PR 2000/97 - Income tax: Summerhill Orchards 2000

Product Ruling

Income tax: Summerhill Orchards 2000

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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.

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.*

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

No guarantee of commercial success

The 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.

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' 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 Summerhill Orchards 2000, or just simply as 'the Project'.

Tax law(s)

2. Tax law(s) dealt with in this Ruling are as follows:

- section 6-5 of the *Income Tax Assessment Act* 1997 (ITAA 1997);
- section 8-1 (ITAA 1997);
- section 17-5 (ITAA 1997);
- section 25-25 (ITAA 1997);
- Division 27 (ITAA 1997);
- section 35-55 (ITAA 1997);
- section 387-165 (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 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 Goods and Services Tax ('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.

5. 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 relevant 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 it. Neither does it include persons or entities who are associates, as that term is defined in subsection 82KH(1) of the ITAA 1936, of any of the entities involved in the arrangement.

Qualifications

9. The Commissioner rules on the precise arrangement identified in the Ruling. The class of persons defined in the Ruling may rely on its contents, provided the arrangement (described below at paragraphs 14 to 31) is carried out in accordance with details described in the Ruling. If the arrangement described in the 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

11. This Ruling applies prospectively from 13 September 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).

12. 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

13. 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

14. The arrangement that is the subject of this Ruling is described below. This description incorporates the following relevant documents or parts of documents lodged with the Australian Taxation Office ("ATO") that incorporate into this description of the arrangement are:

- Application for a Product Ruling together with Annexures and Attachments dated 14 March 2000;
- Draft Information Memorandum for Summerhill Orchards 2000 prepared by Summerhill Orchards Limited ACN 082 087 812 ('the Manager') and sent to the ATO on 5 September 2000;
- Draft Information Memorandum Summary for Summerhill Orchards 2000 which was sent to the ATO on 5 September 2000;
- **Draft Farm Allotment Agreement** between the Manager and a Grower which was sent to the ATO on 6 September 2000;
- **Draft Management Agreement** between the Manager and a Grower which was sent to the ATO on 6 September 2000;
- **Draft Loan Agreement** between Geoffrey Thompson Developments Pty Ltd ACN 004 371 653 ('the Lender') and a Grower which was sent to the ATO on 5 September 2000;
- Project Deed between the Manager, Geoffrey Thompson (Harcourt) Pty Ltd ACN 004 371 652 ('Land Owner') and Australian Rural Group Limited ACN 002 635 501 ('Trustee');
- Memorandum and Articles of Association of the Manager; and
- Correspondence and Attachments sent through e-mails and facsimile transmissions by the Manager and/or Advisor dated 24 April 2000, 5 May 2000, 11 June 2000, 16 June 2000, 20 June 2000, 29 June 2000, 4 July 2000, 11 July 2000, 16 July 2000, 19 July 2000, 20 July 2000, 21 July 2000, 26 July 2000, 4 September 2000, 5 September 2000 and 6 September 2000.

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

15. The documents highlighted are those Growers enter into or become a party to. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate[1] of a Grower, will be a party to, which are part of the arrangement to which this Ruling applies. The effect of these agreements is summarised as follows.

Overview

16. The arrangement is called Summerhill Orchards 2000. The Manager commits through the Information Memorandum that the offer to participate in the Project will be made to, and applications will only be accepted from, persons that satisfy the exceptions of section 708 of the Corporations Law.

17. The Project is briefly described in the Table below.

Location	The property is situated at Bunbartha, which is approximately 10 km northeast of the city of Shepparton in Central Victoria.
The Business	Commercial growing of apple and pear trees.
Number of allotments on offer	1,127 established allotments. The initial minimum investment required from any one Grower is one allotment and subsequent investments may be in half allotments. There is no minimum number of allotments required for the commencement of the Project.
Size of Allotments	Each allotment comprises 8 different parcels of land totalling 0.22 of an acre.
Number of trees per allotment	Each allotment is comprised of 276 trees and will consist approximately of: Royal Gala 102; Sundowner 70; Pink Lady 92; and Packham Pears 12. Exact tree make will depend on the final planting in 2000. Trees are planted using the

[1] In this Ruling 'associate' has the meaning as defined in section 318 of the ITAA 1936.

