


PR 2009/11 - Income tax: 2007 Macgrove Project (2009 Growers)

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Product Ruling

Income tax: 2007 Macgrove Project (2009 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.

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 2007 Macgrove Project (2009 Growers) or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities:

- are subject to the taxation obligations; and
- can rely on the tax benefits,

set out in the Ruling section of this Product Ruling. The class of entities who can rely on the tax benefits set out in this Ruling are referred to as Growers.

3. 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 who have executed the relevant Project Agreements set out in paragraph 27 of this Ruling on or before 15 June 2009. They will stay in the scheme until its completion and derive 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:

- terminate their involvement in the scheme prior to its completion, or do not derive assessable income from it;
- harvest and take as their own any macadamia nuts during the term of the Project;
- are accepted into this Project before the date of this Product Ruling or after 15 June 2009;
- who fail to pay the Application Fee of \$11,000 per Macgrove in full by 15 June 2009, or
- participate in the scheme through offers made other than through the Product Disclosure Statement.

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 27 to 110 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 18 March 2009, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 18 March 2009 until 15 June 2009 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 2011 being its period of application. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

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.

Changes in the law

11. Although this Product Ruling deals with the income tax 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.

12. 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

13. 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

14. 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

15. 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 27 to 110 of this Ruling.

16. 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 Management Agreement and Sub Leases by Maccacorp Limited under the Power of Attorney given to Maccacorp Limited by the Grower.

Small business concessions

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

18. 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, unless otherwise stated, 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**Section 6-5**

19. 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 in the year in which it is derived.

Deductions for Management Fees, Rent, Grower's Expenses, Performance Incentive Fee and Lease Document Fee**Sections 8-1 and 25-20 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936**

20. A Grower may claim deductions, on a per Macgrove basis, for the following expenditure set out in the Table below.

| Fee Type | Year ended 30 June 2009 | Year ended 30 June 2010 | Year ended 30 June 2011 |
|--------------------------|--|--|---|
| Management Fee | \$11,000 See Notes (i), (ii) & (iii) | \$2,200 See Notes (i), (ii) & (iii) | Must be calculated See Notes (i), (ii) & (iii) |
| Rent | Nil | \$792 See Notes (i), (ii) & (iii) | Must be calculated See Notes (i), (ii) & (iii) |
| Grower's Expenses | Nil | Must be calculated See Notes (i) & (iv) | Must be calculated See Notes (i) & (iv) |

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|----------------------------------|-------------------------------------|-----|---|
| Performance Incentive Fee | Nil | Nil | Must be calculated See Notes (i) & (v) |
| Lease Document Fee | As incurred See Notes (i) & (vi) | | |

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 Fee and the Rent shown in the Management Agreement and the Sub Leases are deductible under section 8-1 in the income year that they are incurred. As the Management Fee and Rent payable in the year ended 30 June 2011 is equal to the Management Fee and Rent from the previous year, indexed by CPI, the amount payable needs to be calculated. The Responsible Entity will advise Growers of the Management Fee and Rent to be paid for 2011 and subsequent financial years.
- (iii) This Ruling does not apply to Growers who choose to prepay Management Fees or Rent (see paragraphs 119 to 123 of this Ruling). 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) Grower's Expenses are deductible under section 8-1 in the income year that they are incurred. The amount payable needs to be calculated with reference to Item 4 of Schedule 1 to the Management Agreement. The Responsible Entity will advise Growers of the amount to be paid.
- (v) Performance Incentive Fees are deductible under section 8-1 in the income year that they are incurred. The Performance Incentive Fee is calculated as 25% of any net proceeds of the sale of the Crop attributable to a Macgrove that exceeds the Performance Incentive Threshold for Macgroves. The Responsible Entity will advise Growers of the amount to be paid.

- (vi) The fee for registering and stamping the Sub Leases is a lease document expense and deductible in full under section 25-20 in the year that it is incurred. It is incurred for acquiring a sub lease over a property that is used or is to be used during the Term of the Project solely for income producing purposes.

Deductions for capital expenditure

Division 40

21. Each Grower will also be entitled to a tax deduction relating to the decline in value of the macadamia trees planted on the Macgrove, on a per Macgrove basis as set out in the Table below.

| Fee Type | Year ended 30 June 2009 | Year ended 30 June 2010 | Year ended 30 June 2011 |
|---|------------------------------------|------------------------------------|------------------------------------|
| Establishment of macadamia trees | Nil See Note (i) & (vii) | Nil See Note (i) & (vii) | Nil See Note (i) & (vii) |

Notes:

- (vii) Macadamia trees are a 'horticultural plant' as defined in subsection 40-520(2). As the Grower holds the Macgrove under Sub Leases, 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 macadamia trees is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. Since the macadamia trees have an 'effective life' of greater than 13 but fewer than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the macadamia trees enter their first commercial season (section 40-530, item 2). The Responsible Entity will notify the Grower of when their macadamia trees enter their first commercial season and the amount that may be claimed.

Joint Venturers

22. A Joint Venture Grower may claim deductions, on a per Macgrove basis, for the following expenditure set out in the Tables and Notes in paragraph 20 of this Ruling:

First Joint Venturer

- in the year ending 30 June 2009, \$11,000 for the Management Fee and Rent (also referred to as Application Fee).

Second Joint Venturer

- in the years ending 30 June 2010 and 30 June 2011 inclusive, the Management Fee and Rent; and
- in the years ending 30 June 2009 to 30 June 2011 inclusive, the Grower's Expenses.

