



PR 2000/112 - Income tax: Percydale Olive Estate

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 This document has changed over time. This is a consolidated version of the ruling which was published on *15 November 2000*



Product Ruling

Income tax: Percydale Olive Estate

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Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons and Qualifications sections**), **Date of effect**, **Withdrawal**, **Arrangement and Ruling parts of this document** are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product as an investment. 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 investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

Terms of Use of this Product Ruling

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

Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Percydale Olive Estate, or simply as 'the Project'.

Tax law(s)

2. The tax laws dealt with in this ruling are:
- Section 6-5 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
 - Section 8-1 (ITAA 1997);
 - Section 17-5 (ITAA 1997);
 - Division 27 (ITAA 1997);
 - Section 387-55 (ITAA 1997);
 - Section 387-125 (ITAA 1997);
 - Section 388-55 (ITAA 1997);
 - Section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
 - Section 82KZL (ITAA 1936);
 - Section 82KZME (ITAA 1936);
 - Section 82KZMF (ITAA 1936); and
 - Part IVA (ITAA 1936).

Goods and Services Tax

3. In this Ruling all fees and expenditure referred to include 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.

Business Tax Reform

4. The Government is currently evaluating further changes to the tax system in response to the *Ralph Review of Business Taxation* and continuing business tax reform is expected to be implemented over a

number of years. Although this Ruling deals with the laws enacted at the time it was issued, future tax changes may affect the operation of those laws and, in particular, the tax deductions that are allowable. Where tax laws change, those changes will take precedence over the application of this Ruling, and to that extent, this Ruling will be superseded.

1. Taxpayers who are considering investing in the Project 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

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for investors in projects such as this. In keeping with that intention, the Tax Office suggests that promoters and advisers ensure that potential investors are fully informed of any changes in tax laws that take place after the Ruling is issued. Such action should minimise suggestions that potential investors have been negligently or otherwise misled.

Class of persons

7. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Growers'.

8. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from the Project.

Qualifications

9. The Commissioner rules on the precise arrangement identified in the Ruling.

10. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

- the Ruling has no binding effect on the Commissioner, as the arrangement entered into is not the arrangement ruled upon; and
- the Ruling will be withdrawn or modified.

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Date of effect

12. This Ruling applies prospectively from 15 November 2000, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

13. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

14. This Product Ruling is withdrawn and ceases to have effect after 30 June 2003. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

Arrangement

15. The arrangement that is the subject of this Ruling is described below. The relevant documents, or parts of documents, incorporated into this description of the arrangement include:

- Application for Product Ruling dated 22 August 2000;
- The Percydale Olive Estate Prospectus, dated 8 August 2000;
- **Draft Scheme Constitution for the Percydale Olive Estate;**
- **Draft Management Agreement between Capital Agricultural Management Ltd [‘the Responsible Entity’] and the participant [‘the Grower’];**
- **Draft Licence Agreement between the Responsible Entity and the Grower;**
- Compliance Plan for Capital Agricultural Management Ltd, as the Responsible Entity, dated 9 June 2000;
- Draft Lease between Espalion Holdings Pty Ltd [‘the Landowner’] and the Responsible Entity;
- Draft Water Licence Agreement between the Landowner and the Responsible Entity;
- Draft Custody Agreement between the Responsible Entity and the Sandhurst Trustees Ltd [‘the Custodian’].
- Correspondence received from the Applicant’s representative dated 25 September 2000, 12 October 2000 and 18 October 2000.

Note: Certain information received from the applicant regarding the Project has been provided with an understanding that it is on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

16. The documents highlighted in paragraph 15 in bold are those that may be entered into by the Grower. For the purposes of describing the arrangements to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, to which the Grower, or an associate of the Grower will be a party.

17. All Australian Securities and Investments Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of the agreements may be summarised as follows.

Overview

18. This arrangement is called the Percydale Olive Estate (‘the Project’).

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Location	Percydale, approximately 9kms from the town of Avoca, Victoria
Type of Business each participant is carrying on	Commercial growing and cultivation of an olive grove for the purpose of producing olives
Number of Hectares to be cultivated	80
Size of each Olive Grove	0.2 hectare
Number of trees per Olive Grove	50 trees per 0.2 hectare
Expected Production	First harvest expected in 2005, reaching maturity in 2011 with expected production of 22.5 tonne of fruit per hectare
Term of the Project	31 December 2020
Minimum Subscription	200 groves/40 hectares
Subscription amount per olive grove (0.2 hectare)	\$10,983.50 on application, comprising: Grove Establishment Fee \$412.50 Annual Licence Fee \$165.00 Grove Management Fee \$8,453.50 Irrigation \$1,512.50 Land Clearing Fee \$220.00 Erosion Control Fee \$220.00
Annual Management Fee	\$1,485 each year following first financial year then indexed by greater of CPI or 3.5% from 1 July 2004
Annual Licence Fee	\$165 each year following first financial year then indexed by greater of CPI or 3.5% from 1 July 2004
Harvesting Fee	As detailed at page 26 and 27 of the Prospectus

19. The Project involves the establishment and operation of a number of olive groves situated on a total land area of approximately 120 hectares. The land is to be subdivided into 400 0.2 hectare land allotments. The balance of the total land area is to be retained and used for native vegetation corridors, wind protection, erosion control and irrigation, for buildings and sheds associated with the Project and as common areas for Growers.

