


PR 2008/16 - Income tax: Alpine Meadows Olive & Walnut Project No. 1

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Product Ruling

Income tax: Alpine Meadows Olive & Walnut Project No. 1

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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 provision(s) 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 Alpine Meadows Olive & Walnut Project No. 1 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.

3. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and execute the relevant Project Agreements mentioned in paragraph 31 of this Ruling on or before 15 June 2008. 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 15 June 2008;
- participate in the scheme through offers made other than through the Product Disclosure Statement; or
- do not acquire a minimum of two Groves (see paragraph 28 of this Ruling).

Superannuation Industry (Supervision) Act 1993

5. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product ruling as to whether investment in this product may contravene the provisions of SISA 1993.

Qualifications

6. 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 31 to 67 of this Ruling.

7. 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

9. This Product Ruling applies prospectively from 27 February 2008, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 27 February 2008 until 15 June 2008, 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 for the income years up to 30 June 2010.

10. However this 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.

11. 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)).

12. 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.

13. 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

14. 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.

15. 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

16. 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

17. 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

18. 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 31 to 67 of this Ruling.

19. The Grower's participation in the Project must constitute the carrying on of 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 Licence and Management Agreement, on or before 15 June 2008.

Minimum subscription

20. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of the Product Disclosure Statement (PDS), a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 416 Groves is achieved.

Concessions for 'small business entities'

21. From the 2007-08 income year, a range of concessions previously available under the Simplified Tax System (STS), will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

22. A 'small business entity' can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions the application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in 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.

Treatment of trading stock

Section 328-285

24. A Grower who is a 'small business entity' may, in some years, hold olives and walnuts or product therefrom that will constitute trading stock on hand. Where, for such a Grower, for an income year, the difference between the value of all their trading stock at the start and a reasonable estimate of it at the end, is less than \$5,000, they can choose not to account for that difference under the ordinary trading stock rules in Division 70 (subsection 328-285(1)).

25. Where the small business entity chooses to account for changes in the value of their trading stock for an income year, they will have to do a stocktake and account for the change in the value of all their trading stock (Subdivision 70-C).

Trading stock

Section 70-35

26. A Grower who is not a 'small business entity' may, in some years, hold olives and walnuts or product therefrom that will constitute trading stock on hand. Where, in an income year, the value of trading stock on hand at the *end* of an income year exceeds the value of trading stock on hand at the *start* of an income year a Grower must include the amount of that excess in assessable income.

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

Deductions for Initial Management Fees, Initial Occupation Fees, Harvest Fees and Management Performance Fees (if applicable)

Section 8-1 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936

28. A Grower who acquires a minimum of two Groves in the Project may claim tax deductions for the following fees and expenses on a per Grove basis, as set out in the Table below.

| Fee Type | Year ending 30 June 2008 | Year ending 30 June 2009 | Year ending 30 June 2010 |
|------------------------------------|--|--|--|
| Initial Management fees | Must be calculated See Notes (i) & (ii) | Must be calculated See Notes (i) & (ii) | Must be calculated See Notes (i) & (ii) |
| Initial occupation Fees | Must be calculated See Notes (i) & (ii) | Must be calculated See Notes (i) & (ii) | Must be calculated See Notes (i) & (ii) |
| Harvest Fees | | | Must be calculated See Note (iii) |
| Management Performance Fees | | | Must be calculated See Note (iii) |

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) The Initial Management Fees and Initial Occupation Fees are not deductible in full in the year ended 30 June 2008. The Initial Management Fees and Initial Occupation Fees consist of prepaid amounts for things to be done in the years ended 30 June 2008, 30 June 2009 and 30 June 2010. Deductions for these fees must be determined using the formula in subsection 82KZMF(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) (see paragraphs 75 to 84 of this Ruling). This provision operates to apportion expenditure over the eligible service period. The eligible service period for both the prepaid Initial Management Fees and the prepaid Initial Occupation Fees extends from the date of acceptance of a Grower's application to 30 June 2010. The Responsible Entity has provided a written undertaking to advise Growers of their eligible service period for the year ended 30 June 2008.
- (iii) The Harvest Fees and Management Performance Fees will be calculated as a percentage of harvest proceeds (see paragraphs 65 and 66 of this Ruling).

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

29. A Grower who is an individual accepted into the Project on or by 15 June 2008 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 Growers for the income years ended **30 June 2008 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.