	'Open V Tatura System.'
Term of the Project	Approximately 15 years ending on 30 June 2015.
Initial Cost	The fee payable on application is $5,500 per Allotment. This consists of $4,400 Management Fee and $1,100 Licence Fee which are for the provision of services and the grant of licence, respectively, by the Project Manager from the date of acceptance of the offer to 30 June 2001.
Other Costs	Management and Licence Fees for the year ending 30 June 2002 and subsequent years will be required to be prepaid yearly in advance. Administration fee of 2.5% of the amount of distribution payable to a Grower. Picking and transport costs up to a maximum of $3.74 per carton (CPI adjusted).

Interest in land

18. The registered owner of the land, Geoffrey Thompson (Harcourt) Pty Ltd, has leased the land to the Trustee, Australian Rural Group Limited, who then subleased it to the Manager, Summerhill Orchards Limited.

19. Under the Farm Allotment Agreement, Summerhill Orchards Limited grants a licence to a Grower to use and occupy a specified separate and distinct Allotment(s). Each Allotment will be 0.22 acre and will comprise eight small parcels of land spread over the Project land so that each Grower has a licence over land which comprises the full variety of fruit trees. The licence granted is for a Grower to use and occupy the Allotment for the purpose of growing and maintaining the trees and harvesting the yearly produce from the trees for the term of the agreement. Schedule 2 of the Draft Farm Allotment Agreement provide the items covered by a licence. These are as follows:

- the trees identified in schedule 1 being 276 planted apple and pear trees from the 1996, 1997, 1998, 1999 and 2000 year plantations in various ages of fruition;
- the Open V trellis system of post and wire that supports the trees;
- the pollination trees of the Manager;
- the use of the irrigation and fertigation pipe work systems;

- the water collection dam, water races and pump house facilities;
- the chemical store room;
- the all weather roads and tracks across the property; and
- the fruit loading pad.

20. The Manager has provided information on the first commercial season of the different variety of trees. These are shown in the Table below. It should be noted however, that for those fruit trees where the first commercial season has not commenced, the Manager will inform Growers of when these fruit trees will have actually entered their first commercial season.

Tree Description	**First Commercial Season in the year ending**
Royal Gala 1996	30 June 1998
Royal Gala 1997	30 June 1999
Royal Gala/Sundowner 1998	30 June 2000
Pink Lady/ Sundowner/Packham 1999	30 June 2001
Pink Lady/Royal Gala 2000	30 June 2002

21. The Farm Allotment Agreement will continue until the earlier of the termination of a Grower's interest or 30 June 2015. At the end of this agreement, a Grower must return the Allotment to the Manager in good condition and must not remove the trees or any of the other improvements from the land.

22. Clause 7.1 of the Farm Allotment Agreement specifies the licence fees payable by a Grower in consideration for the licence granted by the Manager. For the first three years of the Project, licence fees payable are as follows:

- for the period ending 30 June 2001 ('year 1'), $1,100.00 per Allotment. This fee must be paid by the date of commencement of this Agreement;
- for the 12 month period ending 30 June 2002 ('year 2'), $1,133.00 per Allotment. This fee must be paid by 30 June 2001; and
- for the 12 month period ending 30 June 2003 ('year 3'), $1,166.00 per Allotment. This fee must be paid by 30 June 2002.

Management Agreement

23. A Grower engages the Manager as an independent contractor to manage the Allotment on the terms and conditions contained in the Management Agreement. Clause 4.1 stipulates the Manager's duties and that they must be carried out according to sound agricultural and environmental practices as well as in accordance with industry practices for similar orchards. These duties include:

- monitor the irrigation and water management plan, ensure there is adequate water supplied to the Grower's Allotment;
- provide adequate fertilisation and control pests and weeds;
- combat land degradation; and
- repair damage to road, tracks, trellises or fences on the Allotment/Half Allotment.