20. Following execution of the contracts underpinning the Project (which include the Licence and Management Agreements), 250 trees per hectare are to be planted (representing 50 trees per 0.2 hectare Grove). The Licence Agreement confers upon the Grower a right of occupation over an identifiable area of land called a 'Grove', until the earlier of:

- the termination of the Grower's interest in the Project, pursuant to the Scheme Constitution; or
- 31 December 2020 (save for the possibility that an earlier breach of the conditions of the agreement by either party triggers an earlier termination).

The Grower is granted this right for the purpose of planting, growing, harvesting and marketing olives. The Responsible Entity will manage the Project and, where appointed pursuant to the Management Agreement, will perform services on behalf of the Grower. These services include the establishment of the Grove, the planting and maintenance of the trees and the annual harvesting and marketing of the produce of the Grower's Grove.

21. The intended life of the arrangement is approximately 20 years and the minimum period for a Grower is 20 years. Growers have been advised that there is no ready secondary market for their interests in the Project.

22. The expected production yield per Grove, once the trees are mature, is projected to be 22.5 tonnes per hectare. An independent expert's report contained in the Prospectus indicates that this is an attainable, although optimistic, projection for the olive industry generally.

Fees

23. Fees payable by Growers, in relation to the Project, are as follows:

In the first year of the Project, the following fees would be paid:

<i>Grove Establishment Fee</i>	<i>\$412.50</i>
<i>Annual Licence Fee</i>	<i>\$165.00</i>
<i>Grove Management Fee</i>	<i>\$8,453.50</i>
<i>Irrigation Infrastructure Fee</i>	<i>\$1,512.50</i>
<i>Land Clearing Fee</i>	<i>\$220.00</i>
<i>Erosion Control Fee</i>	<i>\$220.00</i>
<i>Total</i>	<i>\$10,983.50</i>

Annual fees payable in years following the first financial year are as follows:

<i>Annual Management Fee</i>	<i>\$1,485*</i>
<i>Annual Licence Fee</i>	<i>\$165*</i>

The annual fees denoted by an asterisk are indexed. The Annual Management Fee and the Licence Fee will be indexed annually from 1 July 2004 by the greater of CPI and 3.5%. Growers will also be required to pay an annual Harvesting Fee which will commence from the first year of harvesting (being the 2004/2005 financial year). The projected harvesting fees are detailed at page 26 and 27 of the Prospectus.

24. The Project cannot commence until the minimum subscription of 200 Grove allotments have been received. **This Ruling does not apply to Growers where their application to participate in the Project was accepted after 31 March 2001. Applicants who elect to perform any of the management activities and/or market and sell their own olives are not covered by this Ruling.**

25. Possible projected returns for Growers are outlined on pages 26 and 27 of the Prospectus. The project is of a long-term nature and subject to certain risks such as agricultural risks in the nature of natural disasters, the weather, pest infestation and crop diseases as well as financial risks and general commercial market risks.

26. Growers will execute a Power of Attorney, as part of the Application Form for the Project, empowering the Responsible Entity to execute the Licence Agreement and Management Agreement on their behalf.

Scheme Constitution

27. The Scheme Constitution for the Project sets out the terms and conditions under which the Responsible Entity agrees to act for the Grower and to manage the Project. The Responsible Entity will keep a register of Growers (Clause 14). Growers are entitled to assign their Grower's Interest in certain circumstances (Clause 18.1). The Licence and Management Agreements are annexed to the Constitution and will be executed on behalf of a Grower, pursuant to Power of Attorney Form in the Prospectus. Growers are bound by the Constitution by virtue of their participation in the Project.

28. The Scheme Constitution confirms that each Grower will have an interest in the olive trees and will have full title to the produce of the trees on their Grove (Clause 16.3).

Management Agreement

29. It is likely that each Grower will enter into a Management Agreement with the Responsible Entity for each Grove. This Ruling only applies to Growers who enter into the Management Agreement. The term of the Management Agreement commences from the date of execution until the date on which the Project is terminated, subject to

the fact that both Grower and Responsible Entity have rights to terminate earlier in the event of a default by the other party (Clause 9.3 and 9.4 of the Management Agreement).

30. Growers that contract with the Responsible Entity pursuant to the Management Agreement appoint the Responsible Entity to provide agricultural management services to assist the Grower in the conduct of its business. The services provided pursuant to the Management Agreement encompass the following:

- establishment services;
- irrigation infrastructure services;
- erosion control services;
- management services; and
- harvesting and marketing of the olives.

A separate fee is charged for each of these services and these are outlined in paragraph 23, above.

Establishment Services

31. The establishment services means the completion of all preparatory work for the planting of the olive trees on the Grower's allotment including ploughing and vermin control and the planting of the olive trees.

Irrigation Infrastructure Services

32. Irrigation infrastructure means the provision by the Responsible Entity of all plant and equipment to be installed on the allotment for the purposes of providing water to trees on the Grower's Grove.