Anti-avoidance provisions

Section 82KL and Part IVA

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

- 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

31. 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 17 October 2007; and additional correspondence and emails dated 10 December 2007, 17 January 2008, 22 January 2008, 25 January 2008, 29 January 2008 and 14 February 2008 and additional documents received on 11 December 2007, 18 January 2008, 22 January 2008, 25 January 2008 and 14 February 2008;
- Draft Product Disclosure Statement for the Alpine Meadows Olive & Walnut Project No. 1 (PDS) received on 14 February 2008;
- **Constitution** of the Alpine Meadows Olive & Walnut Project No. 1 between Huntley Management Limited (HML) as Responsible Entity and each Grower dated 20 September 2007, received on 17 October 2007;
- Draft **Licence and Management Agreement** between the Responsible Entity and each Grower received on 17 October 2007;
- Supplemental Deed for the Constitution of the Alpine Meadows Olive & Walnut Project No. 1 dated 11 October 2007, received on 17 October 2007;
- Draft Supplemental Deed of the Constitution for the Alpine Meadows Olive & Walnut Project No. 1 undated, received on 11 December 2007;
- Draft Supplemental Deed of the Constitution for the Alpine Meadows Olive & Walnut Project No. 1 undated, received on 14 February 2008;

- Compliance Plan for the Alpine Meadows Olive & Walnut Project No. 1 dated 26 September 2007, received on 17 October 2007;
- Custodial Agency Agreement for the Alpine Meadows Olive & Walnut Project No. 1 between the Responsible Entity and Huntley Custodians Limited (HCL) as the Custodian, received on 17 October 2007;
- Operational Management Agreement for the Alpine Meadows Olive & Walnut Project No. 1 between the Responsible Entity and Alpine Meadows (Aust) Pty Ltd as the Operational Manager, received on 17 October 2007; and
- Draft Lease Agreement between Accumax International Pty Ltd (the Land Owner) and the Custodian as agent for the Responsible Entity, received on 11 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.

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

33. 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. The effect of these agreements is summarised as follows.

Overview

34. The main features of the Alpine Meadows Olive & Walnut Project No. 1 are as follows:

| | |
|--|---|
| Location | Beloka & Paupong Rd, Beloka, Southern NSW (Snowy River catchment). |
| Type of business to be carried on by each Grower | Commercial growing, cultivation and harvesting of Olives and Walnuts for sale |
| Term of the Project | 23 years |
| Number of hectares offered for cultivation | 800 hectares |
| Size of each Grove | 0.1 hectares |
| Number of trees per Grove | 40 Olive Trees and 20 Walnut Trees |

| | |
|-------------------------------|--|
| Minimum allocation per Grower | Two Groves |
| Minimum subscription | 416 Groves |
| Initial cost | \$5,683 per Grove |
| Ongoing costs | Ongoing Management Fees, Ongoing Occupation Fees, Harvest Fees and Management Performance Fees (if applicable) |

35. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Huntley Management Limited (HML) has been issued with an Australian Financial Service Licence 229754 and will be the Responsible Entity for the Project.

36. The Project will involve the commercial growing, cultivation and harvesting of Olives and Walnuts or Product therefrom for sale.

37. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer under the PDS is for 800 plantable hectares, which corresponds to 8,000 Groves in the Project.

38. A Grower that participates in the Project will do so by acquiring an interest in the Project which will consist of a minimum of two Groves each of 0.1 hectares in size.

39. Applicants execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints HML to enter into, on behalf of the Grower, a Licence and Management Agreement and any other documents required to hold an interest in the Project.

40. Under terms of the PDS, the interests in the Grower's Grove will be issued after a minimum subscription of 416 Groves has been achieved.

41. The Responsible Entity will enter into a Lease with the Land Owner for the Land for the Project within the Snowy River catchment. Specifically, it is described as Lot 2 of Deposited Plan 749653 and Lot 3 of Deposited Plan 756672, Lots 81 and 90 of Deposited Plan 756707, Lots 27, 28, 35, 41, 50, 107 and 108 of Deposited Plan 756730 and Lot 2 of Deposited Plan 878467 in the Parish of Wilson in the County of Wallace in the Local Government Area of the Snowy Mountains in the Land District of Cooma.

42. This Land will be divided into 0.1 hectare lots and licensed to the Growers accepted in the Project. The Land Owner, at its own cost, will establish the Grower's Grove under the terms of the Lease prior to the acceptance of Growers into the Project.

