

PR 2007/29 - Income tax: Brooklyn Park Organic Olive Groves Bonni-Foi Growers' Project



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Product Ruling

Income tax: Brooklyn Park Organic Olive Groves Bonni-Foi Growers' Project

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

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

No guarantee of commercial success

The Tax Office **does not** sanction or guarantee this product. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. 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.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product 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 Product Ruling.

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the Brooklyn Park Organic Olive Groves Bonni-Foi Growers' Project or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Grower.

3. The class of entities who can rely on those tax benefits consists of entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and which execute relevant Project Agreements mentioned in paragraph 34 of this Ruling on or before 31 May 2007. They must 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.

4. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling 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;
- are accepted into this Project before the date of this Ruling or after 31 May 2007;
- participate in the scheme through offers made other than through the Product Disclosure Statement (PDS);
- choose to pay Year 2, Year 3 and Year 4 Management Fees in Year 1; or
- under Clause 7 of the Allotment Management Agreement, elect to have the Manager harvest their Allotments separately or elect to harvest the olives on the Allotment themselves.

Qualifications

5. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 34 to 91 of this Ruling.

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

- this Product 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 Product Ruling may be withdrawn or modified.

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Date of effect

8. This Product Ruling applies prospectively from 4 April 2007, the date this Product Ruling is made. It therefore applies to the specified class of entities that enter into the scheme from 4 April 2007 until 31 May 2007, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities up to 30 June 2009. This Product Ruling will continue to apply to those entities even after its period of application for schemes entered into during the period of application.

9. However the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;
- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

10. 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)).

11. 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.

12. 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).

Changes in the law

13. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

14. Entities who are considering participating in the scheme 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

15. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes 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 Product Ruling is issued.

Goods and Services Tax

16. All fees and expenditure referred to in this Product 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.

Ruling

Application of this Ruling

17. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters into the scheme described at paragraphs 34 to 91 of this Ruling.

18. The Grower's participation in the Project must constitute the carrying on of the business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Allotment Licence Agreement and their Allotment Management Agreement, on or before 31 May 2007.

Minimum subscription

19. 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 PDS, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 600 Allotments is achieved.

The Simplified Tax System (STS)***Division 328***

20. To be an 'STS taxpayer' a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328 of the ITAA 1997). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower was an 'STS taxpayer' prior to 1 July 2005 and 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*.

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

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

22. 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***Sections 6-5 and 17-5***

23. 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.

Deduction for Management fees, Rental fees, Insurance fees, Interest and borrowing costs***Section 8-1, section 25-25 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936***

24. A Grower may claim tax deductions for the following fees and expenses on a per Allotment basis, as set out in the Table below.

Fee Type	Year ending 30 June 2007	Year ending 30 June 2008	Year ending 30 June 2009
Management fees	\$4,010 See Notes (i), (ii) & (iii)	\$880 See Notes (i), (ii) & (iii)	\$880 See Notes (i), (ii) & (iii)
Rental fees	Nil	\$440 See Notes (i), (ii) & (iii)	\$440 + CPI See Notes (i), (ii) & (iii)
Insurance fees	Nil	To be advised See Notes (i), (ii) & (iii)	To be advised See Notes (i), (ii) & (iii)
Interest on loans with MI Professional Funding Pty Ltd, the Preferred Financier	As incurred See Notes (iii) & (iv)	As incurred See Notes (iii) & (iv)	As incurred See Notes (iii) & (iv)
Loan Establishment Fee	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 Management fees, Rental fees and the Insurance fees are deductible under section 8-1 in the income year that the relevant fee is incurred.
- (iii) This Ruling does not apply to Growers who choose to prepay fees or who choose, or who are required to prepay interest under a loan agreement (see paragraphs 103 to 107 of this Ruling). Subject to certain exclusions, 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 *Income Tax Assessment Act 1936* (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 agreements entered into with financiers other than MI Professional Funding Pty Ltd, the Preferred Financier, is outside the scope of this Ruling. Prepayments of interest to any lender, including the Preferred Financier, are not covered by this Product Ruling. Growers who enter into agreements with other financiers and/or prepay interest may request a private ruling on the deductibility of the interest incurred.
- (v) The Loan Establishment Fee, which may be charged by the Preferred Financier, is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing money that is used or is 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 the Preferred Financier is outside the scope of this Ruling.