24. The Manager will be responsible for the harvesting, marketing and sale of the produce on behalf of Growers. The Manager is required to report regularly to Growers on their farm's progress and, once income is generated, the Manager must give Growers regular reports verifying production, sales, costs and any other expenditure incurred. The Grower will be entitled to the proceeds from the sale less any fees payable by that Grower.

25. Clause 5.1 of the Management Agreement specifies the management fees payable by a Grower over the term of the Agreement as consideration for the duties to be carried out by the Manager. For the first three years of the Project, management fees payable are as follows:

- for the period ending 30 June 2001 ('year 1'), $4,400.00 per Allotment. This fee must be paid by the date of commencement of the Agreement;
- for the 12 month period ending 30 June 2002 ('year 2'), $3,487.00 per Allotment. This fee must be paid by 30 June 2001; and
- for the 12 month period ending 30 June 2003 ('year 3'), $2,464.00 per Allotment. This fee must be paid by 30 June 2002.

Financing

26. Growers can fund their investment in the Project themselves, borrow from an independent lender or borrow from Geoffrey

Thompson Developments Pty Ltd ('the Lender'), a company associated with the Manager.

27. The Lender will provide finance to approved Growers of $10,300 per Allotment, on average. The principal amount will be advanced in three periodic advances over three years as follows:

- Periodic advance #1 on the acceptance of the Grower's Application by the Manager - $2,800;
- Periodic advance #2 on 30 June 2001 - $4,200; and
- Periodic advance #3 on 30 June 2002 - $3,300.

28. It is contemplated by the Lender that in view of the requirements of section 708 of the Corporations Law, the periodic advances as described in paragraph 27 above may vary. It must be noted however, that the Loan Agreement does not contemplate finance for the full per Allotment cost of the management and licence fees.

29. An establishment fee of $100 is payable on application for the loan and the interest rate will be set at a market rate. The interest will be payable monthly in arrears.

30. Security is over a Grower's interest in the Project. Growers will not have the capacity to defer the making of loan repayments. If a Grower defaults, the Lender will pursue the Grower to the full extent permitted by law. There will be no circumstances where the debt will not be required to be fully repaid by the Grower.

31. This Ruling does not apply to a Grower who enters into a loan arrangement with any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- entities associated with the Project other than Geoffrey Thompson Developments Pty Ltd, are involved or become involved in the provision of finance to Growers for the Project;
- 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 borrower for the purpose of section 82KL or the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arm's length;
- repayments of principal and 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; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against a defaulting borrower.

Ruling

Assessable income

32. 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 ITAA 1997. Section 17-5 ITAA 1997 excludes from assessable income an amount relating to GST payable on a taxable supply.

Allowable deductions

Deductions where a Grower is not registered or not required to be registered for GST

33. A Grower may claim tax deductions using the methods and the Tables in paragraphs 35 & 36, where the Grower:

- participates in the Project by 31 December 2000 to carry on the business of growing apples and pears;
- incurs the fees shown in paragraphs 22, 25 & 29; and
- is not registered or is not required to be registered for GST.

Section 8-1 – prepaid fees

34. Expenditure incurred by a Grower who participates in the Project is subject to the prepayment rules contained in sections 82KZME and 82KZMF. Therefore, a Grower who prepays the fees shown in the Table below cannot claim a tax deduction for the fees in the year in which the expenditure is incurred unless it is 'excluded expenditure'. Amounts of less than $1,000 will be 'excluded expenditure'. Excluded expenditure is an 'exception' to the prepayment rules and is deductible in full in the year in which it is incurred (See Example 3 at paragraph 90). In this Project, none of the Management and Licence Fees are 'excluded expenditures'.

35. The amount and timing of tax deductions allowable each year for each prepaid fee incurred that is not 'excluded expenditure' must be determined using the formula in subsection 82KZMF(1). In that formula, which is shown below, the 'eligible service period' means, generally, the period over which the services are to be provided.