23. Each Joint Venturer can also claim deductions for its 50% proportional share of the Performance Incentive Fee, and 50% proportional share of the horticultural plant write-off as set out in the Table & Notes in paragraph 20 of this Ruling.

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

Section 35-55 – exercise of Commissioner's discretion

24. Growers who will stay in the Project until its completion will be considered to be carrying on a business of primary production. Such Growers who are individuals and accepted into the Project in the year ended 30 June 2009 may make losses from the Project that may be affected by the loss deferral rule in section 35-10 in Division 35.

25. The discretion in paragraph 35-55(1)(b) will be exercised for such Growers to who the loss deferral rule would otherwise apply, as follows:

- for the income years ending **30 June 2009 to 30 June 2010** for First Joint Venturers; and
- for the income years ending **30 June 2009 to 30 June 2014**, for all other Growers.

Exercise of the discretion in this case however is conditional on the Project being carried out in the manner described in paragraphs 27 to 110 of this Ruling, but will allow Growers referred to who make losses, to offset against their other assessable income in the income years in which those losses arise.

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

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

- expenditure by a Grower who does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 119 to 123 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

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

- Application for a Product Ruling dated 20 November 2008 as constituted by documents provided on 21 November 2008 and additional correspondence, emails, and telephone conversations dated 22 December 2008, 5 January 2009, 28 January 2009, 6 February 2009, 9 February 2009, 24 February 2009, 26 February 2009 and 10 March 2009;
- Product Disclosure Statement for the 2007 Macgrove Project dated 8 January 2007, including the **Application and Power of Attorney Form**;
- First Supplementary Product Disclosure Statement for the 2007 Macgrove Project dated 21 February 2007;
- Second Supplementary Product Disclosure Statement for the 2007 Macgrove Project dated 9 August 2007;
- Draft Third Supplementary Product Disclosure Statement for the 2007 Macgrove Project received on 10 March 2009;
- **Constitution** for the 2007 Macgrove Project between Maccacorp Limited (Responsible Entity) and each Grower received on 21 November 2008;
- **Supplementary Constitution** for the 2007 Macgrove Project between Maccacorp Limited (Responsible Entity) and each Grower dated 21 December 2006;

- Draft **Second Supplementary Constitution** for the 2007 Macgrove Project between Maccacorp Limited (Responsible Entity) and each Grower received on 26 February 2009;
- Compliance Plan for the 2007 Macgrove Project, received on 21 November 2008;
- Supplementary Compliance Plan for the 2007 Macgrove Project dated 9 October 2006;
- **2009 Grower Management Agreement** of the 2007 Macgrove Project between Maccacorp Limited (Manager) and each Grower received on 9 February 2009;
- Lease (Kenzler Road Lease) for the 2007 Macgrove Project between Maccland Pty Ltd (Lessor) and Maccacorp Limited (Lessee) dated 30 September 2006;
- three draft **Sub Leases** in relation to the Kenzler Road Lease for the 2007 Macgrove Project between Maccacorp Limited (Lessor) and each Grower (Lessee) received on 9 February 2009;
- Principal Subcontractor's Agreement for the 2007 Macgrove Project between Maccacorp Limited (Responsible Entity) and Maccmanagement Pty Limited (Principal Sub Contractor) dated 9 August 2007;
- Nut-In-Shell Supply Agreement (Sale Agreement) for the 2007 Macgrove Project between Maccacorp Limited (Responsible Entity) and Macadamia Processing Co Limited (the Company) dated 9 December 2005;
- Custody Agreement for the 2007 Macgrove Project between Maccacorp Limited (Responsible Entity) and Perpetual Nominees Limited (Custodian) dated 8 May 2006;
- Custody Agreement Variation for the 2007 Macgrove Project between Maccacorp Limited (Responsible Entity) and Perpetual Nominees Limited (Custodian) dated 8 September 2006; and
- Expert's Report (additional land at Moore Park) for the 2007 Macgrove Project received on 21 November 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.

28. 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 below.

29. 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

30. All capitalised terms within this ruling are capitalised terms within the scheme documentation. The main features of the Project are as follows:

| | |
|---|---|
| Location | 92 Kenzler Road, Sharon via Bundaberg, Queensland |
| Type of business to be carried on by each participant | Commercial growing, cultivation and harvesting of Macadamia Nuts for sale |
| Number of hectares offered for cultivation | 27.2 hectares |
| Size of each Macgrove | 0.4 hectare |
| Minimum allocation | 1 Macgrove |
| Number of trees per Macgrove | Approximately 125 |
| Term of the Project | Approximately 19 years |
| Initial cost (referred to as 'Application Fee') | \$11,000 per Macgrove |
| Ongoing costs | Annual Management Fees and Annual Rent |
| Other costs | Orchard Operating Expenses, Grower's Expenses, Annual Insurance premiums and Performance Incentive Fees |

31. The Project is a registered managed investment scheme under the *Corporations Act 2001* (Corporations Act). Maccacorp Limited (Maccacorp) has been granted an Australian Financial Services Licence (Licence No 296213) and will be the Responsible Entity for the Project.

32. An offer to participate in the Project will be made through a Third Supplementary Product Disclosure Statement (SPDS) which is to be read in conjunction with:

- Product Disclosure Statement (PDS) dated 8 January 2007;
- First Supplementary Product Disclosure Statement dated 21 February 2007; and
- Second Supplementary Product Disclosure Statement 9 August 2007.