Deductions for capital expenditure (non-STs taxpayers)

Division 40

25. A Grower who is not an 'STs taxpayer' will be entitled to tax deductions relating to capital expenditure. All deductions shown in the following Table are determined under Division 40.

Fee Type	ITAA 1997	Year ended 30 June 2007	Year ended 30 June 2008	Year ended 30 June 2009
Irrigation expenditure	40-515	\$268 See Notes (i) & (vi)	\$268 See Notes (i) & (vi)	\$268 See Notes (i) & (vi)
Landcare operations	40-630	\$1,126 See Notes (i) & (vii)		
Establishment of horticultural plants	40-515	Nil See Note (viii)	Nil See Note (viii)	Nil See Note (viii)

Notes:

- (vi) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. A deduction is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure of \$804 incurred by each grower on the installation of the 'water facility' in the year in which it is incurred and one-third in each of the next 2 years of income (section 40-540).
- (vii) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630.
- (viii) Olive 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 olive trees is determined using the formula in section 40-545 and is based on the capital expenditure of \$440 incurred by the Grower that is attributable to their establishment. If the olive trees have an 'effective life' of greater than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 7%. The deduction is allowable when the olive trees enter their first commercial season (section 40-530, item 2). The Manager will inform Growers of when the olive trees enter their first commercial season.

Deductions for capital expenditure (STS taxpayers)***Subdivision 328-D, Subdivision 40-F and Subdivision 40-G***

26. A Grower who is an 'STS taxpayer' will be entitled to tax deductions relating to water facilities (for example irrigation), a 'landcare operation' and establishment of olive trees. An 'STS taxpayer' may claim deductions in relation to water facilities under Subdivision 40-F and in relation to a 'landcare operation' under Subdivision 40-G. If the 'water facility' or 'landcare operation' expenditure is on a 'depreciating asset' used to carry on the business, they may choose to claim deductions under Division 328. Deductions for the olive trees must be determined under Subdivision 40-F.

27. The deductions shown in the following Table assume, for representative purposes only, that a grower has either chosen to or can only claim deductions for expenditure on water facilities or a 'landcare operation' under Subdivisions 40-F or 40-G and not under Division 328. If the expenditure has been incurred on 'depreciating assets' and is claimed under Division 328, the deduction is determined as discussed in Notes (ix) and (x) below.

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

Fee Type	ITAA 1997	Year ended 30 June 2007	Year ended 30 June 2008	Year ended 30 June 2009
Irrigation expenditure	40-515	\$268 See Notes (i) & (ix)	\$268 See Notes (i) & (ix)	\$268 See Notes (i) & (ix)
Landcare operations	40-630	\$1,126 See Notes (i) & (x)		
Establishment of horticultural plants	40-515	Nil See Note (xi)	Nil See Note (xi)	Nil See Note (xi)

- (ix) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. If the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-F. For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. If the 'cost' apportionable to that deemed 'depreciating asset' is less than \$1,000 the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is an 'STS taxpayer' for the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction allowable in the year ended 30 June 2007 is determined by multiplying its 'cost' by half the relevant STS pool rate. At the end of the year, it is allocated to the relevant STS pool and in subsequent years the full pool rate will

apply. If the expenditure is not on a 'depreciating asset' or if they choose to use Subdivision 40-F, Growers must claim deductions under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one-third in each of the next 2 years of income (section 40-540).

