



PR 2008/2 - Income tax: Early Season Apple Project - Late Growers

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 This document has changed over time. This is a consolidated version of the ruling which was published on *23 April 2008*



Product Ruling

Income tax: Early Season Apple Project – Late Growers

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

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

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

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law).

You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

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

No guarantee of commercial success

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

Potential participants must form their own view about the commercial and financial viability of the product. 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 'Early Season Apple Project – Late Growers' 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 16 January 2008, the date this Product Ruling is made, and who have executed the relevant Project Agreements set out in paragraph 33 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 the Ruling or after 15 June 2008;
- are accepted into the Project and the Land Owner's Planting Services in respect of their Applelot(s) are not completed by 15 June 2008 and the Pre-Planting Capital Works are not completed prior to planting;
- have their application monies transferred from the Applications Bank Account to the operating account prior to the completion of the Land Owner's Capital Works;
- participate in the scheme through offers made other than through the Product Disclosure Statement & Prospectus (PDS/Prospectus); or
- enter into finance arrangements with entities associated with the Project.

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 33 to 73 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 16 January 2008, the date this Product Ruling is made. It applies to the specified class of entities that enter into the scheme from 16 January 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 up to 30 June 2010.

10. 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.

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 the extent of those amendments this Product Ruling will be superseded.

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 paragraph 4 of this Ruling, 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 below at paragraphs 33 to 73 of this Ruling.

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

Small business concessions

20. 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').

21. 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. Accordingly 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***

22. 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.

23. In the case of Joint Venture Growers, each Joint Venturer will be assessable on 50% of the gross sale proceeds (less any GST payable on those proceeds).

Deductions for Management Fees, Occupation Fees, Administration Fees and Harvest Costs**Section 8-1 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936**

24. A Grower who is not a Joint Venture Grower may claim tax deductions for the following fees and expenses on a per Applelot basis, as set out in the Table below.

Fee Type	Year ended 30 June 2008	Year ended 30 June 2009	Year ended 30 June 2010
Initial Management Fee	\$7,850 See Notes (i), (ii) & (iv)		
Management Fees		Must be calculated See Notes (i), (ii) & (iv)	Must be calculated See Notes (i), (ii) & (iv)
Occupation Fees	Must be calculated See Notes (i), (ii), (iii) & (iv)	\$2,200 See Notes (i), (ii) & (iv)	\$2,420 See Notes (i), (ii) & (iv)
Administration Fees		\$82.50 See Notes (i), (ii) & (iv)	Previous year's fee indexed See Notes (i), (ii) & (iv)
Harvest Costs		Actual Costs See Notes (i), (ii) & (iv)	Actual Costs See Notes (i), (ii) & (iv)

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) Subject to clause (iii) the Management Fees, Occupation Fees, Administration Fees and Harvest Costs are deductible under section 8-1 in the year in which they are incurred. The Management Fees for the income years ended 30 June 2009 and 30 June 2010 are \$3,049.50 and \$2,936.50 respectively plus 5.5% of the Gross Harvest Proceeds received in the relevant income year. Therefore, they must be calculated.

- (iii) For the income year ended 30 June 2008 the Occupation Fee for the licence to use the Applelot is \$1,604. However the amount that can be claimed as a deduction for the Occupation Fee is \$167 per month or part month that the Grower is granted the licence to use the Applelot (see paragraph 82 of this Ruling).
- (iv) This Ruling does not apply to Growers who choose to prepay fees or who choose to, or are required to prepay interest under a loan agreement. 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.

25. A Joint Venture Grower may claim deductions on a per Applelot basis as follows:

First Joint Venturer

- 100% of the Initial Management Fee and Occupation Fee for the income year ended 30 June 2008;
- 50% of the actual Harvest Costs in any Financial Year.

Second Joint Venturer

- 100% of the Management Fees, Occupation Fees and Administration Fees for the income years ended 30 June 2009 to 30 June 2011;
- 50% of the actual Harvest Costs in any Financial Year.