Erosion Control Services

33. Erosion control services means all drainage works to be constructed on the Grove for the purposes of drainage control.

Management Services

34. Management services means the pruning and tending of the olive trees and providing the management and maintenance of the olive trees planted or established on the Grower's Grove and includes:

- providing good agricultural practice to prevent erosion in the Grower's Grove, by using sustainable soil management practices;
- the general maintenance of the Grower's Grove including control of weeds, suckers, vermin or other pests that may impede the growth of the olive trees;
- the maintenance and repair of all fences and irrigation systems;
- the maintenance and repair of all access roads;
- the application of water, fertiliser, and lime to the Grower's Grove as is necessary to maintain projected tree growth, health and olive yields;
- the provision of advice and assistance to the Grower generally in relation to all aspects of general management and good agricultural practice on the Grower's Grove and of the olive trees thereon; and
- the re-planting of the Grower's Grove with an olive tree in place of any olive tree planted as part of the establishment services that does not survive the period from planting until 30 June 2004.

Notwithstanding the forgoing, the Grower may elect to undertake its own weeding, cultivating, fertilising and pruning under Clause 4.1 of the Management Agreement. In the event that this election is made, the fees otherwise payable may be reduced. A Grower who makes this election is not covered by this Product Ruling.

Harvesting and Marketing Services

35. The Responsible Entity is also appointed under the Management Agreement to harvest and market the Grower's olives. However, the Grower may elect to harvest and market its own olives, by making an election under Clause 4.3 of the Management Agreement. If an election is made by Growers to harvest and market their own produce, the olives and their storage are the sole responsibility of the Grower from the point at which the Grower commences harvesting. Growers who elect to market and sell their own olives are not covered by this Product Ruling. Growers may also, pursuant to Clause 4.2, request that the Responsible Entity separately harvest the produce from their Grove, subject to being charged additional costs for this service.

36. For Growers that do not make such elections, harvesting and marketing of olives will be undertaken by the Responsible Entity on the Grower's collective behalf, on a 'pooled' basis. The proceeds of

sale will be distributed to these Growers on a proportional basis having regard to the number of Groves held by the Grower. However, in the event that there is a total or partial destruction, or damage, to a particular Grower's Grove, there will be a corresponding adjustment to the proportionate share of net proceeds to which a Grower is otherwise entitled (Clause 5.3(b)).

37. Net proceeds of sale after deducting the Harvesting Fee and selling costs will be paid to Growers within 30 days of receipt of the gross sales proceeds.

Termination of Manager

38. The Responsible Entity may be removed from its appointment under the Management Agreement (Clause 9.4) if it:

- enters into liquidation; or
- has a controller or administrator appointed;
- defaults in paying any money due to the Grower under this agreement and that default is not remedied within one month of receiving written notice from the Grower; or
- defaults in respect of any other obligation under the agreement and that default is not rectified within one month of receiving written notice from the Grower.

Payment of Fees

39. The fees referred to in paragraph 23 in respect of the above services are payable as follows:

- those fees payable on entry to the Project are payable by Growers out of application monies;
- the subsequent Annual Management Fees are payable annually in advance on 1 July of each year; and
- the harvesting and marketing costs will be deducted from the gross sales proceeds before distributing the net proceeds to Growers.

Licence Agreement

40. The Licence Agreement between the Responsible Entity and the Grower confers a right of use and occupation on the Grower, in respect of a particular Grove, for the purpose of planting, growing, harvesting and marketing olives for the term of the licence. Growers

are to pay a fee in consideration for the licence of \$165 per annum. In the initial year this fee is payable out of the initial application monies. Thereafter the Annual Licence Fee is payable in advance on 1 July of each year.

41. The Annual Licence Fee is fixed until 1 July 2004 from which point it will be annually indexed upwards by the greater of:

- a) 3.5%; and
- b) the CPI applicable at the commencement date of the relevant year divided by the CPI applicable at the commencement date of the immediately preceding year.

42. The Licence Agreement also obligates the Responsible Entity to provide an additional service, immediately after the commencement of the Licence Agreement, being the clearing of the land in consideration of the payment of a fee of \$220.

43. The term of the Licence Agreement extends from the date on which the Grower's application for an interest in the Project is accepted until the earlier of 31 December 2020 and the termination of the Grower's interest in the Project pursuant to the Scheme Constitution.

Compliance Plan

44. The Responsible Entity has prepared a Compliance Plan in accordance with the Corporations Law. Under the Compliance Plan, a Compliance Committee will monitor the extent to which the Responsible Entity meets its obligations, as such, in relation to the Project and ensure that the rights of Growers are protected.

Lease Agreement

45. A lease is granted by the Landowner to the Responsible Entity, under the terms of the Lease Agreement, in respect of the total land area on which the Project is to be conducted.

Water Licence Agreement

46. A Water Licence is to be granted by the Landowner to the Responsible Entity to draw water from water conservation facilities on parts of land owned by the Landowner not included in the lease of the land by the Landowner to the Responsible Entity. Pursuant to the Water Licence Agreement, the Responsible Entity will have the right to lay water supply and irrigation pipes across the land and to install

and operate pumping equipment on the land. An annual fee of \$1 is paid in consideration for the licence.