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

The application of this method is shown in Examples 2 & 3 at paragraphs 89 and 90.

Fee type	ITAA 1997 section	Year 1 30/6/2001	Year 2 30/06/2002	Year 3 30/06/2003
Management fee	8-1	$4,400 - see note (i) below	$3,487 - see notes (ii) & (iv) below	$2,464 - see notes (ii) & (iv) below
Licence fee	8-1	$1,100 - see note (i) below	$1,133 - see notes (ii) & (iv) below	$1,166 - see notes (ii) & (iv) below
Interest	8-1	See notes (i) (iii) & (iv) below	See notes (i) (iii) & (iv) below	See notes (i) (iii) & (iv) below
Loan establishment fee	25-25	See note (v)	See note (v)	See note (v)

Notes:

(i) Interest and year 1 management and licence fees are not prepaid and therefore are deductible in the year incurred.

(ii) Years 2 & 3 management and licence fees are prepaid and therefore are **NOT** deductible in the year incurred. The deduction for each year's fees must be determined using the formula above (see paragraph 35). See Example 3 at paragraph 90.

(iii) The deductibility or otherwise of interest arising from agreements entered into with financiers other than the Lender is outside the scope of this Ruling. However, under the prepayment rules applying to the Project, 'agreement' is a broad concept and includes all activities that relate to the agreement including those that give rise to deductions or assessable income. Therefore, all Growers who finance their participation

in the Project other than with the Lender should read carefully the information provided in paragraphs 59 to 61.

(iv) Where a Grower chooses to prepay fees beyond 13 months, sections 82KZME and 82KZMF will not apply to set the amount and timing of that Grower's tax deductions. Instead, unless the expenditure is 'excluded expenditure', the amount and timing of the tax deductions is determined under either subsection 82KZM(1) or subsection 82KZMD(2) (see paragraphs 62 to 64). To apportion the expenditure over the eligible service period, these provisions, which apply respectively to 'small business taxpayers' and taxpayers who are not 'small business taxpayers', effectively use the same formula as that shown above.

(v) The $100 loan establishment fee payable by a Grower to the Lender will be deductible in the financial year the fee is incurred.

Horticultural plant costs – subdivision 387-C

36. A deduction is allowable under section 387-165 ITAA 1997 for capital expenditure incurred by the Manager on acquiring and planting the trees for use in horticultural business. Trees that have an 'effective life' for the purposes of section 387-185 of greater than 13 but less than 30, as in this Project, have a write-off rate of 13%. The period of write-off starts from the time the trees enter their first commercial season. Based on the Manager's advice (see paragraph 20 above), the amount that can be written-off per allotment for the years ending 30 June 2001 to 30 June 2003 are shown in the Table below.

Year of Income	**Deduction under section 387-165 ITAA 1997**
30 June 2001	$278 x $\frac{\text{Number of days of a Grower's participation in the period ending 30 June 2001}}{365}$
30 June 2002	$302
30 June 2003	$302

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

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

- participates in the Project by 31 December 2000 to carry on the business of growing apples and pears;
- incurs the fees shown in paragraphs 22, 25 & 29; and
- is entitled to an input tax credit for the fees

then the tax deductions calculated using the methods and Tables in paragraphs 35 & 36 (above) will exclude any amounts of input tax credit (Division 27 of the ITAA). See Example 1 at paragraph 88.

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

38. For a Grower who is an individual and who enters the Project during the year ending 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 2003 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.

39. 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 74 in the Explanations part of this Ruling, below).