- (x) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630. If the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-G (although expenditure on some items of plant can only be deductible under Division 328). For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. If the 'cost' apportionable to the deemed 'depreciating asset' is less than \$1,000, the deemed asset is treated as a 'low-cost asset' and the amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction is determined by multiplying its 'costs' by half the relevant STS pool rate. At the end of the year, it is allocated to the relevant STS pool and in subsequent years, the full pool rate will apply. If the expenditure is not on a 'depreciating asset', the expenditure is fully deductible under Subdivision 40-G.
- (xi) Olive 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 olive trees is determined using the formula in section 40-545 and is based on the capital expenditure of \$440 incurred by the Grower that is attributable to their establishment. If the olive trees have an 'effective life' of greater than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 7%. The deduction is allowable when the olive trees enter their first commercial season (section 40-530, item 2). The Manager will inform Growers of when the olive trees enter their first commercial season.

Shares in unit trust

29. The units in Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust are CGT assets (section 108-5) and the amount paid by a Grower to acquire those assets is an outgoing of capital and not allowable as a deduction.

30. 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 Grower will be a CGT event and may give rise to a capital gain or loss.

31. Income distributions by the unit trust are included in the assessable income of a Grower who is a unit holder.

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

32. A Grower who is an individual accepted into the Project by 4 April 2007 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described below, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for these Growers as follows:

- for the income years ended 30 June 2007 to 30 June 2011 for Growers who do not borrow funds from the Preferred Financier to enter the Project; and
- for the income years ended 30 June 2007 to 30 June 2012 for Growers who borrow from the Preferred Financier to enter the Project.

This conditional exercise of the discretion will allow those losses to be offset against the Grower’s other assessable income in the income year in which the losses arise.

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

33. For a Grower who commences participation in the Project and incurs expenditure as required by the Lease and Management Agreement, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 103 to 107 of this Ruling);
- section 82KL does not apply to deny the deductions otherwise allowable; and

- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Scheme

34. The scheme that is the subject of this Ruling is identified and described in the following documents:

- Application for a Product Ruling received on 12 December 2006 as constituted by documents provided on 12 December 2006, 6 February 2007, 5 March 2007 and 9 March 2007 and additional letters and emails received on 6 February 2007, 5 March 2007, 8 March 2007, 9 March 2007, 12 March 2007, 14 March 2007, 15 March 2007, 20 March 2007 and 21 March 2007;
- **Draft Product Disclosure Statement** for Brooklyn Park Organic Olive Groves – Bonni-Foi Growers' Project received on 9 March 2007;
- Draft Constitution of Brooklyn Park Organic Olive Groves Bonni-Foi Growers Project dated 24 May 2006, received on 12 December 2006;
- Brooklyn Park Organic Olive Groves Bonni-Foi Olive Growers' Project Compliance Plan received on 12 December 2006;
- Draft Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust Constitution dated 2 February 2006, received on 12 December 2006;
- Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust Compliance Plan received on 12 December 2006;
- Allotment Sub Management Agreement (Bonni-Foi) between Australian Green & Gold Ltd and Horticultural Developments Pty Ltd received on 12 December 2006;
- Loan Agreement between Australian Green & Gold Ltd as Responsible Entity of the Brooklyn Park Organic Olive Groves Bonni-Foi Property (Borrower) and Horticultural Developments Pty Ltd (Lender) received on 12 December 2006;
- Call Option Deed over part of the interim water entitlements between Australian Green & Gold Ltd as Responsible Entity for the Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust and Horticultural Developments Pty Ltd received on 12 December 2006;

