


# ***PR 2009/54 - Income tax: 2004 Swan Hill Almond Grower Project (for 2004 Growers only)***

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## Product Ruling

### Income tax: 2004 Swan Hill Almond Grower Project (for 2004 Growers only)

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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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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**

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The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives 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. The Commissioner recommends 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**

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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

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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 Product Ruling relates. All legislative references in this Product 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 2004 Swan Hill Grower Project or simply as 'the Project'.

### Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits.

3. The class of entities who can rely on those tax benefits are referred to as Growers. Although Product Ruling PR 2004/40 applied to subscriptions for the Project that were accepted until 30 September 2004, Growers for the purposes of this Product Ruling will be those entities that were accepted to participate in the scheme specified below and who executed the relevant Project agreements set out in the Arrangement part of Product Ruling PR 2004/40 on or before 15 June 2004. These Growers are referred to in Product Ruling PR 2004/40 as 2004 Growers. In addition, 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;
- were accepted into the Project between 1 July 2004 and 30 September 2004. These Growers are referred to in Product Ruling PR 2004/40 as 2005 Growers;
- have elected to take their own almonds; or
- participated in the Project through offers made other than the Product Disclosure Statement for the 2004 Swan Hill Almond Grower 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 14 to 43 of Product Ruling PR 2004/40.

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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National Circuit  
Barton ACT 2600

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**Date of effect**

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9. This Product Ruling applies prospectively from 21 October 2009, the date this Product Ruling is made. It applies to the specified class of entities that entered into the scheme set out in paragraphs 14 to 43 of Product Ruling PR 2004/40 between 7 April 2004 and 15 June 2004.

10. However the Product Ruling only applies to the extent that there is no change in the scheme or in the entities' involvement in the scheme.

## **Changes in the law**

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

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.

## **Ruling**

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### **Continuing application of Product Ruling PR 2004/40**

14. Although now withdrawn, the tax benefits set out in Product Ruling PR 2004/40 continue to apply to participants who are within the specified class of entities to which the Product Ruling applied and who entered into the specified scheme between 7 April 2004 and 15 June 2004. This is subject to there being no material difference in the way the scheme is carried out or in the entities' involvement in the scheme.

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

#### ***Section 35-55 – exercise of the Commissioner's discretion***

15. A Grower who will stay in the Project until its completion is considered to be carrying on a business of primary production. Such a Grower, who is an individual and was accepted into the Project between 7 April 2004 and 15 June 2004 may make losses from the Project that may be affected by the loss deferral rule in section 35-10 in Division 35.

16. The discretion in paragraph 35-55(1)(b) will be exercised for such Growers to whom the loss deferral rule would otherwise apply for the 2009 income year.

17. Exercise of the discretion in this case however is also conditional on the Project continuing to being carried out in the manner described in paragraphs 14 to 43 of Product Ruling PR 2004/40, but will allow Growers referred to who make losses, to offset them against their other assessable income in the income year in which those losses arise.

## **Scheme**

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18. The scheme that is the subject of this Product Ruling is specified in paragraphs 14 to 43 of Product Ruling PR 2004/40. It also incorporates the correspondence and information received on 10 August 2009 and 23 September 2009.

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**Commissioner of Taxation**

21 October 2009

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## Appendix 1 – Explanation

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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*

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

#### **Section 35-55 – exercise of the Commissioner's discretion**

19. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the 2009 income year based on the evidence supplied, the Commissioner has determined that:

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

20. 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.

21. 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 Product Ruling PR 2004/40 during the income year specified. If the Project is carried out in a materially different way to that described in the Product Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

## **Appendix 2 – Detailed contents list**

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22. The following is a detailed contents list for this Ruling:

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

PR 2004/40

*Subject references:*

- Commissioner's discretion
- non-commercial loss
- product rulings

*Legislative references:*

- ITAA 1997
  - ITAA 1997 Div 35
  - ITAA 1997 35-10
  - ITAA 1997 35-10(2)
  - ITAA 1997 35-55
  - ITAA 1997 35-55(1)(b)
  - SISA 1993
  - TAA 1953
  - Copyright Act 1968
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ATO references

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