33. PR 2006/163 issued for Early Growers who entered the Project from 20 December 2006 to 15 June 2007. PR 2007/74 issued for Late Growers who entered the Project from 8 August 2007 to 15 June 2008. This ruling deals with offers made under the SPDS and only applies to Growers who enter into the Project from 18 March 2009 to 15 June 2009.

34. The offer under the SPDS is for 68 established Macgroves totalling approximately 27.2 hectares in the Project. Participants will be invited to subscribe for a minimum of one Macgrove, comprising 0.4 hectares. The Trees have been planted on each Grower's Macgrove and all other establishment activities will be completed by the time of acceptance of each Grower's application to participate in the Project. This ruling has no application to Growers accepted to participate in the Project before 18 March 2009 and after 15 June 2009.

35. PR 2006/163 was issued in respect of the original PDS on 20 December 2006 for the Project's Early Growers, based on a Minimum Subscription of 100 established Macgroves. Minimum Subscription was achieved on 7 May 2007. There is no Minimum Subscription for this latest offer.

36. Entities associated with Maccacorp may apply for established Macgroves. However, entities associated with Maccacorp will not take up more than 20 percent of the total number of issued established Macgroves. Each of the entities associated with Maccacorp will be:

- Growers as defined in the Constitution;
- bound by the Project Agreements in the same way as other Growers; and
- required to pay the same fees at the same time as other Growers.

37. This Product Ruling will have no application if entities associated with Maccacorp purchase Macgroves and fail to pay the same fees at the same time as other Growers. In this context, payment means that Maccacorp is paid with real money that does not include the use of bridging finance, promissory notes or other such instruments.

38. The Project involves the commercial growing, cultivation and harvesting of Macadamia Nuts for sale.

39. Applications to participate in the Project must be made using the Application and Power of Attorney Form included in the PDS. By completing this Form, the Grower agrees to allow Maccacorp to enter into, execute and otherwise deal with Project Agreements (being the Sub Leases, Management Agreement and Sale Agreement) on their behalf. A custodian will be appointed under the Custody Agreement to hold the Project Assets for the Growers.

40. Maccacorp will allocate established Macgroves to those Applicants accepted as Growers in the Project and establish and maintain a register of Growers throughout the term of the Project.

41. Applicants who are accepted to participate in the Project and who execute the Sub Leases and Management Agreement from the date of this Ruling to on or before 15 June 2009, will become 2009 Growers.

42. The Project Land on which Growers will be growing and cultivating the Trees for the production of Macadamia Nuts is situated at 92 Kenzler Road, Sharon via Bundaberg, Queensland. Maccacorp entered into a Lease with the Land Owner for the Land on 30 September 2006. There are three dams on the land with a total capacity of approx 400 mega litres as well as Water Allocations Nos 360 and 379 for a total of 238 mega litres per annum. The Lease has been registered with the Registrar of Titles, Queensland.

43. Maccacorp will grant the Growers three consecutive Sub Leases to use and occupy one or more identifiable established Macgroves. The collective terms of the Sub Leases (ten years, eight years and one year) correspond to the 19-year term of the Project. Under the first Sub Lease, the Grower agrees to maintain the Orchard in accordance with the Management Plan and in a manner that is consistent with best agricultural practice. The Trees and all Improvements are and remain the property of the Land Owner.

44. Each Grower will enter into a Management Agreement with Maccacorp to cultivate and maintain the Trees and be responsible for harvesting, procuring the processing of and selling the macadamia nuts on behalf of the Grower.

45. Maccacorp has entered into the Sale Agreement with Macadamia Processing Co Limited (MPC) to sell the entire Crop produced from the Orchard during the duration of the Project at prices and on terms that are no less favourable than arms length terms.

46. As an alternative to participation by a Grower as a single entity, the terms of the Constitution and the Management Agreement provide that two Growers may enter into a 'Joint Venture' to subscribe for a Macgrove(s).

Constitution

47. The Constitution establishes the Project and operates as a deed binding on each Grower and Maccacorp (clause 2.1). The Constitution sets out the terms and conditions under which Maccacorp agrees to act as the 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.

48. The Project is established for the purpose of:
- (a) inviting persons to become the proprietor of their own Macgrove and commencing a primary production business of growing, harvesting and selling Macadamia Nuts; and
 - (b) enabling a person to become a Grower by:
 - (i) applying for and being issued an Interest;
 - (ii) entering into a Management Agreement which appoints the Responsible Entity to manage the person's business;
 - (iii) entering into the Sub Leases; and
 - (iv) agreeing to be bound by the Constitution (clause 2.3).
49. The Term of the Project ends upon the earliest of:
- (a) the termination or expiry of the last of the Growers' Interests;
 - (b) the termination of the Head Lease in circumstances where no satisfactory ongoing arrangement is made to ensure the Land remains available for the purpose of the Project;
 - (c) the Project being wound up in accordance with clause 11 and the Corporations Act; and
 - (d) the expiry of the period of 80 years from the date of the Constitution (clause 10.1).

Upon the termination of the Project, all of the rights and obligations under the Project Agreements will cease and each Project Agreement will be automatically terminated.

50. In order to become a Grower in the Project, an Applicant must lodge an Application and pay to the Responsible Entity the amount of \$11,000 in respect of each established Macgrove on the terms and conditions specified in the PDS and SPDS which is current at the date of lodging the relevant Application and the Application must be accepted by the Responsible Entity (clause 3). For this Product Ruling to apply the 'current' PDS under which a Grower is accepted must be materially the same as the PDS dated 8 January 2007, as amended by:

- (a) first supplementary PDS dated 21 February 2007;

- (b) second supplementary PDS dated 9 August 2007; and
- (c) draft third supplementary PDS received by the Tax Office on 9 February 2009.