- Call Option Deed over part of the Property between Australian Green & Gold Ltd as Responsible Entity for the Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust and Horticultural Developments Pty Ltd received on 12 December 2006;
- **Allotment Licence Agreement (Bonni-Foi)** received on 15 March 2007;
- **Allotment Management Agreement (Bonni-Foi)** received on 9 March 2007;
- Custodial Agency Agreement received on 12 December 2007;
- Draft Lease Agreement between Australian Green & Gold Ltd as the Responsible Entity for Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust and Huntley Custodians Limited received on 12 December 2006;
- Draft Sub Lease Agreement between Huntley Custodians Limited and Australian Green & Gold Ltd as Responsible Entity for Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust received on 12 December 2006;
- Draft Olive Oil Procurement Agreement between Australia Green & Gold Ltd (Manager) and Boundary Bend Marketing Pty Ltd (Purchaser) received on 6 February 2007;
- Water and Services Agreement (Bonni-Foi) received on 12 December 2007; and
- **Draft Finance Application (including Loan Terms)** between MI Professional Funding Pty Ltd and the borrowing Grower received on 12 December 2007.

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

35. The documents highlighted are those that 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.

36. 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

37. The main features of the Brooklyn Park Organic Olive Groves Bonni-Foi Growers' Project are as follows:

Location	The Darling Downs Region of Queensland
Type of business to be carried on by each Grower	Commercial growing and cultivation of olives for the purpose of harvesting and selling olives
Term of the Project	20 years
Number of hectares offered for cultivation	240 hectares
Number of Allotments offered	2400 Allotments
Minimum subscription	600 Allotments
Size of each Allotment	0.10 hectares
Number of olive trees per hectare	400
Number of olive trees per Allotment	40
Minimum allocation per Grower	One Allotment
Initial cost	\$7,380 comprising \$6,380 in the Project and \$1,000 for 1 unit in Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust
Ongoing costs	Ongoing Management Fees from Year 2 to Year 20 Annual Licence Fees from Year 2 to Year 20
Other costs	Insurance premium per Allotment from Year 2 onwards

38. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Australian Green & Gold Ltd has been issued with an Australian Financial Service Licence, Number 246717 and will be the Responsible Entity for the Project.

39. The Project will involve the commercial growing, cultivation and harvesting of olives for sale.

40. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer under the PDS is for 240 hectares, which corresponds to 2400 Allotments in the Project.

41. Under the terms of the PDS, the interests in the Growers' Allotments will be issued after a minimum subscription of 600 Allotments has been achieved.
42. Huntley Custodian Ltd will be appointed Custodian under the Custody Agreement to protect the interests of the Growers in their dealing with Australian Green & Gold Ltd and its associates.
43. A Grower that participates in the Project will do so by acquiring an interest in the Project which will consist of a minimum of 1 Allotment. A Grower acquiring a single interest in the Project will hold a licence over a separate and distinct area (called an 'Allotment') of 0.10 hectare on which the Grower can plant and maintain 40 olive trees. Each Allotment will be separately identifiable on a plan prepared by Australian Green & Gold Ltd for that purpose.
44. Applicants execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints Australian Green & Gold Ltd the Responsible Entity to enter into, on behalf of the Grower, an Allotment Licence Agreement, Allotment Management Agreement and any other documents required to hold an interest in the Project. The Responsible Entity will allocate Allotments and place their details in a register of Growers.
45. Growers may acquire more than one interest in the Project. However, for each interest acquired the Grower must apply for and be allotted a Unit in Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust. The cost of one Unit is \$1,000.
46. Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust is the owner of the Land that will be used for the Project. The Land for the Project is located 20 kilometres west of Inglewood in the Border Rivers Region of southern Queensland. Specifically, it is described as Lot 26 on CPCVE248, County of Clive, Parish of Tandan.
47. This Land to be used for the Project will have land degradation measures carried out, irrigation installed and 40 olive trees established per Allotment between 1 June 2007 and 15 June 2007.
48. Each Grower will use their Allotments for the purpose of carrying on a business of cultivating and harvesting olives and the sale of harvested produce.
49. Growers will enter into an Allotment Management Agreement with Australian Green & Gold Ltd, the Responsible Entity acting in its capacity as Manager, whereby the Manager will establish and maintain each Allotment during the term of the Project.
50. Unless a Grower elects otherwise, the Manager will harvest the olives on their behalf and use its best endeavours to sell the produce at the best available price. The Manager holds a contract with Boundary Bend Marketing Pty Ltd who has agreed to buy olive oil from the Project.