Custodian Agreement

47. Under the Custody Agreement, the Responsible Entity appoints Sandhurst Trustees Ltd as Custodian to hold Application Monies until they are expended and a separate Application Fund is to be established and maintained for this purpose. The Custodian will also hold the Mortgage of Lease to protect the interests of Growers. The appointment is for the term of the Project, subject to prior termination in case of an event of default.

Finance

48. All Growers are required to fund their investment in the Project themselves or borrow from a lender independent of the Responsible Entity. The Responsible Entity has an arrangement with an independent bank whereby Growers seeking finance are referred to the independent bank. The bank will independently assess the finance application using its normal commercial criteria and will make loans on its normal commercial terms and conditions.

49. This Ruling does not apply if a Grower enters into a finance agreement that 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 purposes of section 82KL, or the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- terms or conditions are non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Projects;
- 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; or

- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers

Ruling

Assessable Income

50. A Grower's share of the gross sales proceeds from the Project, less any GST payable on these proceeds, will be assessable income under section 6-5. Section 17-5 excludes from assessable income an amount relating to GST payable on a taxable supply.

Minimum subscription

51. A Grower will not incur the fees shown in the Table(s) below before the minimum subscription for the Project is reached and the Grower's application to enter the Project is accepted (the date the investment is made). Under the prospectus, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 200 interests is achieved. Tax deductions are not allowable until these requirements are met. This Ruling has no application if minimum subscription is not achieved before 31 March 2001.

Section 8-1

Deductions where a Grower is not registered nor required to be registered for GST

52. A Grower may claim tax deductions using the methods and Tables in this paragraph and paragraph 53, where the Grower:
- participates in the Project by 31 March 2001 to carry on the business of growing olives;
 - incurs the fees shown in paragraph 23; and
 - is not registered nor required to be registered for GST.

Fee Type	ITAA 1997 Section	Year 1 deductions	Year 2 deductions	Year 3 deductions
Management Fee	8-1	\$8,453 – See Note (i) below	\$1,485 – See Note (i) below	\$1,485 – See Note (i) below
Licence Fee (Rent)	8-1	\$165 – See Note (i) below	\$165 – See Note (i) below	\$165 – See Note (i) below
Interest		See Note (ii) below	See Note (ii) below	See Note (ii) below

Notes:

- (i) Where a Grower incurs the management fees and the licence fees as required by the Management Agreement and the Licence Agreement those fees are deductible in full in the year incurred. However, if a Grower **chooses** to prepay fees for the doing of things (e.g., the provision of management services or the leasing of land) that will not be wholly done in the same income year as the fees are incurred, then the prepayments rules of the ITAA may apply to apportion those fees. In such cases, the tax deduction for the prepaid fee **MUST** be determined using the formula shown in paragraphs 90 to 97 unless the expenditure is ‘excluded expenditure’. ‘Excluded expenditure’, being expenditure of less than \$1,000, is an ‘exception’ to any prepayment rules that apply and is deductible in full in the year in which it is incurred.
- (ii) The deductibility or otherwise of interest arising from agreements that Growers enter into to finance their participation in the Project is outside the scope of this Ruling. However, all Growers who enter into agreements to finance their participation in the Project should read carefully the discussion of the prepayment rules in paragraph 101 to 103 below as those rules may be applicable if interest is prepaid.

Tax deductions for capital expenses

53. A Grower who participates in the Project will also be entitled to the following tax deductions:

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Fee type	ITAA 1997 section	Year 1 deduction	Year 2 deduction	Year 3 deduction
Grove Establishment Fee	387-165	See note (iii) below	See note (iii) below	See Note (iii) below
Irrigation Infrastructure Fee	387-125	\$505 – see note (iv) & (vi) below	\$504 - see note (iv)& (vi) below	\$504 - see note (iv) & (vi) below
Erosion Control Fee	387-55	\$220 – see note (v) and (vi) below		

Notes:

- (i) A deduction is allowable under section 387-165 for capital expenditure incurred for the acquisition and establishment of the olive trees for use in a horticultural business. The deduction is allowable when the olive trees, as horticultural plants, enter their first commercial season. If the olive trees have an 'effective life' for the purposes of section 387-185 of greater than '30 years', this results in a write-off rate of rate of 7% prime cost. The Project's manager will inform Growers of when the olive trees enter their first commercial season.
- (ii) A deduction is allowable under section 387-125 for capital expenditure incurred for acquisition and installation of the irrigation system. The deduction is calculated on the basis of one third of the capital expenditure in the year in which the expenditure is incurred, and one third in each of the next 2 years of income.
- (iii) A deduction is allowable under section 387-55 for capital expenditure incurred for landcare operations. The deduction is allowed in the year that the expenditure is incurred.
- (iv) A tax offset is available to certain low income primary producers under section 388-55 in respect of expenditure incurred on landcare operations and/or facilities to conserve or convey water. This is an alternative to claiming deductions under sections 387-55 and 387-125.