40. Where either a 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.

Section 82KL

41. Section 82KL does not apply to deny the deduction otherwise allowable.

Part IVA

42. 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 ITAA 1997 - licence and management fees

43. Consideration of whether the licence fee and management fee are deductible under section 8-1, begins with paragraph 8-1(1)(a) of the section. This view proceeds on the following basis:

- the outgoings 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 paragraph 8-1(1)(b) if they are incurred when the business has not commenced; and
- where all that happens in a year of income is 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 paragraph 8-1(1)(b) applies. However, that does not preclude the application of paragraph 8-1(1)(a) and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

44. An orchard scheme can constitute the carrying on of a business. Where there is a business, or a future business, the gross sale proceeds from fruit from the scheme will constitute gross assessable income. 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 planting, tending, and maintenance of the apple and pear trees as well as the harvesting, distribution and marketing of the apples and pears.

45. Generally, a Grower will be carrying on a business of an orchard where:

- the Grower has an identifiable interest in specific growing trees coupled with a right to harvest and sell the fruit produced;
- the orchard activities are carried out on the Grower's behalf; and
- the weight and influence of the general indicators of a business as used by the courts point to the carrying on of a business.

46. For this Project, Growers have, under the Farm Allotment and Management Agreements, rights in the form of a licence over an identifiable area of land consistent with the intention to carry on a business of a commercial orchard. Under these agreements Growers appoint Summerhill Orchards Limited, as Manager, to provide services such as tending, pruning, training, fertilising, replanting, spraying, maintaining and otherwise caring for the trees. The Manager is also responsible for the harvesting, marketing and sale of the produce from the trees.

47. The Farm Allotment Agreement provides a Grower with the right to use identified land containing specific trees and to harvest the produce of those trees. A Grower has a legal interest in the land and produce by virtue of the Farm Allotment Agreement.

48. Growers have the right to use the land in question for horticultural purposes and to have the Manager come onto the land to carry out its obligations under the Farm Allotment and Management Agreements. The Growers' degree of control over the Manager, as evidenced by the agreements and supplemented by the Corporations Law, is sufficient. Under the Project, Growers are entitled to receive a yearly account for the proceeds of the sale of fruit from, as well as regular reports of, the Manager's activities. Growers are able to terminate the arrangement with the Manager in certain instances, such as cases of default or neglect. The activities described in the Farm Allotment and Management Agreements are carried out on the Growers' behalf.

49. 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. An independent horticultural report has been included in the Draft Information Memorandum. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to Projections in the Draft Information Memorandum that suggest the Project should return a 'before-tax' profit to Growers, ie., a 'profit' in cash terms that does not depend in its calculation, on the fees in question being allowed as a deduction.

50. Growers will engage the professional services of a Manager who holds itself out as having the appropriate credentials. These services are required to be carried out using accepted horticultural practices and are of the type ordinarily found in orchards that would commonly be said to be businesses.

51. Growers have a continuing interest in the trees from the time they start to participate in the Project until the cessation of the Project. The horticultural 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' horticultural activities will constitute the carrying on of a business.

52. The licence fees and management fees associated with the horticultural 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 apples and pears) 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. The fee appears to be reasonable. There is no capital component of the management fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Sections 82KZME and 82KZMF – prepaid fees

53. Expenditure prepaid by Growers for management fees and licence fees meets the requirements of subsections 82KZME(1) and (2) and the expenditures are incurred under an 'agreement' as described in subsection 82KZME(3). Therefore, unless one of the exceptions to section 82KZME applies to the expenditures, the amount and timing of tax deductions for those expenditures are determined under section 82KZMF.

54. In relation to the requirements of subsection 82KZME(1) and (2), the prepaid management and licence fees incurred by a Grower who participates in the Project:

- are otherwise deductible under section 8-1;
- have 'eligible service periods' (for each of the fees) that end not more than 13 months after the Grower incurs the expenditure; and
- are incurred in return for the doing of a thing under the agreement that is not wholly to be done within the expenditure year.

55. The 'eligible service period' (defined in subsections 82KZL(1)) means, generally, the period over which the services are to be provided.