Interest

26. The deductibility or otherwise of interest incurred by Growers who finance their participation in the Project through a loan facility with an independent lender external to the Project is outside the scope of this Ruling. Such Growers may request a private ruling on the deductibility or otherwise of interest under finance arrangements not covered by this Product Ruling.

Deductions for capital expenditure

Division 40

27. A Grower will also be entitled to tax deductions relating to the establishment of the Apple Trees.

28. A 'horticultural plant' is a 'depreciating asset' as defined in section 40-30 and Apple Trees are 'horticultural plants' 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 Apple Trees is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. The Commissioner has determined that the effective life of apple trees is 20 years. Subject to subsection 40-545(3), for the purposes of section 40-545, this results in a straight-line write-off rate of 13% per annum beginning in the income year in which the first commercial season starts. The Responsible Entity will inform Growers of when the Apple Trees enter their first commercial season and the amount that may be claimed.

29. Each Joint Venture Grower can claim 50% of the deduction for the decline in value of the Apple Trees on their Applelot(s).

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

Section 35-55 – exercise of Commissioner's discretion

30. A Grower who is an individual accepted into the Project 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 these Growers as follows:

- for the First Joint Venturers, for the income year ended 30 June 2008;
- for the Second Joint Venturers, for the income years ended 30 June 2008 to 30 June 2011 inclusive; and
- for all other Growers, for the income years ended 30 June 2008 to 30 June 2011 inclusive.

31. 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.

Section 82KL and Part IVA

32. For a Grower who participates in the Project and incurs expenditure as required by the Grower's 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

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

- Application for a Product Ruling received on 24 October 2006 as constituted by the following documents and additional correspondence including emails received 24 August 2007, 27 August 2007, 5 October 2007, 19 October 2007, 22 October 2007, 30 October 2007, 6 November 2007 and 19 November 2007;
- Draft Product Disclosure Statement for the Early Season Apple Project, received 19 November 2007;
- Draft **Replacement Constitution** for the Early Season Apple Project, received 19 November 2007;
- Draft **Grower's Agreement** between Advanced Horticultural Management Limited (Responsible Entity), Rivercorp Land & Water Limited (Land Owner) and the Grower, received 19 November 2007;
- Draft Operational Management Agreement – Early Season Apple Project between Advanced Horticultural Management Limited (Responsible Entity) and Rivapp Pty Limited (Operational Manager), received 19 November 2007;
- Draft Early Season Apple Project – Orchard Establishment Services between Rivercorp Land & Water Ltd (Land Owner) and Rivapp Pty Limited (Operational Manager) received 19 November 2007;
- Draft Early Season Apple Project – Apple Marketing Agreement between Advanced Horticultural Management Limited (Responsible Entity) and BP Fruits Pty Limited, received 24 August 2007;
- Draft Compliance Plan for the Early Season Apple Project, received 19 November 2007; and
- Additional correspondence, received 20 March 2008, 1 April 2008 and 9 April 2008.

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

34. The documents highlighted (in bold) 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.

35. 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

36. Following is a summary of the scheme:

Location	The Riverland Region of South Australia, within 20 kilometres of Loxton
Type of business to be carried on by each participant	Commercial growing, cultivation and harvesting of Fuji and Granny Smith apples for sale
Number of hectares offered for cultivation	60 hectares
Size of each Applelot	0.25 hectares
Number of trees per hectare	Approximately 2,200
Term of the Project	14 years (may be extended)
Initial Cost per Applelot	\$9,454
Ongoing and other costs	<ul style="list-style-type: none"> • Management fees; • Occupation fees; • Administration fees; • Harvest Costs; • Incentive fee; and • Optional insurance

37. The Project has been registered as a Managed Investment Scheme under the *Corporations Act 2001*. Advanced Horticultural Management Limited has been issued with Financial Services Licence Number 246451 and will be the Responsible Entity for the Project.