43. Each Grower will use their Groves for the purpose of carrying on a business of cultivating and harvesting Olives and Walnuts or Product therefrom for sale.

Constitution

44. The Constitution establishes the Project and operates as a deed binding all Growers and HML. The Constitution sets out the terms and conditions under which HML 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.

45. In order to acquire an interest in the Project, the Grower must make an application for Groves in accordance with clause 15. Among other things, 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.

46. Under the terms of the Constitution, HML holds the Application Money on bare trust. HML will deposit all Application Moneys received from applicants in an Application Bank Account (clause 15.1).

47. Once HML has accepted the application and all of the Project Documents have been executed and remain in force (clause 15.3(b)), HML will transfer the relevant Application Money from the Application Bank Account to the Scheme Bank Account (clause 15.7). The Application Money may be transferred and applied against the fees due to HML (clause 15.8).

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

- Consideration payable by Growers (clause 4);
- Fees payable to HML (clause 8);
- Acceptance of applications (clause 15);
- Duties of HML (clause 22) which includes ensuring that the Scheme's Constitution meets the requirements of the *Corporations Act 2001* and ensuring that the Scheme Property is clearly identified and held separately from HML's property or any property of another Scheme; and
- Retirement and removal of HML (clause 23).

Compliance Plan

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

Lease

50. The Custodian, as agent for the Responsible Entity, will enter into a Lease with the Land Owner (Lessor) in respect of Land and all the Lessor's fixtures and improvements required for the Project.

51. The Responsible Entity must use the Land only for the term of the Project and for the horticultural purposes as set out in the Licence and Management Agreements.

52. The Land Owner, at its own cost, will construct the necessary infrastructure and carry out the necessary capital works to establish the Grower's Grove (clause 3.1). The Land Owner will plant the Groves with 40 Olives Trees and 20 Walnut Trees before commencement of the Lease (clause 3.3).

53. The Capital Works, Olive Trees, Walnut Trees and Water Licenses attached to the Grower's Grove, will at all times, remain the property of the Land Owner (clause 3.5(a)).

Licence and Management Agreement

54. Growers participating in the arrangement will enter into a Licence and Management Agreement with HML, the Custodian and the Land Owner.

55. Pursuant to clause 3.1 of the Licence and Management Agreement, HML grants to the Grower the exclusive right to carry out the Grower's Business upon the Grove and to do all other things upon the Grove that may be necessary to be carried out upon the Grove pursuant to the Licence and Management Agreement and the Constitution.

56. Pursuant to clause 2.1 of the Licence and Management Agreement Growers participating in the arrangement appoint HML, the Responsible Entity, as the manager of the Grower's Business to carry out for the Grower:

- the Initial Management Services;
- the Ongoing Management Services; and
- the Harvest Services.

57. The Initial Management Services are to be carried out from the date that a Grower's application is accepted until 30 June 2010 (clause 5.1(a)(1)). The Initial Management Services include:

- (a) carrying out any other activity of a revenue and not a capital nature that may be required to generally maintain the Groves in accordance with good horticultural practice including:
 - (1) irrigating and applying water to the Grove to maintain the Olive Trees and Walnut Trees on the Grower's Grove;

- (2) pruning the Olive Trees and Walnut Trees as required from time to time in order to 'fillet' the shape of the Olive Trees and Walnut Trees to promote growth and production in accordance with good horticultural practice;
 - (3) taking such reasonable measures as may be required to control the growth of weeds and other vegetable pests on the Grower's Grove and the land surrounding the Grower's Grove including the cultivation of the Grower's Grove between the rows of Olive Trees and Walnut Trees;
 - (4) applying manure, fertiliser, mulch and such other materials as is necessary in accordance with good agricultural practice to encourage growth of the Olive Trees and Walnut Trees; and
 - (5) obtaining professional services and advice which the Responsible Entity may consider necessary or desirable in connection with the services described in subparagraphs 57(a)(1) to 57(a)(4) of this Ruling.
- (b) carrying out any other obligation to be performed by the Responsible Entity pursuant to the terms of any agreement entered into by the Responsible Entity that is of a revenue and not of a capital nature;
 - (c) procuring on behalf of the Grower and keep current with a reputable insurer the insurance policies required to be maintained by the Responsible Entity under the Constitution and Licence and Management Agreement and all other activities in respect of arranging insurance other than crop insurance;
 - (d) preparing the reports and statements required to be provided to Growers and provide the administrative services required to perform the above services; and
 - (e) undertake all marketing activities in respect of the future sale of Grower's Olives and Walnuts, including without limitation entering into forward sales agreements in respect of the Grower's Olives and Walnuts and foreign exchange hedging agreements, as required, and monitor and supervise the performance of all contractors in that regard.