56. In relation to an 'agreement' referred to in subsection 82KZME(3), the Project is an 'agreement' (this being a broad concept under subsection 82KZME(4)), where, during the term of this Product Ruling:

- the Grower's allowable deductions attributable to the Project for each expenditure year exceeds the Grower's assessable income from the Project (if any) for the expenditure year;

- the Grower does not have day-to-day control over the operation of the Project; and
- there is more than one Grower participating in the Project.

57. The prepaid licence and management fees incurred by Growers do not fall within any of the 5 exceptions to section 82KZME and therefore, the deduction for each year is determined using the formula in subsection 82KZMF(1). Section 82KZMF overrides section 8-1 and apportions the management fees over the period that the services for which the prepayment is made are performed.

Interest deductibility

(i) Growers who use the Lender as the finance provider

58. The interest expense incurred by Growers with respect to finance provided by the Lender as described in paragraphs 26 to 30 will have sufficient connection with the gaining of assessable income from the Project.

(ii) Growers who DO NOT use the Lender as the finance provider

59. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than the Lender 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.

60. 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 section 82KZME, 'agreement' (defined in subsection 82KZME(4)) is a broad concept and will encompass activities, such as a loan to finance participation in the Project, not described in the Arrangement or otherwise dealt with in the Product Ruling.

61. Therefore, unless the prepaid interest is 'excluded expenditure', where interest is prepaid under such a loan facility and the requirements of section 82KZME are met, relevant Growers will be required to determine any tax deduction using the formula in subsection 82KZMF(1). The relevant formula is shown above in paragraph 35 and the method is explained in the Examples at paragraphs 89 & 90.

Prepayments where the eligible service period exceeds 13 months

62. Although not required under the Arrangement described in this Product Ruling, some Growers may choose to prepay some or all of their fees for periods longer than the agreements require. Specifically, this will occur when the 'eligible service period' relating to the prepaid amount ends more than 13 months after the Grower incurs the expenditure. Where the 'eligible service period' exceeds 13 months sections 82KZME and 82KZMF will not apply, as the requirement of paragraph 82KZME(1)(b) is not met.

63. Instead, for a Grower who is a 'small business taxpayer' (see paragraphs 65 to 67) subsection 82KZM(1) applies to apportion the expenditure and determine the amount and timing of the deductions. Alternatively, for a Grower who is not a 'small business taxpayer' subsection 82KZMD(2) applies to apportion the expenditure and determine the amount and timing of the deductions.

64. Both of these provisions, although slightly different in form, apportion deductible expenditure over the 'eligible service period' in the same way as the formula contained in paragraph 35 (above). However, expenditure, which is 'excluded expenditure', is an exception to both provisions (subparagraph 82KZM(1)(b)(ii) and subsection 82KZMA(4) respectively). A tax deduction for 'excluded expenditure' can be claimed in full in the year in which the expenditure is incurred.

Small business taxpayers

65. 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.

66. '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).

67. 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'.

Section 25-25 ITAA 1997 - loan establishment fee

68. Where Growers finance the investment through a loan facility from the Lender, a loan establishment fee of $100 will be payable at the time of entering into the Loan Agreement. The loan establishment fee to be incurred will be deductible in the year incurred pursuant to subsection 25-25(1) ITAA 1997 provided the total amount of the borrowing costs do not exceed $100.

Subdivision 387-C - horticultural plants

69. 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. It does not matter who incurred the capital expenditure.

70. 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 with an effective life of 13 to 30 years, as in this Project, the rate is 13%.

Division 35 - losses from non-commercial business activities

71. 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.

72. 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.

73. 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.

74. 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.

75. In broad terms, the objective tests require:

- at least $20,000 of assessable income in that year from the business activity (section 35-30);
- the business activity results in a taxation profit in 3 of the past 5 income years (including the current year)(section 35-35);
- 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
- 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).

76. 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 Allotment in the Project is unlikely to pass one objective tests in the years covered by this Ruling. Growers who acquire more than one interest in the Project may however, pass one of the tests in an earlier income year.

77. Therefore, during this period, 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.

78. 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) for the term of this Product Ruling.

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

- the business activity has started to be carried on; and
- 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.

