and sell the 'Product';
- 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.

85. In this Project, each 'Grower' enters into a Grovelot Management Agreement and a Sub-lease.

86. Under the Sub-lease each individual 'Grower' will have rights over a specific and identifiable area of 0.25 hectares of land. The Sub-lease provides the 'Grower' with an ongoing interest in the specific 'Olive Trees' on the leased area for the 'Term' of the Project. Under the 'Sub-lease' the 'Grower' must use the land in question for the purpose of carrying out horticulture activities, and for no other purpose. The 'Sub-lease' allows the Manager to come onto to the land to carry out its obligations under the Grovelot Management Agreement.

87. Under the Grovelot Management Agreement the Responsible Entity is engaged by the 'Grower' to cultivate and maintain the 'Olive Trees' on the 'Grower's' identifiable area of land during the 'Term' of the Project. Under the Management Agreement and Olive Grove Management Agreement the management services are sub-contracted to BBEM Pty Ltd which has provided evidence that it holds the appropriate professional skills and credentials to provide the services to establish and maintain the 'Grovelot' on the 'Grower's' behalf during the 'Term' of the Project.

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

89. 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.

90. 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 'Olives', 'Crop' or 'Product' 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.

91. The pooling of 'Olives', 'Crop' or 'Product' grown on the 'Grower's' 'Grovelot' with the 'Olives', 'Crop' or 'Product' of other 'Growers' is consistent with general horticultural practices. Each 'Grower's' proportionate share of the sale proceeds of the pooled 'Olives', 'Crop' or 'Product' will reflect the proportion of the 'Olives', 'Crop' or 'Product' contributed from their 'Grovelot'.

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

93. The 'Grower's' degree of control over the Manager as evidenced by the Grovelot 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' 'Grovelot' and the activities carried out on the 'Grower's' behalf. A 'Grower' is able to terminate arrangements with the Manager in certain instances, such as cases of default or neglect.

94. 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 'Grower's' horticultural activities in the 2006 Olive Timbercorp Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

95. 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.

96. 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 'Management Fees', 'Rent' and interest

Section 8-1

97. Consideration of whether the 'Management Fees' and '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.

98. The 'Management Fees' and 'Rent' 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 'Olives', 'Crop' or 'Product') 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 scheme. The fee appears to be reasonable. There is no capital component of the 'Management Fee'. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Interest deductibility

Section 8-1

(i) A 'Grower' who uses Timbercorp Finance Pty Ltd as the finance provider

99. A 'Grower' may finance their participation in the Project through a loan facility with Timbercorp Finance Pty Ltd. 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 'Rent'.

100. 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 'Olive Trees' and the sub-lease of the land on which the 'Olive Trees' will have been planted – that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

(ii) A 'Grower' who does NOT use Timbercorp Finance Pty Ltd as the finance provider

101. The deductibility of interest incurred by a 'Grower' who finance their participation in the Project through a loan facility with a bank or financier other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling. Product Rulings only deal with schemes where all details and documentation have been provided to, and examined by the Tax Office.

Prepayment provisions

Sections 82KZL to 82KZMF

102. 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

103. Under the Scheme to which this Product Ruling applies 'Management Fees' and 'Rent' are incurred annually and interest payable to Timbercorp 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.

104. 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 Grovelot Management Agreement and/or the Sub-lease or prepays interest under a loan agreement (including loan agreements with lenders other than Timbercorp 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.

105. As noted in the Ruling section above, a 'Grower' who prepays fees or interest is 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

106. 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 'Olive Trees is of a capital nature. This expenditure falls for consideration under Division 40.

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

107. 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 Olive 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.

108. 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

109. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of ‘additional benefits(s)’. Insufficient ‘additional benefits’ will be provided to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA – general tax avoidance provisions

110. 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).

111. The 2006 Timbercorp Olive Project will be a 'scheme'. A 'Grower' will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 75 to 80 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.

112. A 'Grower' to whom this Ruling applies intends to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the 'Olives'. There are no facts that would suggest that a 'Grower' has 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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

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

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
- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

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 IVA

- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 25-25(1)
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
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- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 40
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- ITAA 1997 40-545
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- ITAA 1997 Div 328
- ITAA 1997 328-105
- ITAA 1997 Subdiv 328-F
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