Constitution

51. The Constitution establishes the Project and operates as a deed binding all Growers and Australian Green & Gold Ltd. The Constitution sets out the terms and conditions under which Australian Green & Gold Ltd agrees to act as Responsible Entity and thereby manage the Project. Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

52. In order to acquire an interest in the Project, the Grower must make an application for Allotments in accordance with clause 8 of the Constitution. The application must be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant, lodged at the registered office of the Responsible Entity and accompanied by payment of the Application Money in a form acceptable to the Responsible Entity.

53. Under clause 7 of the Constitution, Australian Green & Gold Ltd holds the Application Money on bare trust. Australian Green & Gold Ltd will deposit all Application Moneys received from applicants in a Growers' Application Account (clause 7.2).

54. Once Australian Green & Gold Ltd has accepted the application and all of the Project Documents have been executed and remain in force (clause 9) the Application Money may be transferred and applied against the fees due to Australian Green & Gold Ltd (clause 9).

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

- application for Grower's allotments (clause 8);
- transfer of money from Growers' Application Account; (clause 9);
- register of Growers (clause 14);
- Growers' fees and costs (clause 18);
- powers of the Responsible Entity (clause 21);
- Growers' income and payment (clause 27);
- Responsible Entity's fees and expenses (clause 28); and
- termination of the Scheme and procedures for calling and holding meetings of Growers (clauses 25, 31 and 32).

Compliance Plan

56. As required by the *Corporations Act 2001*, Australian Green & Gold Ltd has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that Australian Green & Gold Ltd manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

Lease and Sub Lease

57. Australian Green & Gold Ltd as Responsible Entity for Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust (the owner of the Land) has entered into a Lease with Huntley Custodians Ltd, the Custodian of the Project. Huntley Custodians Ltd as Sub Lessor of the Land will sublease the land back to Australian Green & Gold Ltd as Responsible Entity of Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust. This sub lease will enable the Landowner to enter into licences with the Growers to occupy a separate and distinct portion of the Land for the purpose of growing olives for commercial sale.

58. Both Lease and Sub Lease commence on 31 May 2007 and expire on 30 May 2027.

Allotment Licence Agreement (Bonni-Foi)

59. Each Grower will execute an Allotment Licence Agreement with Australian Green & Gold Ltd as Responsible Entity of the Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust, the Landowner. The Allotment Licence Agreement will be executed at the same time as when all of the Project Documents have been implemented. The Landowner will grant to the Grower the right to exclusively possess, occupy, use and enjoy the Allotment, for the conduct of the Grower's Business and to harvest and sell the olives for a commercial profit. Each Licence to Occupy will terminate on 30 June 2026.

60. The Growers shall have the right to use their Allotments for the purposes referred to in the Management Agreement, including without limitation, the planting, tending, growing, caring for and the harvesting of their olives for commercial profit.

61. The Allotment Licence Agreement sets out the rights and obligations of the parties to the Agreement. Under the terms of the Allotment Licence Agreement, each Grower will licence from the Landowner a minimum of 1 Allotment, each of 0.10 hectares. The Allotment Licence Agreement shall operate on and from the Commencement Date until terminated in accordance with the terms under clause 13.

62. The Grower's obligations are set out in detail in clause 4 under which the Grower agrees to use the Allotments for the purpose of establishing, maintaining, and harvesting the olives in accordance with best practices of the olive industry. The Agreement permits the grower to use dams, irrigation system, roads and other infrastructure located on the Project Land (clause 2.3). The Landowner as part of the Allotment Licence Agreement has allocated 480 megalitres to the Project of the interim water allocation held by the Landowner.

63. The Grower is required to pay an annual Licence Fee for each year of the Agreement, commencing in Year 2. The annual Licence Fee from year 3 onwards will equal the Fee of the preceding year indexed by the All Groups Consumer Price Index for Brisbane.