38. The Project involves the cultivation of Apple Trees and the harvest and sale of the apples.

39. The Project will be conducted on land located in the Riverland Region of South Australia within 20 kilometres of Loxton.

40. The Custodian, as agent for the Responsible Entity, will lease the land, the improvements on the land and the water licences from the Land Owner. The Responsible Entity will then grant the Growers a licence to the Applelots together with the improvements on the land and the water licences.

41. An offer to participate in the Project will be made through a PDS/Prospectus. The offer for Late Growers is for 240 Applelots comprising 60 hectares in the Project, with the right for the Responsible Entity to accept oversubscriptions where sufficient land is able to be sourced and is verified by the independent expert as being suitable. If oversubscriptions are accepted, the Responsible Entity will seek an addendum to the Product Ruling. Participants will be invited to subscribe for a minimum of 1 Applelot of 0.25 hectares. For Late Growers, each Applelot will be planted with new Apple Trees at the rate of approximately 2,200 trees per hectare.

42. A minimum of 60 Applelots must be issued under the PDS/Prospectus for the Project to commence. Minimum Subscription was reached under PR 2007/31 which issued for the Project's Early Growers who entered the Project in the period 11 April 2007 to 15 June 2007. **This Product Ruling applies to Growers who enter the Project during the period 16 January 2008 and 15 June 2008.**

43. Entities associated with Advanced Horticultural Management Limited may apply for interests in the Project and will not take up more than 40 percent of the total interests offered to Late Growers. Each of the entities associated with Advanced Horticultural Management Limited will be Growers as defined in the Constitution, will be bound by the Project Agreements in the same way as other Growers and will be required to pay the same fees at the same time as other Growers.

44. The term of the Project is a minimum of 14 years with the opportunity to extend the term for up to 6 years.

45. The Land Owner will be responsible for all development work on the land and will establish the Applelots. Specifically, the Land Owner must plant the Apple Trees by 15 June 2008 and the Pre-Planting Capital Works must be completed in a reasonable time prior to planting.

46. A Grower who acquires an interest in the Project may subscribe for a parcel of 7,000 ordinary shares, partly paid, in the Land Owner.

47. Applications to participate in the Project must be made using the Application and Power of Attorney Form included in the PDS/Prospectus. The Power of Attorney irrevocably appoints the Responsible Entity to enter into, on behalf of the Grower, a Grower's Agreement and any other agreements required to hold an interest in the Project.

Replacement Constitution

48. The Replacement Constitution establishes the Project and operates as a deed binding on all Growers and Advanced Horticultural Management Limited. The Replacement Constitution sets out the terms and conditions under which Advanced Horticultural Management Limited agrees to act as Responsible Entity and thereby manage the Project. Growers are bound by the Replacement Constitution by virtue of their participation in the Project.

49. In order to acquire an interest in the Project, the Grower must make an application for Applelots 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.

50. Under the terms of the Replacement Constitution, all monies received from applications shall be paid to the Responsible Entity. The Responsible Entity shall deposit those moneys into the Applications Bank Account in the name of the Custodian. The application money will be transferred to the operating account only once the Land Owner's Capital Works have been completed (clause 15.7).

51. The Responsible Entity may accept applications from two Joint Venturers (the First Joint Venturer and the Second Joint Venturer) that wish to conduct an unincorporated joint venture to participate in the Project. Under the joint venture, each Joint Venturer is entitled to a Prescribed Proportion of 50% of the Joint Venture Assets (clause 28).

52. The Responsible Entity is required to hold Asset Risk and Public Liability Insurance on behalf of the Growers. If the Responsible Entity is able to obtain insurance for the Grower's Produce at a reasonable premium, the Responsible Entity will do so and the Grower must reimburse the Responsible Entity for the Grower's Proportional Interest of such a premium (clause 27).