51. The amount payable under clause 3 represents the Management Fee payable for the Initial Orchard Maintenance Services to be provided in the First Financial Year in respect of each established Macgrove, pursuant to the Management Agreement.

52. Each Application for an Interest must:

- (a) be in the form included in or accompanying the SPDS issued by the Responsible Entity and current at the time of lodgement of the Application;
- (b) be signed by the Applicant and lodged at the registered office of the Responsible Entity or such other place as the Responsible Entity nominates; and
- (c) be accompanied by such other information or evidence as the Responsible Entity may require (clause 13.1).

53. The Responsible Entity may accept Applications where the Application contains all of the material required as detailed in paragraph 52 of this Ruling and the Application Money has been paid (clause 13.2). Upon accepting an Application, the Responsible Entity will allocate to the Applicant that number of established Macgroves in respect of which the Application has been accepted by the Responsible Entity (clause 14.1).

54. The Responsible Entity must establish and maintain a register of Growers throughout the Term of the Project (clause 14.2).

55. If any Application is refused then the Responsible Entity must refund any Application Money to the Applicant concerned within five Business Days after the refusal (clause 13.3).

56. The Responsible Entity must open two Project accounts with a bank or other financial institution. One account will be the Application Fund (into which will be deposited all money received from Applicants) and the other will be the Proceeds Fund (into which will be deposited all money generated from the Project for the Growers of the Project, excluding the Application Money). However, in certain limited circumstances the Responsible Entity may use one account only (clause 12.2). The Responsible Entity may transfer money paid by an Applicant from the Application Fund to the Responsible Entity for the purposes of the Project where the Responsible Entity has issued an Interest to the Applicant (clause 15.1).

57. Each Applicant has an interest in the Application Fund equal to the proportional interest that Applicant's Application Money bears to the total Application Money paid by all Applicants. However, an Applicant does not have any interest in any particular part of the Application Fund or in any Investment (clause 16.1).

58. Each Grower directly owns their Grower Interest, including:

- (a) the Grower's business of growing, and maintaining Trees on, and harvesting Macadamia Nuts from, each of its established Macgroves;
- (b) a share of any Crop equal to the Grower's Proportion (as defined in the Constitution); and
- (c) the net proceeds that result from the sale of Macadamia Nuts by the Grower carrying on its business of primary production (clause 16.3).

59. The Grower's Interest does not include the Trees or any of the Improvements which will at all times remain the property of the Land Owner (clause 16.3).

60. Each Grower has an interest in the Proceeds Fund equal to the Grower's Proportion, which is defined as the proportion that the area of the Grower's established Macgroves bears to the total area of all established Macgroves registered to Growers in that Financial Year (clause 16.2).

61. Where an event occurs to which any insurance policies apply, the insurance proceeds will be dealt with as follows:

- In the situation where the whole Orchard is destroyed, the proceeds of any insurance policies paid in respect of all established Macgroves will be paid into and form part of the Proceeds Fund and the proceeds of any insurance policy will be deemed attributable to all Growers' Interests (clause 25.4(a)).
- Where an event occurs which affects some but not all the Growers' established Macgroves, and those affected established Macgroves are fully destroyed, the proceeds of the insurance policies paid in respect of that event will be paid into and form a separate fund, and each Grower with a Macgrove affected by the event (Affected Grower) has an interest in the separate fund calculated as provided in clause 25.4(c)(iii) (clause 25.4(b)).
- Where an event occurs which affects some but not all the Grower's established Macgroves, and those affected established Macgroves are only partially destroyed, those Affected Grower's have an interest in both the Proceeds Funds (in relation to sale of Macadamia Nuts) and the separate fund (in relation to insurance proceeds) in accordance with the formulae shown at clause 25.4(c).

62. The Responsible Entity must harvest all of the Macadamia Nuts grown on Trees in each Grower's Macgrove in accordance with the Management Agreements and may store, market and sell the Crop harvested in accordance with the terms of any Sale Agreement (clause 25.1). Macadamia Nuts grown during the term of the Project will be sold under the Nut in Shell Supply Agreement discussed in paragraphs 96 and 97 of this Ruling.

63. The Responsible Entity must pay into the Proceeds Fund:
- (a) proceeds from the sale of all Macadamia Nuts harvested from the Orchard;
 - (b) proceeds of any insurance policy accruing to the Growers where the Orchard is totally destroyed; and
 - (c) any other amount properly related to the proceeds of the Growers' Interests (clause 25.2).

Supplementary Constitution

64. The principal purposes of this document are to firstly, change the name of the Constitution of the 2006 Macgrove Project, to the Constitution of the 2007 Macgrove Project and secondly, to amend the Constitution and Management Agreement to provide for the situation where two entities participate in the Project as Joint Venturers.

65. Joint Venturers are known as First Joint Venturer and Second Joint Venturer, and are apportioned specific responsibilities, rights and entitlements under clause 35 of the Constitution.

66. Each of the First Joint Venturer and the Second Joint Venturer are responsible for the payment of Management Fees, Grower's Expenses, and Rent over the Term of the Project in the manner stated at paragraphs 105 to 108 of this Ruling. Both the First Joint Venturer and the Second Joint Venturer are entitled to a Prescribed Proportion of 50% of the Joint Venture Assets, as defined in clause 1.1.