Deductions where a Grower is registered or required to be registered for GST

54. Where a Grower who is registered or required to be registered for GST:

- participates in the Project by 31 March 2001 to carry on the business of growing olives;
- incurs the fees shown in paragraph 23; and
- is entitled to an input tax credit for the fees

then the tax deductions calculated using the methods and Tables in paragraphs 52 and 53 (above) will exclude any amounts of input tax credit (Division 27 of the ITAA). See Example 1 at paragraph 110.

Section 35-55 – Losses from non-commercial business activities

55. For a Grower who is an individual and who enters the Project during the year ended 30 June 2001 the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner will decide for the income years ending 30 June 2001 to 30 June 2006 that the rule in section 35-10 does not apply to this activity provided that the Project is carried out in the manner described in this Ruling.

56. This exercise of the discretion in subsection 35-55(1) will not be required where, for any year in question:

- a Grower's business activity satisfies one of the objective tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the 'Exception' in subsection 35-10(4) applies (see paragraph 82 in the Explanations part of this Ruling, below).

57. Where, either the Grower's business activity satisfies one of the objective tests, the discretion in subsection 35-55(1) is exercised, or the Exception in subsection 35-10(4) applies, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of deductions attributable to their business activity in excess of any assessable income from that activity, ie, any 'loss' from that activity, to a later year. Instead, this 'loss' can be offset against other assessable income for the year in which it arises.

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Sections 82KZM, 82KZMB – 82KZMD, 82KZME – 82KZMF, 82KL and Part IVA

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

- expenditure by the Grower does not fall within the scope of section 82KZM (but see paragraphs 90 to 97);
- expenditure by the Grower does not fall within the scope of sections 82KZMB-82KZMD (but see paragraphs 90 to 97);
- expenditure by the Grower does not fall within the scope of sections 82KZME-82KZMF (but see paragraphs 90 to 97);
- 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.

Explanations

Section 8-1

59. Consideration of whether the management fees and the licence fees are deductible under section 8-1, begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

Is the Grower carrying on a business?

60. A commercial olive growing business can constitute the carrying on of a business. Where there is a business, or a future business, the gross sale proceeds from the sale of olives produced from the Groves (Project) will constitute gross assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income. These operations will include the leasing of land, water and trees, and the tending, maintaining and harvesting of the olive trees.

61. Generally, a Grower will be carrying on a business of olive growing where:

- the Grower has an identifiable interest in specific trees coupled with a right to harvest and sell the olives;
- the growing, tending, harvesting and marketing activities are carried out in a business like way either by the Grower or on behalf of the Grower; and
- overall, the weight and influence of the general indicators used by the Courts to determine when a person is carrying on a business are present.

62. For this Project Growers have rights under the Licence Agreement in the form of a licence over an identifiable area of land consistent with the intention to carry on a business of growing olives. Under the Management Agreement Growers engage the Project Managers to acquire olive seedlings and plant out the seedlings on the licensed land and to provide ongoing services to care and maintain the olive trees. Growers are considered to have control of their operations.

63. The Licence Agreement provides Growers with more than a chattel interest in the olive trees. The Project documentation contemplates Growers will have an ongoing interest in the olive trees.

64. Growers have the right to use the land in question for growing olive trees and to have the Project Manager come onto the land to carry out its obligations under the Management Agreement. The Growers degree of control over the Project Manager as evidenced by the Management Agreement, and supplemented by the Corporations Law, is sufficient. Under the Project, Growers are entitled to receive regular progress reports on the Project Manager's activities. Growers are able to terminate arrangements with the Project Manager in certain instances, such as cases of default or neglect. The olive growing activities described in the Management Agreement are carried out on the Growers behalf.

65. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the arrangement's description for all the indicators. The Agricultural Report considers that the Project is both a low risk venture on horticultural grounds and commercially viable in the long term. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections contained in the Prospectus that suggest the Project should return a 'before-tax' profit to the Growers, i.e., a 'profit' in cash terms. This profit does not depend on the fees in question being allowed as a deduction.

66. Growers will engage the professional services of a manager with appropriate credentials. There is a means to identify which olive trees Growers have an interest in. These services are based on accepted olive grove practices and are of the type ordinarily found in olive grove ventures that would commonly be said to be businesses.

67. Growers have a continuing interest in the olive trees from the time they are acquired until the cessation of the Project. The olive grove activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. The Growers' olive grove activities will constitute the carrying on of a business.

68. The licence fees and management fees associated with the olive grove activities will relate to the gaining of income from this business, and hence have a sufficient connection to the operations by which income (from the regular sale of olives) is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. There appears to be no capital component included in the management fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Expenditure of a capital nature

69. Any part of the expenditure of a Grower entering into an olive growing business 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, the costs of landcare, irrigation, establishing horticultural plants and land clearing are considered to be capital in nature. The fees for these expenditures are not deductible under section 8-1. However, some of this expenditure falls for consideration under specific write-off provisions of the ITAA 1997.

Subdivision 387-A - Expenditure for landcare operations

70. Section 387-55 allows a taxpayer a deduction for capital expenditure incurred on a landcare operation for land used to carry on a primary production business. Growers need not own the land to qualify for the deduction, so long as it is used by them to carry on a primary production business.