53. Clause 18 sets out provisions relating to a Grower's income, expenses and distributions. Included in the expenses to be borne by Growers is the cost to acquire or distribute water where the quantity of water available to the Project is insufficient for the Project's needs.

54. The Replacement Constitution also sets out (among other things) provisions relating to:

- register of Growers, clause 17;
- appointment of agents, clause 13;
- complaints handling, clause 6; and
- winding up the Project, clause 7.

Compliance Plan

55. As required by the Corporations Act, a Compliance Plan has been prepared for the Project. Its purpose is to ensure that the Responsible Entity manages the Project in accordance with its obligations and responsibilities contained in the Replacement Constitution and that the interests of Growers are protected.

Grower's Agreement

56. Growers participating in the scheme will enter into a Grower's Agreement with the Land Owner and the Responsible Entity.

57. The Land Owner must, at its own cost, establish the Applelots in accordance with good horticultural practice. This includes carrying out the Pre-Planting Capital Works and the Land Owner's Planting Services.

58. The Pre-Planting Capital Works must be completed within a reasonable time before planting takes place (clause 3.2) and include:

- identify suitable parts of the Land;
- organise soil surveys;
- organise block layout;
- construct and install the Irrigation Equipment and Infrastructure;
- carry out drainage work;
- clear vegetation or trees from the Orchard and perform broadacre weed spraying;
- rip and mound tree rows; and
- install trellising.

59. The Land Owner must plant out the Applelots with Apple Trees on or before 15 June 2008 (clause 3.3).

60. The Grower's Agreement will commence on the date of acceptance of the Grower's application (Settlement Date) and will expire on 30 June 2022 or when the Project is terminated or extended as provided for by clause 2.3 of the Grower's Agreement.

61. Under clause 2 of the Grower's Agreement, the Responsible Entity will grant to the Grower an interest in the Orchard in the form of a licence to use their Applelot(s) for the conduct of the Grower's Business of growing and cultivating Apple Trees and the harvesting, marketing and sale of the Apples produced from the Apple Trees. The Land Owner consents to the grant of the Grower's Agreement to the Grower.

62. Under clause 5, the Grower appoints the Responsible Entity to carry out the Grower's Management Services, the Management Services and the Harvest Services subject to the terms and conditions of the Agreement. These services are defined in the Replacement Constitution at clause 30. The Responsible Entity must carry out the services with a view to maximising the yield of the Apple Trees from the Grower's Applelot.

63. The Responsible Entity must perform the Late Grower's Management Services in the Initial Period from Settlement Date to 30 June 2008. The Management Services and the Harvest Services must be performed as required and in accordance with good horticultural practice during each income year from 1 July 2008 to the end of the Project.

64. The Responsible Entity may engage contractors or others to perform its obligations under the Grower's Agreement. Under the Operational Management Agreement, the Responsible Entity will engage the Operational Manager as an independent contractor to perform the duties, including the Operational Management Services, set out in clause 5 of the Operational Management Agreement.

Pooling of Growers' produce and Growers' Entitlement to Net Proceeds

65. Under clause 7.2 of the Grower's Agreement, the Responsible Entity is authorised to pool the Apples harvested from the Late Grower's Applelot(s) with Apples harvested from the Applelots of other Growers in the Project. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who contribute apples are entitled to benefit from distributions of Gross Harvest Proceeds from the pool; and
- any pooled Apples must consist only of Apples contributed by Late Growers.

66. Where an Applelot is partially destroyed, the Grower's Proportional Interest in the Product Pool will be adjusted accordingly (clause 10.4 of the Grower's Agreement).