Second Supplementary Constitution

67. The principal purposes of this document are to firstly, provide for 2009 Growers to invest in the project, and secondly, to amend the responsibilities, rights and entitlements of 2009 Growers who participate in the project as Joint Venturers.

68. As per the amended constitution, 2009 Grower means a person whose Application is accepted after 1 July 2008 and on or before 15 June 2009.

69. For 2009 Growers who participate in the Project as Joint Venturers, the First Joint Venturer is entitled to a Prescribed Proportion of the Joint Venture Assets of 50% and the Second Joint Venturer is entitled to a Prescribed Proportion of the Joint Venture Assets of 50%.

Compliance Plan

70. The Plan describes how the Responsible Entity will operate the Project and ensure that it complies with the Corporations Act, the Constitution and with any other operating requirements set down by the board of Directors of the Responsible Entity.

71. The principal purpose of the Compliance Plan is to ensure that the interests of Growers are protected. The Plan sets out the systems and methods by which the Responsible Entity, its officers, agents, contractors and employees will ensure that the Project and the Responsible Entity continue to comply with all relevant parts of the Corporations Act and the Constitution and continuously monitor and review such compliance.

Supplementary Compliance Plan

72. This Plan changes all references to the 2006 Macgrove Project in the Compliance Plan to the 2007 Macgrove Project. It also amends certain definitions in clause 1 to reflect the changes in the arrangement from the 2006 Macgrove Project. The 2006 Macgrove Project did not proceed because Minimum Subscription was not reached.

Lease

73. Maccland leases the Land to Maccacorp for the Term of the Project, in return for the 'Rent' (clause 2). The Land is located at 92 Kenzler Road, Sharon via Bundaberg, Queensland, being Lots 3 and 4 on RP866764, Lot 1 on SP 199369, and Lot 60 on CP CK2025. The Term of the Lease is the period commencing on 30 September 2006 and ending 30 June 2028. The Rent is the total of rental received by Maccacorp under all sub lease agreements including, but not limited to the Sub Leases between Maccacorp and the Growers, which shall be due and payable on 1 July in each Financial Year commencing 1 July 2007 (clause 3).

74. The Lessee may give the Lessor a notice asking the Lessor to grant the Lessee a further lease for the period of five years commencing on the day following the expiration of the initial Term of the Lease. This is known as the First Option Period.

75. The Lessee may give the Lessor a notice asking the Lessor to grant the Lessee a further lease for the period of four years commencing on the day following the expiration of the First Option Period. This is known as the Second Option Period.

76. Under the Lease, Maccacorp:

- must not use or allow the Land to be used other than for the purposes of the Project (clause 6.1);

- must undertake the Development Work at its own cost and expense, prior to Growers being accepted into the Project. The Lessor makes no representation or warranty that the Land is suitable for use as a commercial macadamia nut orchard (clause 7.1);
- is responsible to obtain all necessary permits or approvals that may be required from any Public Authority in relation to the use of the Land for the purpose of the Project and/or in relation to the performance of the Development Work (clause 7.2);
- acknowledges that the Trees and all Improvements are and remain the property of the Lessors and the Lessee (whether in its capacity as Responsible Entity of the Project or otherwise) will not have right, title, interest or claim in or to either the Trees or the Improvements (clause 7.3);
- must perform all Development Work in a good workmanlike manner and so as not to cause any nuisance, damage or injury to the Lessors or the Land or the occupiers of any adjoining land (clause 8.1); and
- must undertake all necessary Orchard Maintenance in accordance with Best Agricultural Practice.

77. Under the Lease, Maccland will provide Access Roads for use by Maccacorp and Maccacorp's employees and will maintain the supply of the Irrigation Water and will renew water allocations and licences as and when required (clauses 9.5 and 9.6). Maccacorp at its own cost keep and maintain with a reputable insurer insurance against public risk and occupiers liability and damage to the Land by fire or other insurable risks (clause 10.1)

Sub Leases

78. Each Grower will execute three Sub Leases with the Responsible Entity as the Lessor. Under the Sub Leases, the Lessor leases to the Grower the Grower's established Macgrove together with the right to use in common with the Lessor and other participants in the Project the Common Area for the Term from the Commencement Date on and subject to the terms and conditions set out in the Sub Leases (clause 2). Common Area means those parts of the Land provided by the Lessor from time to time for common use by the Grower and the Lessor and/or other Growers who are occupants of the Land and is more particularly described in Item 5 of Schedule 1.

79. Each Sub Lease will be entered at the same time. The commencement and expiry dates of each Sub Lease are as follows:

| Sub Lease | Term (years) | Commencement Date | Expiry date |
|------------------|---------------------|--|---|
| First | 10 | Date of execution of first Sub Lease (being the date of acceptance of Grower into Project) | 10 years after the commencement date of the first Sub Lease |
| Second | 8 | 10 years and one day after the commencement of the first Sub Lease | 8 years after the commencement date of the second Sub Lease |
| Third | 1 | 19 years and one day after the commencement of the first Sub Lease | 30 June 2028 |

80. The Grower may give the Lessor a notice asking the Lessor to grant the Lessee a further lease for the period of five years commencing on the day following the expiration of the initial Term of the Third Sub Lease. This is known as the First Option Period.

81. The Grower may give the Lessor a notice asking the Lessor to grant the Lessee a further lease for the period of four years commencing on the day following the expiration of the First Option Period. This is known as the Second Option Period.