64. Upon termination of the Agreement, Growers are not required to remove the trees or restore the Allotment to its original condition (clause 13.4). Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust will be legally entitled to any trees growing on the Allotment following termination of the Agreement (clause 13.5(b)).

Allotment Management Agreement (Bonni-Foi)

65. Under the Allotment Management Agreement the Grower appoints the Responsible Entity (as Manager) to manage the Allotments and to carry out the management services subject to the terms and conditions of the Agreement. The Agreement will commence on the date the Responsible Entity accepts the Grower's application under the PDS and shall continue until its termination under clause 15.

66. The parties to the Allotment Management Agreement are Australian Green & Gold Ltd (the Responsible Entity & Manager), Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust (the Landowner) and the Grower.

67. The Manager will commence the provision of the initial Allotment Management Services on or after the Commencement Date and will complete the following services by 30 June 2007:

- properly prepare the Allotment, including the performance of soil conservation, irrigation and drainage work on the Land;
- identify the Trees allotted to the Grower; and
- perform any other services required to maintain the Business.

68. The Landowner under the Allotment Management Agreement will supply and plant 40 trees on each Allotment allocated to each Grower on or before 15 June 2007. The Landowner will be entitled to a Planting Fee of \$440 per Allotment from each Grower.

69. The Manager will commence the provision of the Ongoing Management Services after the completion of the initial services and shall continue to provide the Management Services until the termination of this Agreement.

70. The Ongoing Management Services include:

- minimize soil erosion and maintain soil quality on the Allotment;
- keep the Allotment free from vermin, vegetation, insects and diseases that might inhibit the growth of Trees;

- maintain and cultivate the trees, including watering and weeding and application of fertilisers, nutrients and herbicides;
- harvest the trees and market and sell the olives produced (subject to the Grower's right to make an election regarding these services); and
- provide the Grower with a statement showing the Grower's Sale Proceeds and the Management Fee within 90 days after receipt of the final payment for sale of olives.

71. The Manager guarantees survival of the Grower's Trees to the commencement of the fourth year of the term of the Agreement. Thereafter, the manager does not guarantee survival of the Grower's Trees or that they will produce olives (clause 4.4).

72. Under the Allotment Management Agreement, Growers may elect to have the Manager harvest the Trees on their Allotment separately (clause 7(a)) or they may elect to harvest the trees on their Allotment themselves (clause 7(h)). This Ruling will not apply to any Grower who makes an election under clause 7(a) or clause 7(h). A Grower who makes such an election may request a private ruling on the taxation consequences of their participation in the Project.

Pooling of crops and Grower's entitlement to net proceeds

73. Australian Green & Gold Ltd (the Manager), will market and sell the Grower's Olives for the maximum price achievable. The Manager will pool for sale the Olives produced from the Grower's Business with that of other Growers. The proceeds of the sale of all Olives will be paid to the Custodian to be divided and credited amongst all Growers as specified in clause 27 of the Constitution.

74. Clause 8.3 of the Allotment Management Agreement provides that, where the quantity of olives from a Grower's allotment is less than 90% of the average of olives harvested on all Grower's Allotments for that particular harvest, then the Grower's Sale Proceeds will be reduced by an amount determined by the Manager.

75. The Constitution (clause 27) sets out provisions relating to the pooling and distribution of the Growers' Proceeds. Proceeds can include both sale proceeds and insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed produce are entitled to benefit from distributions of Growers Proceeds from the pool; and
- any pooled produce must consist only of produce contributed by Growers of Brooklyn Park Organic Olive Groves Bonni-Foi Growers' Project.

76. In the event of partial or total destruction of the Grower's Allotment or inadequate production compared to other Growers' Allotments the Manager shall make an adjustment to the Grower's interest in the Growers Proceeds Account to take into account any deficiency.