80. This Product Ruling is issued on a prospective basis (ie, 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 38), in the manner described in the Arrangement (see paragraphs 14 to 31), 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.

81. 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 horticulturalist; and
- independent, objective, and generally available information relating to apple and pear growing which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling Application submitted by the Manager.

Section 82KL - recouped expenditure

82. 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'.

83. 'Additional benefit' (see the definition of 'additional benefit' at subsection 82KH(1) and paragraph 82KH(1F)(b)) is, broadly speaking, a benefit received 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.

84. Section 82KL's operation depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. Here, there may be a loan provided by an associate of the Manager to the

Grower. The loan is provided on a full recourse basis, and on commercial terms. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL. Section 82KL will not apply to deny the deduction otherwise allowable under section 8-1.

Part IVA – general tax avoidance provision

85. 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).

86. The Summerhill Orchards 2000 will be a 'scheme'. The Growers will obtain a 'tax benefit' from entering into the scheme, in the form of the tax deductions for the amounts indicated in 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.

87. 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 fruit. 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'

88. 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 which includes its ABN and shows the price of the taxable supply for management services ($5,500).. Using the details shown on the valid tax invoice, Margaret calculates her input tax credit as:

1/11 x $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 – apportionment of fees

89. 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, or 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 for 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.

Example 3 – apportionment of fees where there is a contractual 'eligible service period' and the fees include expenditure that is 'excluded expenditure'

90. On 1 June 2001 Kevin applies for an interest into the Western Bluegum Project, a prospectus based afforestation project of 12 years. Kevin is accepted into the project and executes a lease and management agreement with the Responsible Entity for the provision of management services and the lease of his Woodlot. The terms of the lease and management agreement require Kevin to prepay the management fees and the lease fee on or before the 30 June each year for the lease of his Woodlot and the provision of management services between the 1 July and 30 June in the following income year. Kevin pays the first year management fee of $3,600 and first year lease fee of $500 on 15 June 2001.

Kevin, who is not registered, or required to be registered for GST calculates his tax deduction for management fees and the lease fee for the **2001 income year** as follows:

Management fee

91. Even though he paid the $3,600 in the 2001 income year, because there are no 'days of eligible service period' in that year, Kevin is unable to claim any part of his management fees as a tax deduction in his tax return for the year ended 30 June 2001.

Lease fee

92. Because the $500 lease fee is less than $1,000 it is 'excluded expenditure' and can be claimed in full as a tax deduction in Kevin's tax return for the year ended 30 June 2001.

In the **2002 income year** Kevin can claim a tax deduction for his first year's management fees calculated as follows:

$$\$3{,}600 \times \frac{365}{365}$$

= **$3,600** (this represents the whole of the first year's management fee prepaid in the 2001 income year but not deductible until the 2002 income year).

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

Detailed contents list

93. Below is a detailed contents list for this Product Ruling:

Commissioner of Taxation
13 September 2000

Previous draft
Not previously issued in draft form

Related Rulings/Determinations:
TR 92/1; TR 92/20; TD 93/34; TR 97/11; TR 97/16; TR 98/22; PR 1999/95

Subject references:
- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees expenses
- producing assessable income
- product rulings

- public rulings
- schemes and shams
- taxation administration
- tax avoidance

Legislative references:
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 8-1(a)
- ITAA 1997 8-1(b)
- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 25-25(1)
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(3)
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(a)
- ITAA 1997 35-55(1)(b)
- ITAA 1997 387-165
- ITAA 1997 387-185
- ITAA 1997 960-335
- ITAA 1997 960-340
- ITAA 1997 960-345
- ITAA 1997 960-350
- ITAA 1936 82KH
- ITAA 1936 82KL
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- ITAA 1936 82KZM
- ITAA 1936 82KZM(1)
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- ITAA 1936 82KZMA
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- ITAA 1936 Pt IVA
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- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- TAA 1953 Pt IVAAA
- Copyright Act 1968

ATO references:
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