82. The Growers must pay to Maccacorp, in respect of each Financial Year during the Term, the Rent in accordance with Item 3 of Schedule 1. There is no Rent payable for the First Financial Year. The Rent for the second and each successive Financial Year of the Term is due and payable on 1 July in each Financial Year, commencing 1 July 2009.

83. Under the Sub Leases the Grower:

- will pay all of the stamp duty and any registration fees payable in relation to the Sub Leases or any document executed pursuant to the Sub Leases (clause 17.4);
- will maintain the Orchard in accordance with the Management Plan and in a manner that is consistent with Best Agricultural Practice (clause 7);
- acknowledges that Maccland is the owner of the Improvements and the Trees and the Grower will not have right, title, interest or claim in or to any of that property (clause 8.1); and

- except as provided in the Project Agreements, will have the right to harvest and take as its own any Macadamia Nuts during the Term (clause 8.2).

84. Unless inconsistent with the Management Plan the Grower will do or will cause to be done, the following:

- (a) prune the Trees as and when required;
- (b) provide the Grower's Macgrove with irrigation, fertilisers and nutrients;
- (c) minimise soil erosion and maintain soil quality on the Grower's Macgrove;
- (d) maintain any buildings, sheds, fire-breaks, windbreaks, fences, access roads or tracks on the Grower's Macgrove in the condition required by Maccacorp and in good repair and first class condition;
- (e) keep the Grower's Macgrove free from Vermin and Vegetation;
- (f) keep the Trees or the Macadamia Nuts free from insects and diseases;
- (g) destroy, abandon or leave to rot any Trees or Macadamia Nuts which a reasonable horticulturalist would destroy, abandon or leave to rot consistent with Best Agricultural Practice;
- (h) do all things required by the terms of the Management Plan; and
- (i) harvest, dehusk, dry and store the Macadamia Nuts with a view to obtaining macadamia nuts that are of optimum quality (clause 9.1).

2009 Grower Management Agreement

85. Under clauses 4 and 5 of this Agreement the Grower engages the Manager during the Term of the Project to perform all services necessary to maintain a macadamia nut tree orchard on the Grower's Macgrove, harvest the Macadamia Nuts and sell the Crop on behalf of the Grower (referred to as the 'Orchard Services'). The Term of the Project commences on the Commencement Date (being the date of execution of the Management Agreement) and is expected to end on 30 June 2028.

86. If the Grower exercises the first five year option to extend the term of the Sub Lease, then the Term of this agreement is automatically deemed extended by five years. If the Grower exercises the second four year option to further extend the term of the Sub Lease, then the Term of this agreement is automatically deemed extended by a further four years (clause 3).

87. Specifically clause 5 of the Agreement states that the Manager will:

- perform the Initial Orchard Maintenance Services in the first Financial Year;
- perform the Orchard Maintenance Services in the second and subsequent Financial Years;
- harvest the Macadamia Nuts in accordance with clause 7; and
- sell the Crop on behalf of the Grower in accordance with clause 8.

88. The Initial Orchard Maintenance Services that must be provided by the Manager in the first Financial Year are set out in Schedule 2 to the Management Agreement and the Orchard Maintenance Services that must be provided by the Manager in the second and subsequent Financial Years are set out in Schedule 3 of that Agreement.

89. The Grower must pay the Management Fee to the Manager for the Orchard Services set out in clause 5. The Management Fee for each Financial Year is specified in Column 3 of Item 5 of Schedule 1. 80% of the Management Fee is in respect of performing, or causing to be performed, the Orchard Services and the remaining 20% of the Management Fee is remuneration payable to the Manager as Responsible Entity of the Project for managing that performance. The Management Fee is payable in advance on the date stated in Column 4 of Item 5 of Schedule 1.

90. The Manager will, at the Grower's cost, maintain with a reputable insurer a policy of insurance against public risk and occupier's liability and against damage to the Grower's Macgrove that is caused by fire or other insurable risks provided that in the opinion of the Manager the costs of any such insurance are economically justified. The Manager is not required to take out crop insurance unless specifically agreed between the Manager and the Grower from year to year. All such policies of insurance must be in the names of or note the interests of the Land Owner and the Grower (clause 12).

Pooling of amounts and distribution of the Proceeds Fund

91. The Constitution (clause 25) sets out provisions relating to the pooling of amounts from the sale of each Grower's Macadamia Nuts and the distribution of the Grower's Proportion of the Proceeds Fund from that sale or from insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only a Grower who has contributed Macadamia Nuts or insurance proceeds to a pool making up a Proceeds Funds is entitled to benefit from distribution from those Proceeds; and

- any pool of Macadamia Nuts or other Proceeds must consist only of Macadamia Nuts or other Proceeds contributed by a Grower in the 2007 Macgrove Project.

Principal Subcontractor's Agreement

92. Maccacorp, the Responsible Entity, appoints the Maccmanagement Pty Limited as Principal Subcontractor, to provide the Services as an independent contractor during the Term. Under this Agreement, Maccmanagement Pty Limited (Maccmanagement) has agreed to provide the Orchard Establishment Services as detailed in Schedule 1, establish the Orchard and provide all necessary services to maintain the Orchard on the Land including the Initial Orchard Maintenance Services and the Orchard Maintenance Services (as defined in the Management Agreement) (clause 3). Maccmanagement will also provide a written report on the Services provided and details of the health and vigour of the Orchard (clause 3.3)

93. The Orchard Establishment Services include the preliminary works, selection of suitable macadamia trees, the planting of the macadamia trees and installation of a modern cost effective irrigation system.