Allotment Sub Management Agreement

77. The Responsible Entity intends to enter into the Sub Management Agreement with Horticultural Developments Pty Ltd to delegate some of the functions under the Allotment Management Agreement.

78. Horticultural Development Pty Ltd will provide farm management services, including establishing the Allotments, ongoing maintenance and management of the Allotments and harvesting of the olives.

Water Services Agreement (Bonni-Foi)

79. Upon acceptance of the Grower's application, the Grower becomes a party to the Water and Services Agreement. The other parties to the Agreement are Australian Green & Gold Ltd as Responsible Entity of the Brooklyn Park Organic Olive Grove Bonni-Foi Property Trust (the Landowner) and Australian Green & Gold Ltd in its capacity as the Manager of the Project.

80. Under this Agreement, the Landowner has agreed to supply additional water of up to 720 megalitres per annum that is in addition to the current water allocation of 480 megalitres of water per annum that is available for supply to all Allotments under their entitlement to water in the Allotment Licence Agreement (Bonni-Foi). This additional water equates to up to an additional 0.3 megalitres of water per annum for each Allotment.

81. The Landowner will supply without charge the additional water of up to 720 megalitres whilst it has access to the water supply or reserves of water. However, in the event that the Landowner is required to spend any money for the purposes of supplying the Additional Water Supply under the Agreement the Landowner will be entitled to impose a charge on the Grower for the cost of water supplied.

Fees

82. A Grower accepted into the Project in Year 1, the 2007 income year, will pay on an Allotment basis the following amounts on application:

- \$1,000 for 1 Unit in Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust;
- \$440 to Brooklyn Park Organic Olive Groves Bonni-Foi Property Trust to supply and plant 40 olive trees;

- \$1,126 to the Responsible Entity for Landcare Operations;
- \$804 to the Responsible Entity for irrigation establishment costs; and
- \$4,010 to the Responsible Entity for management services.

Ongoing fees

83. Under the Allotment Management Agreement and Allotment Licence Agreement the following fees will be incurred from Year 2, the 2008 income year, on an Allotment basis:

- in consideration for management services to be provided in each of the financial years ending 30 June 2008, 30 June 2009 and 30 June 2010, \$880 is payable on 15 June 2008, 15 June 2009 and 15 June 2010 respectively;
- in consideration for management services to be provided in each of the financial years ending 30 June 2011 to 30 June 2026 a percentage of Gross Proceeds attributable to the Grower's Allotment is payable by 15 June in each Financial Year;
- insurance premiums from Year 2;
- \$440 Allotment Rental for 2008 income year payable on 15 June 2008; and
- \$440 Allotment Rental for financial years ending 30 June 2009 to 30 June 2026 increased annually by the Consumer Price Index for that year, commencing in the financial year ended 30 June 2009.

Finance

84. A Grower who does not pay the Application Monies in full upon application can borrow from MI Professional Funding Pty Ltd, the Preferred Financier, or from an independent lender external to the Project.

85. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with the Preferred Financier that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling. A Grower who enters into a finance arrangement with an independent lender external to the Project other than the Preferred Financier may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

86. Growers cannot rely on any part of this Ruling if the Application Monies are not paid in full on or before 31 May 2007 by the Grower or, on the Grower's behalf, by a lending institution.

Finance offered by the Preferred Financer

87. Subject to the terms and conditions of the Loan Agreement a Grower can finance the cost of their Application Money and the cost of their unit in the Property Trust by borrowing that amount from MI Professional Funding Pty Ltd the Preferred Financier (as the Lender).

88. Subject to MI Professional Funding Pty Ltd accepting the Grower's application, the Grower will be bound by the terms and conditions of the Loan Agreement.

89. The Loan Arrangements offered by MI Professional Funding Pty Ltd are:

Loan Term and Interest Rate Options

- 2 years principal and interest;
- 3 years principal and interest;
- 4 years principal and interest;
- 5 years principal and interest;
- 7 years principal and interest; and
- 10 years principal and interest.