67. The Grower's Agreement (clause 7.1) and the Replacement Constitution (clause 18) set out the provisions relating to the Grower's entitlement to the Gross Harvest Proceeds. The Responsible Entity must deposit the Grower's Business Income (Gross Harvest Proceeds less all fees, cost and expenses to be deducted as specified in the Replacement Constitution and the Grower's Agreement) into the Scheme Bank Account. The Grower's Business Income must be transferred to a distribution account and distributed to the Grower in accordance with the Grower's Proportional Interest, after deducting any outstanding fees and taxes.

Fees

68. Under the terms of the Grower's Agreement, a Grower will make payments as described below on a per Applelot basis.

Management Fees

- Initial Management Fee of \$7,850 payable to the Responsible Entity on application for the Late Grower's Management Services which will be provided during the Initial Period from Settlement Date to 30 June 2008;
- Management Fee of \$3,049.50 for the income year ended 30 June 2009 payable on 1 July 2008 plus 5.5% of the Gross Harvest Proceeds received in that income year;
- Management Fee of \$2,936.50 for the income year ended 30 June 2010 payable on 1 July 2009 plus 5.5% of the Gross Harvest Proceeds received in that income year;
- Management Fee of \$2,800 for the income year ended 30 June 2011 payable on 1 July 2010 plus 5.5% of Gross Harvest Proceeds received in that income year; and
- Management Fees for the income years ended 30 June 2012 to 30 June 2022 consisting of estimated Applelot Operating Costs plus 5.5% of the estimated Gross Harvest Proceeds. These are payable annually on 1 July.

The Operating Costs and Harvest Proceeds will be estimated 12 months in advance for the purposes of calculating the Management Fees for the income years ended 30 June 2012 to 30 June 2022. At the end of the relevant income year, the Responsible Entity will adjust the amount payable depending on the actual costs incurred and the actual Gross Harvest Proceeds.

Occupation Fees

- \$1,604 payable on application for the Initial Period;
- \$2,200, \$2,420 and \$2,860 for the income years ended 30 June 2009, 30 June 2010 and 30 June 2011 respectively; and
- from the income year ended 30 June 2012 until the end of the Project the fee payable for the previous income year indexed by the Consumer Price Index (CPI) payable on 1 July each income year.

Administration Fees

- \$82.50 for the income year ended 30 June 2009 payable by 1 July 2008; and
- for the income years ended 30 June 2010 to 30 June 2022, the fee payable for the previous income year indexed by CPI, payable annually commencing on 1 July 2009.

Harvest Costs

- actual Harvest Costs payable out of Gross Harvest Proceeds in each income year in which a harvest occurs.

Incentive Fee

- for each income year from the income year ended 30 June 2011 until the end of the Project, 33% of the Average Net Proceeds which exceed an Investment Fee Threshold in the income year, payable annually commencing on 1 July 2010. 'Average Net Proceeds' and 'Investment Fee Threshold' are described in clause 6.4 of the Grower's Agreement.

Joint Venture Growers

69. The First Joint Venturer will be responsible for the following fees:

- 100% of the Initial Management Fee;
- 100% of the Occupation Fee for the Initial Period;
- 50% of the Management Fees, Administration Fees and Occupation Fees for the income years ended 30 June 2012 to 30 June 2022; and
- 50% of the Harvest Costs and the Incentive Fees.

70. The Second Joint Venturer will be responsible for the following fees:

- 100% of the Management Fees, Administration Fees and Occupation Fees for the income years ended 30 June 2009 to 30 June 2011;
- 50% of the Management Fees, Administration Fees and Occupation Fees for the income years ended 30 June 2012 to 2022; and
- 50% of the Harvest Costs and the Incentive Fees.

Finance

71. A Grower who does not pay the application fee in full upon application can borrow from an independent lender external to the Project. A Grower who enters into a finance arrangement with an independent lender external to the Project may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

72. Growers cannot rely on any part of this Ruling if the application fee is not paid to the Responsible Entity in full on or before 15 June 2008 by the Grower or, on the Grower's behalf, by a lending institution.

73. 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 Taxation16 January 2008

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?