58. The Ongoing Management Services will be performed during each subsequent year beginning 1 July 2010 (clause 5.1(a)(2)). The Ongoing Management Services includes:

- (a) managing the Grower's Groves in a commercial manner in keeping with generally accepted industry standards;

- (b) caring and maintaining the Olive Trees and Walnut Trees according to principles of good horticulture;
- (c) caring and maintaining the Olive Trees and Walnut Trees prior to harvesting according to principles of good horticulture;
- (d) caring and maintaining the Olive Trees and Walnut Trees including cultivating, fertilising and mulching as required to ensure that approximately forty (40) Olive Trees and twenty (20) Walnut Trees are maintained in a healthy condition of a suitable size and quality to be available for harvest;
- (e) irrigating and applying water and nutrients to the Grower's Grove to maintain the Olive Trees and Walnut Trees on the Grove in a healthy condition;
- (f) pruning the Olive Trees and Walnut Trees as required from time to time in order to promote the growth of the Olive Trees and Walnut Trees and production of Olives and Walnuts in accordance with the good horticulture practice for the growing of Olive Trees and Walnut Trees;
- (g) taking such reasonable measures as may be required to control the growth of weeds and other vegetable pests on the Grower's Grove and the land surrounding the Grower's Grove including the cultivation of the Grower's Grove between the rows of Olive Trees and Walnut Trees;
- (h) taking all reasonable measures in accordance with the principles of good horticulture and to the extent reasonably possible to deter and eradicate any insect, bird or animal pests from the Grower's Grove which may detract from the health and vigour of the Olive Trees and Walnut Trees or the yield Olives and Walnuts therefrom;
- (i) applying manure, fertiliser, mulch and such other materials as is necessary in accordance with good agricultural practice to encourage growth of the Olive Trees and Walnut Trees;
- (j) repairing and maintaining in a good condition all fences, access ways and other structural improvements and irrigation plant and equipment on the Grower's Grove;
- (k) effecting the insurance referred to in the Constitution;
- (l) carrying out the accounting, financial control and reporting needs and functions of the Project;
- (m) keeping of proper books of account for the Project and preparing and filing of income tax returns;
- (n) attending meetings of the Growers and maintaining minutes of those meetings;

- (o) performing any of its duties under the Licence and Management Agreement; and,
- (p) doing all other things that are necessary or incidental to the carrying out of the Grower's business constituted by the Grower's Scheme Interest to produce a viable business growing, marketing and selling the Grower's Olives and Walnuts.

59. The Responsible Entity must provide to the Grower the Harvesting Services when the Olives and Walnuts are ready to be removed for production there from in accordance with good horticultural practice for the harvesting of the Olives and Walnuts (clause 5.6).

60. The Grower is entitled to the Grower's Business Income. The Grower's Business Income is the amount left after deduction of the Harvest Fee and Management Performance Fee, from the Product Sale Proceeds together with any other amounts which would be included in the Grower's taxable income from the carrying on of the Grower's Business. The Product Sale Proceeds consists of the total amount received for the sale of Olive Oil, Olive products and Walnuts which has been harvested from the Grower's Grove or where the Olives and Walnuts from the Grower's Grove forms part of the Product Pool, then the proportion of the Product Pool that is attributable to the Olives and Walnuts harvested from the Grower's Grove.

61. The Licence and Management Agreement set out provisions relating to the pooling of amounts from the sale of the Growers Olives and Walnuts or Product. This Product Pool only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed to the Product Pool or, if applicable, insurance proceeds to the Product Pool making up the Product Sale Proceeds are entitled to benefit from distributions from those Product Sale Proceeds; and
- any Product Pool must consist only of Olives and Walnuts contributed by Growers in the Alpine Meadows Olive & Walnut Project No. 1.

Fees

62. Under the terms of the Licence and Management Agreement, a Grower will make payments as described below on a per Grove basis.

63. The Application Money is to be paid by each Grower on application for the provision of the Initial Management Services and the licence of the Grove for the period from acceptance of a Grower's application up to and including 30 June 2010.

The Application Moneys comprise an Initial Management Fee of \$5,128 and an Initial Occupation Fee of \$555.