94. The Principal Subcontractor must complete the Orchard Establishment Services in respect of the Macgroves of each Grower by the time of acceptance of each such Grower's application to participate in the Project.

95. This Agreement commences on the Commencement Date, 9 August 2007 (being the date of the Agreement) and ends on the second anniversary of the Commencement Date, 9 August 2009 (Initial Term). By mutual agreement, the Initial Term may be extended by two-year periods or for such other period as may be agreed by the Parties (clause 6).

Nut-In-Shell Supply Agreement

96. Under this Agreement Maccacorp agrees to sell and Macadamia Processing Co Limited (MPC) agrees to buy, all Macadamia Nut-In-Shell produced on the Project Property from the date of the Agreement (9 December 2005).

97. Each year MPC will pay to Maccacorp the average selling price per kilogram obtained by MPC for the finished product after deducting all reasonable expenses and provisions of MPC.

Custody Agreement

98. In accordance with clause 4.1 of the Constitution, the Project Property will be held by the Responsible Entity on trust for the Growers from the Term of the Project. The Responsible Entity may appoint an agent or custodian to hold the Project Property separately from any other property (clause 4.2 of the Constitution). Under this Agreement, Maccacorp appoints Perpetual Nominees Limited (Perpetual) as custodian of the Project Assets and Perpetual accepts that appointment.

Fees

99. The fees payable under clause 14 of the Management Agreement for each Macgrove are set out in Item 5 of Schedule 1, as follows.

Management fees

| Financial year of Project | Amount (\$) | Date payable |
|----------------------------------|--|--|
| 3 | \$11,000 | Date of Application |
| 4 | \$2,200 | 1 July 2009 |
| 5 | As for Financial Year 4 Indexed by the percentage increase (if any) in the CPI during the 12 months preceding the date on which indexation is to occur | 1 July 2010 |
| 6 | As for Financial Year 5 Indexed as above | 1 July 2011 |
| 7 | As for Financial Year 6 Indexed as above | 1 July 2012 |
| 8 | As for Financial Year 7 Indexed as above | 1 July 2013 |
| 9-21 inclusive | Instalment 1 (the Management Fee Indexed from the previous Financial Year); plus Instalment 2 (the amount, if any, by which the Grower's Proportion of the Orchard Operating Expenses ¹ incurred in a Financial Year exceeds the amount of Instalment 1 for that Financial Year) | Instalment 1: 1 July in each Financial Year; Instalment 2: within 7 days of receipt of the Orchard Operating Expenses Statement |

¹ The Orchard Operating Expenses are the total expenses properly and reasonably incurred by the Manager in performing the Orchard Services for all of the Grower's Macgroves on the Land plus 10% of such expenses.

Performance Incentive Fee

100. The Grower must pay a Performance Incentive Fee where applicable (clause 14.6). The Performance Incentive Fee payable in each Financial Year is 25% of any net proceeds of sale of the Crop attributable to a Macgrove that exceeds the Performance Incentive Threshold (as defined in the Management Agreement) in the Financial Year (Item 6 of Schedule 1). The Performance Incentive Fee will only commence from 1 July 2010 as the Trees reach maturity. The Performance Incentive Fees will be deducted from the proceeds of nut-in-shell sales.

Rent

101. The fee payable under clause 3 of the Sub Leases for each Macgrove is set out in Item 3 of Schedule 1, as follows:

| Sub Lease | Year of Sub Lease | Financial Year of Project | Amount (\$) | Date Payable |
|------------------|--------------------------|----------------------------------|--|---|
| First | 1 | 3 | Nil | Not applicable |
| | 2 | 4 | \$792 | 1 July 2009 |
| | 3-10 inclusive | 5-12 inclusive | The amount of Rent payable in the previous financial year Indexed by the percentage increase (if any) in the CPI during the 12 months preceding the date on which indexation is to occur | 1 July 2010 |
| Second | 1 | 13 | The amount of Rent payable in the last Financial Year of the first Sub Lease Indexed as above | 1 July of the first Financial Year of this second Sub Lease |
| | 2-8 inclusive | 14-20 inclusive | The amount of Rent payable for the previous Financial Year Indexed as above | 1 July in each Financial Year |

| | | | | |
|-------|---|----|--|--|
| Third | 1 | 21 | The amount of Rent payable in the last Financial Year of the second Sub Lease Indexed as above | 1 July of the Financial Year in which this third Sub Lease commences |
|-------|---|----|--|--|

Grower's Expenses

102. Grower's Expenses includes all stamp duty and registration fees in respect of the Management Agreement plus the Grower's portion of all premiums for insurance taken out by the Manager in accordance with clause 12 of the Management Agreement.

103. The Manager will maintain, with a reputable insurer, a policy of insurance against public risk and occupier's liability and against damage to the Grower's Macgrove that is caused by fire or other insurable risks provided that in the opinion of the Manager the costs of any such insurance are economically justified (clause 12.1 of the Management Agreement).

104. Grower's Expenses are payable within 30 days of written notification by the Responsible Entity to the Grower of the amount of the Grower's Expenses (clause 14.5 of the Management Agreement).

Joint Venture

105. Fees payable per Macgrove by a Grower who is in a Joint Venture are as stipulated in the new paragraph 35.5(c) of the Second Supplementary Constitution. Under this clause, the amounts of fees for which a Joint Venture Grower will be solely responsible are expressed as percentages of the fees outlined in paragraphs 99 to 104 of this Ruling.