74. For the amounts set out in paragraphs 24 and 27 of this Ruling to constitute allowable deductions, the Grower's horticulture activities as a participant in the Early Season Apple Project – Late Growers must amount to the carrying on of a business of primary production.

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

76. 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?

77. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Early Season Apple Project. As 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.

78. Having applied these principles to the arrangement set out above, a Grower in the Early Season Apple Project – Late Growers is accepted to be carrying on a business of growing and harvesting apples for sale.

Deductibility of Management Fees, Occupation Fees, Administration Fees and Harvest Costs

Section 8-1

79. Other than part of the Occupation Fee for the Initial Period, the Management Fees, Occupation Fees, Administration Fees and Harvest Costs 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 other than part of the Occupation Fee for the Initial Period, there is no capital component evident in the Management Fees, Occupation Fees, Administration Fees and Harvest Costs.

80. Subject to paragraphs 81 and 82 of this Ruling the tests of deductibility under the first limb of section 8-1 are met and the exclusions do not apply.

81. One of the exclusions under section 8-1 relates to expenditure that is capital, or is capital in nature. Any part of the expenditure of a Grower entering into a horticulture business which is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and hence will not be deductible under section 8-1. The Commissioner is of the view that a portion of the Occupation Fee payable by a Grower for the Initial Period will be capital expenditure.

82. A Grower, who enters the Project on or before 15 June 2008, pays an Occupation Fee of \$1,604 for the licence to use their Applelot in the Initial Period. Based on the annual Occupation Fee payable in the income year ended 30 June 2009, discounted by 10%, this is equivalent to an Occupation Fee payable for approximately 9 months. As the Grower does not lease the land for this period it is considered that part of the Occupation Fee is a premium paid by the Grower for the grant of the licence and is capital in nature. Therefore, under section 8-1 Growers will be entitled to a deduction of \$167 per month calculated on a pro-rata monthly basis for each month or part month that the Grower is granted the licence to use the Applelot in the Initial Period.

83. Subject to the above qualification, and provided the prepayment provisions do not apply (see paragraphs 84 to 88 of this Ruling), a deduction for the Management Fees, Occupation Fees, Administration Fees and Harvest Costs may 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

84. 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.

85. 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

86. Under the scheme to which this Product Ruling applies the Management Fees, Occupation Fees and other fees are incurred annually. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

87. 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 Grower's Agreement, or prepays interest under a loan agreement. Where such a prepayment is made these prepayment provisions will also apply to 'small business entities' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

88. Growers who prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

Expenditure of a capital nature

Division 40

89. Any part of the expenditure of a Grower that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, expenditure attributable to the establishment of the apple trees and that portion of the Occupation Fee for the income year ended 30 June 2008 that is considered a lease premium (refer paragraphs 81 and 82 of this Ruling) are of a capital nature. The expenditure attributable to the establishment of the apple trees falls for consideration under Division 40.

90. The tax treatment of capital expenditure on the establishment of apple trees has been dealt with in a representative way in paragraphs 27 and 28 of this Ruling.

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

Section 35-55 – exercise of Commissioner's discretion

91. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis:

- for the income year ended 30 June 2008 (for the First Joint Venturers);
- for the income years ended 30 June 2008 to 30 June 2011 (for the Second Joint Venturers); and

- for the income years ended 30 June 2008 to 30 June 2011 (for all other Growers),

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 the horticulture industry of growing apple trees, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

92. 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.

93. 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

94. 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

95. 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).

96. The Early Season Apple Project – Late Growers will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions as detailed at paragraphs 24 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.

97. 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 apples. 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 2000/8;
PR 2007/31

Subject references:

- borrowing expenses
- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- tax avoidance
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF

- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
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- ITAA 1997 40-515(1)(b)
- ITAA 1997 40-520(2)
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- ITAA 1997 40-545(3)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- SISA 1993
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- Corporations Act 2001

Case references:

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

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