64. Commencing on 1 July 2010 an Ongoing Management Fee of \$485 and an Ongoing Occupation Fee of \$185 are payable in advance each financial year (indexed annually thereafter for CPI) commencing 1 July 2010.

65. Harvest Fees of seventeen and a half per centum (17.5%) of Product Sale Proceeds will be payable out of the Product Sale Proceeds.

66. A Management Performance Fee of thirty three per centum (33%) of the Hurdle Rate will be payable until the termination of the Project.

Finance

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

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?

68. For the amounts set out in paragraph 28 of this Ruling to constitute allowable deductions the Grower's commercial olive and walnut growing activities as a participant in the Alpine Meadows Olive & Walnut Project No. 1 must amount to the carrying on of a business of primary production.

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

70. 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?

71. Taxation Ruling TR 2000/8 Income tax; investment schemes, particularly paragraph 89, is more specific to arrangements such as the Alpine Meadows Olive & Walnut Project No. 1. 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.

72. Having applied these principles to the arrangement set out above, a Grower in the Alpine Meadows Olive & Walnut Project No. 1 is accepted to be carrying on a business of growing and harvesting olives and walnuts and produce therefrom for sale.

Deductibility of the Initial Management Fees, Initial Occupation Fees, Harvest Fees and Management Performance Fees (if applicable)

Section 8-1

73. The Initial Management Fees, Occupation Fees, Harvest Fees and Management Performance Fees (if applicable) 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 Initial Management Fees, Initial Occupation Fees, Harvest Fees and Management Performance Fees (if applicable) (see paragraphs 49 to 51 of TR 2000/8).

74. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Subject to the application of the prepayment provisions (see paragraph 75 to 82 of this Ruling) a deduction for some part of 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.)

Prepayment provisions

Sections 82KZL to 82KZMF

75. 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.

76. 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

77. Under the scheme to which this Product Ruling applies the Initial Management Fees and Initial Occupation Fees will be incurred by a Grower in the Project on or before 15 June 2008 for services that will not be wholly done within the same year of income as the year in which the expenditure is incurred.

78. For this expenditure the requirements of section 82KZME of the ITAA 1936 are met, and, therefore, unless one of the exceptions to sections 82KZME applies, the amount and timing of tax deductions for those fees are determined under section 82KZMF of the ITAA 1936. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

$$\text{Expenditure} * (\text{number of days of eligible service period in the year of income} / \text{Total number of days of eligible service period})$$

79. In the formula, 'eligible service period' (defined in subsection 82KZL(1) of the ITAA 1936) means the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

80. As a Grower in this Project acquires at least a minimum allocation of two interests in the Project the quantum of prepaid Initial Management Fees and Initial Occupation Fees is \$1,000 or more, therefore the deduction allowable for those amounts will be subject to apportionment according to the formula in paragraph 78 of this Ruling.

Example – apportionment of fees

81. A participant applies for a minimum of two interests in the Project and pays the Application Money of \$11,366 on application. The participant is accepted into the Project and their Licence and Management Agreement is executed on 15 June 2008. The number of days of eligible service in the year ended 30 June 2008 would be 16. The total eligible service period up to 30 June 2010 would be 746 days.

82. Using the formula shown in paragraph 77 of this Ruling the participant will be entitled to the following deductions:

Year ended 30 June 2008

Initial Management Fees $\$10,256 \times 16 \text{ days} / 746 \text{ days} = \220

Initial Occupation Fees $\$1,110 \times 16 \text{ days} / 746 \text{ days} = \24

83. The deductions for Initial Management Fees and Initial Occupation Fees would be \$5,018 and \$543 respectively in each year for the years ended 30 June 2009 and 2010.

84. The Harvest Fees and Management Performance Fees (if applicable) will be incurred for things to be done wholly within the same income year in which the fees are incurred. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this expenditure.

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

85. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ended 30 June 2008 to 30 June 2011, based on the evidence supplied, the Commissioner has determined that for those income years:

- 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 both the olive and walnut industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

86. 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.

87. 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

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

Part IVA – general tax avoidance provisions

89. 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).

90. The Alpine Meadows Olive & Walnut Project No. 1 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 28 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.

91. 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, walnuts and produce therefrom. 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

Subject references:

- carrying on a business
- commencement of business
- fee expenses
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- non commercial losses
- producing assessable income
- product rulings
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- taxation administration
- tax avoidance
- tax benefits under tax
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- tax shelters
- tax shelters project

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
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