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

- 100% of the Management Fees and Rent payable for the 2009 Financial Year (which amount is included in the Application Money).
- 50% of the Management Fees in respect of management services provided in all Financial Years commencing on and from the 2014 Financial Year.
- 50% of the Rent payable in respect of all leasehold rights granted in all Financial Years, commencing on and from the 2014 Financial Year.
- 50% of the Grower's Expenses in all Financial Years, commencing on and from the 2014 Financial Year.

- 50% of the Orchard Operating Expenses (as defined in clause 14.3 of the Management Agreement) in all Financial Years, commencing on and from the 2015 Financial Year.

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

- 100% of the management fees in respect of management services provided commencing on and from the 2010 Financial Year up to and including the 2013 Financial Year.
- 100% of the rent payable in respect of all leasehold rights granted in all Financial Years, commencing on and from the 2010 Financial Year up to and including the 2013 Financial Year.
- 100% of the Grower's Expenses in all Financial Years, commencing on and from the 2009 Financial Year up to and including the 2013 Financial Year.
- 50% of the management fees in respect of management services provided in all Financial Years, commencing on and from the 2014 Financial Year.
- 50% of the Grower's Expenses in all Financial Years, commencing on and from the 2014 Financial Year.
- 50% of the Orchard Operating Expenses (as defined in clause 14.3 of the Management Agreement) in all Financial Years, commencing on and from the 2015 Financial Year.
- 50% of the rent payable in respect of all leasehold rights granted in all Financial Years, commencing on and from the 2014 Financial Year.

108. Each Joint Venturer is liable for paying their Prescribed Proportion (being defined in the Supplementary Constitution as 50% each) of any Performance Incentive Fees and each will be entitled to the Prescribed Proportion of the Joint Venturer's Macadamia Nuts Crop and the Joint Venture Proceeds (clause 35.6 of the Second Supplementary Constitution).

Finance

109. There is no financing facility offered by the Manager or any other party to the arrangement. Growers can fund their investment in the Project themselves or borrow from an independent lender. Growers cannot rely on any part of this Ruling if the Application Fee is not paid in full on or before 15 June 2009. Where the Application fee is being financed through a lending institution written evidence of approval must be provided to the Responsible Entity by the lending institution on or before 15 June 2009. The lending institution must provide the full amount of the loan monies to Responsible Entity no later than 30 June 2009.

110. 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?

111. For the amounts set out in paragraphs 20 to 23 of this Ruling to constitute allowable deductions the Grower's macadamia horticultural activities as a participant in the 2007 Macgrove Project (2009 Growers) must amount to the carrying on of a business of primary production.

112. The general indicators used by the Courts in determining whether an entity is carrying on a business are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business?

113. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Ruling, the Full Federal Court in *Hance v. FC of T; Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 applied these principles to conclude that 'Growers' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

114. Application of these principles to the arrangement set out above leads to the conclusion that Growers (as described in paragraphs 2 to 4 in this Ruling), who will stay in the Project until its completion, will be carrying on a business of primary production involving growing and harvesting Macadamia Nuts for sale.

Deductibility of Management Fees, Rent, Performance Incentive Fees and Grower's Expenses

Section 8-1

115. The Management Fees, Rent, Grower's Expenses and Performance Incentive Fees are deductible under section 8-1. A 'non-income producing' purpose is not identifiable in the arrangement and there is no capital component evident in the Management Fees, Rent, Grower's Expenses and Performance Incentive Fees.

116. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. If the prepayment provisions do not apply (see paragraphs 119 to 123 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.)

117. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or other financier is outside the scope of this Ruling. A Grower may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements that are not covered by this Product Ruling.

Lease Document Fee

Section 25-20

118. Applying the same principles as that used for the Management Fees, Rent, Grower's Expenses and Performance Incentive Fees, a fee for registering and stamping the Sub Leases is a lease document expense incurred for acquiring a sub lease over a property that is used or is to be used during the Term of the Project solely for income producing purposes, has sufficient connection with the gaining of assessable income to be deductible under section 25-20.

Prepayment provisions

Sections 82KZL to 82KZMF

119. 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.

120. 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

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

122. 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 Management Agreement and/or the Sub Leases. 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.

123. As noted in the Ruling section above, Growers who prepay Management Fees and Rent 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***

124. 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 macadamia trees is of a capital nature. This expenditure falls for consideration under Division 40.

125. The tax treatment of capital expenditure has been dealt with in a representative way in paragraph 21 of this Ruling in the Tables and the accompanying Notes.

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

126. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2009** and **30 June 2010** (for First Joint Venturers) and **30 June 2009 to 30 June 2014** (for all other Growers), based on the evidence supplied, the Commissioner has determined that for the income years ended 30 June 2009 up to and including 30 June 2010 and for the income years ended 30 June 2009 up to and including 30 June 2014:

- 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 macadamia industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

127. 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.

128. The exercise of the Commissioner’s discretion under paragraph 35-55(1)(b) for Growers who will stay in the Project until its completion, 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

129. 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

130. 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).

131. The 2007 Macgrove Project (2009 Growers) 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 20 to 23 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.

132. 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 nuts in shell. 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;
PR 2006/163; PR 2006/163A;
PR 2007/74

Subject references:

- carrying on a business
- fee expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings

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 25-20
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 40
- ITAA 1997 40-515(1)(b)
- ITAA 1997 40-520(2)
- ITAA 1997 40-525(2)
- ITAA 1997 40-530
- ITAA 1997 40-545
- TAA 1953
- Copyright Act 1968
- Corporations Act 2001
- SISA 1993

Case references:

- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085

ATO references

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