71. 'Landcare operation for land' includes the construction of surface or subsurface drainage works on the land, provided that the construction is primarily and principally for the purpose of controlling salinity or assisting in drainage control.

72. Under the Management Agreement a Grower incurs expenditure for drainage works to be constructed on the Grove for the purposes of drainage control. In this Project there will be no delay between the execution of the relevant agreements and the commencement of 'business operations' on the Growers behalf. Accordingly, a Grower's primary production business will have commenced at the time the expenditure in question has been incurred, and the requirements of section 387-55 will have been satisfied.

73. However, a deduction under section 387-55 is denied where the Grower is entitled to claim a landcare tax offset under section 388-55 and chooses to do so. A Grower can only choose a landcare tax offset where:

- had the Grower chosen a deduction instead of the tax offset, the Grower's taxable income for the income year would have been \$20,000 or less; and
- the expenditure is incurred before the end of the 2000-01 income year.

Subdivision 387-B – Irrigation expenditure

74. Section 387-125 allows a taxpayer, who is carrying on a business of primary production on land in Australia, to claim a deduction for capital expenditure on conserving or conveying water. The deduction is allowed over a three-year period and applies to plant or a structural improvement primarily or principally used for the purpose of conserving or conveying water for use in a primary production business. Irrigation systems of the kind proposed would be covered by this Subdivision.

75. As the taxpayer who can claim the deduction does not have to actually own the land but can be a tenant, a lessee or licensee who is conducting a primary production business on land in Australia, a deduction would be available to a Grower in the Project at a rate of 33.3 per cent per annum for the cost of the irrigation system.

76. However, a deduction under section 387-125 is denied where the Grower is entitled to claim a water facility tax offset under section 388-55 and chooses to do so. A Grower can only choose a water facility tax offset where:

- had the Grower chosen a deduction instead of the tax offset, the Grower's taxable income for the income year would have been \$20,000 or less; and
- the expenditure is incurred before the end of the 2000-01 income year.

Subdivision 387-C – Olive Tree Establishment

77. Section 387-165 allows capital expenditure on establishing horticultural plants owned and used, or held ready for use, in Australia in a business of horticulture to be written off for tax purposes. A lessee or licensee of land carrying on a business of horticulture is taken to own the plants growing on that land rather than the actual owner of the land (section 387-210).

78. Under this Subdivision, if the effective life of the plant is less than three years, the expenditure can be written off in full. If the effective life of the plant is more than three years, an annual deduction is allowable on a prime cost basis during the plant's maximum write-off period. The period starts from the time the plant enters its first commercial season. The write-off rate is detailed in section 387-185. For a plant, such as the olive trees in this Project, with an effective life of 30 years or more, that rate is 7%.

Division 35 - Losses from non-commercial business activities

79. Under the rule in subsection 35-10(2) a deduction for a loss incurred by an individual (including an individual in a general law partnership) from certain business activities will not be allowable in an income year unless:

- the 'Exception' in subsection 35-10(4) applies;
- one of four objective tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or
- if one of the objective tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

80. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

81. Losses that cannot be claimed as a tax deduction because of the rule in subsection 35-10(2) are able to be offset to the extent of future profits from the business activity, or are quarantined until one of the objective tests is passed.

82. For the purposes of applying the objective tests, subsection 35-10(3) allows taxpayers to group business activities 'of a similar kind'. Under subsection 35-10(4), there is an 'Exception' to the general rule in subsection 35-10(2) where the loss is from a primary production business activity and the individual taxpayer has other assessable income for the income year from sources not related to that activity, of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

83. In broad terms, the objective tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);
- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year)(section 35-35);
- (c) at least \$500,000 of real property is used on a continuing basis in carrying on the business activity in that year (section 35-40); or
- (d) at least \$100,000 of certain other assets are used on a continuing basis in carrying on the business activity in that year (section 35-45).

84. A Grower who participates in the Project will be carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling indicates that a Grower who acquires the minimum investment of one interest in the Project is unlikely to pass one of the objective tests until the income year ended 30 June 2008. Growers who acquire more than one interest in the Project may however, pass one of the tests in an earlier income year.

85. Therefore, prior to this time, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

86. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, for an individual Grower who acquires an interest(s) in the Project, the Commissioner will decide that it would be unreasonable not to

exercise the second arm of the discretion in paragraph 35-55(1)(b) until 30 June 2006.

87. The second arm of the discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where:

- (i) the business activity has started to be carried on; and
- (ii) there is an objective expectation that the business activity of an individual taxpayer will either pass one of the objective tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

88. This Product Ruling is issued on a prospective basis (i.e., before an individual Grower's business activity starts to be carried on). Therefore, if the Project fails to be carried on during the income years specified above (see paragraph 55), in the manner described in the Arrangement (see paragraphs 15 to 49), the Commissioner's discretion will not have been exercised, because one of the key conditions in paragraph 35-55(1)(b) will not have been satisfied.