Interest Only Periods

- 3 years with 1 year interest only;
- 4 years with 2 years interest only;
- 5 years with 2 years interest only;
- 7 years with 3 years interest only; and
- 10 years with 3 years interest only.

90. The Loan Agreement offered by the Preferred Financer requires that:

- the Applicant has made application to enter into Licence and Management Agreements in respect of Brooklyn Park Organic Groves Bonni-Foi Growers' Project;
- the Preferred Financier will take security over the Borrower's Allotment and Unit for the term of the loan;
- interest rate under the loan is fixed for the term of the loan;
- Borrowers who enter into these finance arrangements will be required to make monthly repayments; and

- it will be at the Preferred Financier's discretion at the time of offering the finance whether they will charge an application fee.

91. 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, are involved or become involved in the provision of finance to Growers for the Project.

Commissioner of Taxation

4 April 2007

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?

92. For the amounts set out in the Tables above to constitute allowable deductions the Grower's horticultural activities as a participant in the Brooklyn Park Organic Olive Groves Bonni-Foi Growers' Project must amount to the carrying on of a business of primary production.

93. Two Taxation Rulings are relevant in determining whether a Grower will be carrying on a business of primary production.

94. The general indicators used by the Courts are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

95. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Brooklyn Park Organic Olives Bonni-Foi Growers' Project. As Taxation Ruling TR 2000/8 sets out, the relevant principles have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

96. Having applied these principles to the arrangement set out above, a Grower in the Brooklyn Park Organic Olives Bonni-Foi Growers' Project is accepted to be carrying on a business of growing and harvesting olives for sale.

The Simplified Tax System

Division 328

97. 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.

98. Changes to the STS rules apply from 1 July 2005. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductibility of the Management fees, Rental fees, Insurance fees and interest on loans with the Preferred Financier**Section 8-1**

99. The Management fees, Rental fees and Insurance fees are deductible under section 8-1 (see paragraphs 43 and 44 of TR 2000/8). A 'non-income producing' purpose (see paragraphs 47 and 48 of TR 2000/8) is not identifiable in the arrangement and there is no capital component evident in the Management fees, Rental fees and Insurance fees (see paragraphs 49 to 51 of TR 2000/8).

100. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Provided that the prepayment provisions do not apply (see paragraphs 103 to 107 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred. (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7.)

101. Some Growers may finance their participation in the Project through a Loan Agreement with the Preferred Financier. Applying the same principles as that used for the Management Fee and the Rental Fee, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

102. Other than where the prepayment provisions apply (see paragraphs 103 to 107 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

Prepayment provisions**Sections 82KZL to 82KZMF**

103. 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.

104. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 (operative provisions).

Application of the prepayment provisions to this Project

105. Under the scheme to which this Product Ruling applies Management Fees, Rental Fees and other fees are incurred annually and the interest payable to MI Professional Funding Pty Ltd the Preferred Financier is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

106. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Allotment Management Agreement and Allotment Licence Agreement, or prepays interest under a loan agreement. Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

107. 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.

Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion

108. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ended 30 June 2007 to 30 June 2011 for Growers who do not borrow funds from the Preferred Financier to enter the Project and for the income years ended 30 June 2007 to 30 June 2012 for Growers who borrow from the Preferred Financier to enter the Project:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the olive industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

109. 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.

110. 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

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

Part IVA – general tax avoidance provisions

112. 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).

113. The Brooklyn Park Organic Olive Groves Bonni-Foi Growers’ 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 24, 25 and 27 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

114. 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 olives. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm’s length or, if any parties are not dealing at arm’s length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/7; TR 97/11; TR 98/22;
TR 2000/8; TR 2002/6;
TR 2002/11

Subject references:

- carrying on a business
- commencement of business
- management fee expenses
- non-commercial losses
- primary production
- primary production expenses
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

Legislative references:

- ITAA 1936 82 KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZM
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- ITAA 1936 82KZMB
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- ITAA 1936 82KZMD
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