89. In deciding that the second arm of the discretion in paragraph 35-55(1)(b) will be exercised on this conditional basis, the Commissioner has relied upon:

- the report of the independent expert included in the Prospectus for the Project;
- independent, objective, and generally available information relating to the Australian olive industry which supports the prices used in the cash flow projections. The projections for yields appear to be at the high end of the scale for the Australian olive industry;
- crop yields from overseas projects which support the yields used in the cash flow projections.

Prepayments provisions – sections 82KZM, 82KZMA – 82KZMD, and 82KZME – 82KZMF

90. The prepayments provisions of the ITAA operate to spread over more than one income year, a deduction for prepaid expenditure that would otherwise be immediately deductible, in full, under section 8-1. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (e.g., the performance of management services or the licensing of land) that is not wholly done within the same year of income as the year in which the expenditure is incurred.

91. In this Project, the Management Fee of \$8,453.50 and a Licence Fee of \$165 per Olive Grove will be incurred on execution of the Management Agreement and the Licence Agreement. The Management Fee and the Licence Fee are charged for providing management services or licensing land to a Grower by 30 June of the year of execution of the Agreements. In particular, the Management Fee is expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the description of the arrangement that the Management Fee has been inflated to result in reduced fees being payable for subsequent years.

92. There is also no evidence that might suggest the management services covered by the fee could not be provided within the same year of income as the expenditure in question is incurred. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial fee is for the Manager doing 'things' that are not to be wholly done within the year of income of the fee being incurred. On this basis, provided a Grower incurs expenditure as required by the agreements as set out in paragraph 23, then the basic precondition for the operation of the prepayment provisions is not satisfied and fees will be deductible in the year in which they are incurred.

Growers who choose to pay fees for a period in excess of that required by the Project's agreements

93. Although not required under either the Management Agreement or the Licence Agreement, a Grower participating in the Project may choose to prepay fees for a number of years. Where this occurs, contrary to the conclusion reached in paragraph 92 above, the prepayments provisions of the ITAA will operate to apportion the expenditure and allow an income tax deduction over the period that the prepaid benefits are provided (see Example 2 at paragraph 111).

94. The amount and timing of tax deductions for any prepaid Management Fees or prepaid Licence Fees otherwise deductible under section 8-1 will depend upon when the respective amounts are incurred and what the 'eligible service period' is, as defined in subsection 82KZL(1), in relation to these amounts. The 'eligible service period' means generally, the period over which the services are to be provided. The relevant provision of the ITAA will depend on a number of factors including the amount and timing of the prepayment and, where the 'eligible service period' exceeds 13 months, whether the Grower is a 'small business taxpayer'.

95. Where a Grower participating in this Project incurs expenditure in respect of an eligible service period that ends 13 months or less from the time the expenditure was incurred, but also in respect of the doing of a thing not to be wholly done within the income year in which that expenditure has been incurred, and the

other tests in section 82KZME are met, then section 82KZMF will apply in the manner set out in the formula below.

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

In the formula, the 'eligible service period' means, generally, the period to which the services are to be provided.

96. Where a Grower participating in this Project incurs expenditure in respect of a period that ends more than 13 months after that expenditure has been incurred, then section 82KZM will apply if the Grower is a 'small business taxpayer' or section 82KZMD if the Grower is not a 'small business taxpayer'. For a 'small business taxpayer' (see paragraphs 98 to 100) the amount and timing of the allowable deductions will then be calculated using the formula in subsection 82KZM(1) and for non-small business taxpayers using the formula in subsection 82KZMD(2). Both formulae are the same, or effectively the same as that shown in paragraph 93 above, concerning section 82KZMF.

97. A prepaid management fee and/or a prepaid licence fee of less than \$1,000 incurred in an expenditure year is 'excluded expenditure' as defined in subsection 82KZL(1). Subsections 82KZM(1), 82KZME(7) and 82KZMA(4) all provide that 'excluded expenditure' is an exception to the prepayment rules discussed above. Therefore, a prepaid fee of less than \$1,000 is deductible in full in the year in which it is incurred. However, where a Grower acquires more than one interest in the Project and the quantum of a prepaid management fee or a prepaid licence fee is \$1,000 or more, then the amount and timing of the deduction allowable must be determined using the formula shown above.

Subdivision 960-Q - Small business taxpayers

98. A 'small business taxpayer' is defined in section 960-335 of the ITAA 1997 as a taxpayer who is carrying on a business and either their 'average turnover' for the year is less than \$1,000,000 or their turnover recalculated under section 960-350 is less than \$1,000,000.

99. 'Average turnover' is determined under section 960-340 by reference to the average of the taxpayer's 'group turnover'. The group turnover is the sum of the 'value of business supplies' made by the taxpayer and entities connected with the taxpayer during the year (section 960-345).

100. Whether a Grower is a 'small business taxpayer' depends upon the circumstances of each Grower and is beyond the scope of this Product Ruling. It is the responsibility of each Grower to determine whether or not they are within the definition of a 'small business taxpayer'.

Interest deductibility

101. 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. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

102. While the terms of any finance agreement entered into between relevant Growers and such financiers are subject to commercial negotiation, those agreements may require interest to be prepaid. Under the prepayment rules contained in sections 82KZME, 'agreement' (defined in subsection 82KZME(4)) is a broad concept and includes all activities that relate to the agreement including those that give rise to deductions or assessable income. It will encompass activities not described in the Arrangement or otherwise dealt with in the Product Ruling, such as a loan to finance participation in the Project.

103. Therefore, unless the prepaid interest is 'excluded expenditure', where such a loan facility requires interest to be prepaid and the requirements of section 82KZME are met, relevant Growers will be required use the formula in subsection 82KZMF(1) to determine any tax deduction that may be allowable. Where a prepayment is for a more than 13 months, any tax deduction that may be allowable must be determined under section 82KZM (for a 'small business taxpayer') or section 82KZMD (for a taxpayer who is not a 'small business taxpayer'). The relevant formula is the same, or effectively the same as that shown above in paragraph 95 above.

Section 82KL - recouped expenditure

104. Section 82KL is a specific anti-avoidance provision that operates to deny an otherwise allowable deduction for certain expenditure incurred, but effectively recouped, by the taxpayer. Under subsection 82KL(1), a deduction for certain expenditure is disallowed where the sum of the 'additional benefit' plus the 'expected tax saving' in relation to that expenditure equals or exceeds the 'eligible relevant expenditure'.

105. 'Additional benefit' (see the definition of 'additional benefit' at subsection 82KH(1) and paragraph 82KH(1F)(b)) is, broadly speaking, a benefit that is additional to the benefit for which the expenditure is ostensibly incurred. The 'expected tax saving' is essentially the tax saved if a deduction is allowed for the relevant expenditure.

106. Section 82KL's operation depends, among other things, on the identification of a certain quantum of 'additional benefits'. Here, there may be a loan provided to the Grower. The loan will be

provided on a full recourse basis, and on commercial terms. Insufficient 'additional benefits' will be provided in respect of this Project, to trigger the application of section 82KL. It will not apply to deny the deductions otherwise allowable under section 8-1.

Part IVA - general tax avoidance provisions

107. For Part IVA 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).

108. The Percydale Olive Estate 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 52 to 53 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.

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

Examples

Example 1 – Entitlement to 'input tax credit'

110. Margaret, who is registered for GST, invests in the Green Circle Bluegums Project. The management fees are payable on 1 July each year for management services to be provided over the following 12 months. On 1 July 2000 Margaret pays her first year's management fees of \$5,500 and is eligible to claim a tax deduction for the fees in the income year ended 30 June 2001. The extent of her deduction for the management fees however, is reduced by the amount of any 'input tax credit' to which she is entitled. The Project Manager provides Margaret with a 'tax invoice' showing its ABN and the 'price of the taxable supply' for management services as \$5,500. Using the details shown on the valid tax invoice, Margaret calculates her input tax credit as:

$$1/11 \times \$5,500 = \$500$$

Therefore, the tax deduction for management fees that she can claim in her income tax return for the year ended 30 June 2001 is \$5,000 (\$5,500 less \$500).

Example 2 – Prepaid expenditure and the apportionment of fees

111. Murray decides to invest in the ABC Pineforest Prospectus which is offering 500 interests of 0.5ha in an afforestation project of 25 years. The management fees are \$5,000 in the first year and \$1,200 for years 2 and 3. From year 4 onwards the management fee will be the previous year's fee increased by the CPI. The first year's fees are payable on execution of the agreements for services to be provided in the following 12 months and thereafter, the fees are payable in advance each year on the anniversary of that date. The project is subject to a minimum subscription of 300 interests. Murray provides the Project Manager with a 'Power of Attorney' allowing the Manager to execute his Management Agreement and the other relevant agreements on his behalf. On 5 June 2001 the Project Manager informs Murray that the minimum subscription has been reached and the Project will go ahead. Murray's agreements are duly executed and management services start to be provided on that date.

Murray, who is not registered nor required to be registered for GST calculates his tax deduction for management fees for the **2001 income year** as follows:

$$\text{Management fee} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

$$\$5,000 \times \frac{26}{365}$$

= **\$356** (this is Murray's total tax deduction in 2001 for the Year 1 prepaid management fees of \$5,000. It represents the 26 days for which management services were provided in the 2001 income year).

In the **2002 income year** Murray will be able to claim a tax deduction for management fees calculated as the sum of two separate amounts:

$$\$5,000 \times \frac{339}{365}$$

= **\$4,643** (this represents the balance of the Year 1 prepaid fees for services provided to Murray in the 2002 income year).

$$\$1,200 \times \frac{26}{365}$$

= **\$85** (this represents the portion of the Year 2 prepaid management fees for the 26 days during which services were provided to Murray in the 2002 income year).

\$4,643 + \$85 = \$4,728 (The sum of these two amounts is Murray's total tax deduction for management fees in 2002).

Murray continues to calculate his tax deduction for prepaid management fees using this method for the term of the Project.

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Commissioner of Taxation

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 No draft issued - ITAA 1936 82KZME
 - ITAA 1936 82KZME(7)
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 - ITAA 1936 82KZMF(1)
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 - carrying on a business - ITAA 1997 6-5
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 - ITAA 1936 82KH(1) - ITAA 1997 387-125
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