

PR 2001/126 - Income tax: Almond Orchards Australia Robinvale 2000

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Product Ruling

Income tax: Almond Orchards Australia Robinvale 2000

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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

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.

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 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 Almond Orchards Australia Robinvale 2000, or just simply as 'the Project'.

Tax law(s)

2. The tax law(s) that are dealt with in this Ruling are:
- Division 35 of the *Income Tax Assessment Act 1997* ('ITAA 1997').

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.

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 entered into the arrangement described below between 19 April 2000 and before 31 May 2000. They will have had 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 have terminated or intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

Qualifications

9. 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

11. This Ruling applies prospectively from 19 April 2000. 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 upon 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, the product 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 2002. 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 on or after 19 April 2000 and before 31 May 2000. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into 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. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Robinvale 2000 prospectus for Almond Orchards Australia dated 6 March 2000;
- **Draft Project Constitution** prepared by Almond Orchards Australia Limited ('AOAL', 'the Manager', or 'the Responsible Entity') received 10 February 2000;
- **Draft Allotment Agreement** between AOAL and the Growers, received 15 February 2000;
- **Draft Management Agreement** between AOAL and the Growers, received 15 February 2000;
- Draft Almond Orchard Management Agreement between the Manager and Select Harvests Limited ('Select') and Almond Management Australia Pty Ltd ('AMA'), received 15 February 2000;
- Draft Custodian agreement between AOAL and Sandhurst Trustees Limited ('the Custodian'), received 4 November 1999;

- Draft Almond Orchard Lease between Kyndalyn Park Pty Ltd and the Custodian, received 28 October 1999;
- Draft Sub-Lease between the Custodian and the Manager, received 28 October 1999;
- Draft Licence Agreement between AMA and the Custodian, received 15 February 2000;
- Draft Sub-Licence Agreement between the Custodian and AOAL, received 15 February 2000;
- Draft Compliance Plan for the Responsible Entity, received 10 February 2000;
- Product Ruling request received 4 November 1999 and amendment to Product Ruling request received 25 January 2000;
- **Loan Agreement** between Growers and AOAL received 23 November 1999;
- Additional correspondence from the AOAL and Tax Adviser dated 23 November 1999, 30 November 1999, 2 December 1999, 10 December 1999, 13 December 1999, 21 December 1999, 6 January 2000, 11 January 2000, 17 January 2000, 20 January 2000, 25 January 2000, 8 February 2000, 14 February, 15 February 2000, 6 April 2000, 12 April 2000, 14 February 2001 and 20 June 2001.

Note: Certain information received 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 entered into. For the purposes of this Ruling there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of the Grower will be party to. In this Ruling 'associate' has the meaning as defined in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936).

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

17. The arrangement is called Almond Orchards Australia Robinvale 2000. Growers entering the Project were to occupy, under licence, land owned by Kyndalyn Park Pty Ltd, 70kms south of Mildura on the Murray River. The land has been leased to the Custodian, which has, in turn, subleased the land to the Manager. The Manager grants a licence to each Grower, by way of an Allotment Agreement, to conduct almond-growing activities on the land.

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18. There were up to 1000 Allotments of 0.4 hectares on offer. Following execution of the Allotment and Management Agreements 100 trees per Allotment were to be planted. The Manager as the Responsible Entity was to operate the Project. The Manager did not propose to accept Growers into Project during the period 1 May 2000 to 30 June 2000.

19. Growers were to engage AOAL as the Manager to perform services including the establishment and maintenance of the Orchard and the annual harvesting and marketing of the almonds produced. This Ruling only applies to those parties utilising the services of AOAL. The Manager was to engage Select to professionally manage the Orchard and sell the entire production of the Orchard for the life of the Project.

Years 1 to 3 payments

20. The fees for one allotment for the first three years are:

	Year ended 30 June 2000	Year ended 30 June 2001	Year ended 30 June 2002
Management and administration fees	4,400	1,760	1,650
Farm expenses	1,132	1,638	1,971
Allotment licence fee	1,368	1,536	1,603
Tree establishment	1,625	-	-
Total	\$8,525	\$4,934	\$5,224

Note:

- The fees for the year ended 30 June 2000 were incurred on application and were for work to be done in the year in which they were incurred.

21. The Manager forecasts that a Grower could expect to achieve an internal rate of return of approximately 14% before tax. The term of the Project will be for 15 years. AOAL has a right to buy the Growers' trees at the end of the sixteenth year of the project.

Project Constitution

22. A Grower must pay \$18,683 over a period of three years in order to acquire an interest in the Project (cl 4). The Responsible Entity is required to maintain a register of the Growers (cl 10). There are no withdrawal rights under the Project (cl 11.1). A Grower has the

right to assign their Interest only in the circumstances set out in the Constitution and on the terms and conditions of the Allotment Agreement and Management Agreement (cl 13).

23. Growers are able to remove the Responsible Entity by taking action under the Corporations Law.

24. Each Grower is vested with the following assets:

- the trees on the Grower's Allotment (cl 8.3(a));
- the Almonds Attributable to the Grower's Allotment (cl 8.3(b)); and
- the Grower's Interest in the Project (cl 8.3(c)).

Compliance Plan

25. The objective of the Compliance Plan is to ensure the interests of the Growers are protected. The Responsible Entity must ensure that the Constitution and the Compliance Plan meet the relevant requirements of the Corporations Law (cl 3.1). The Responsible Entity must ensure that all property of the Project is clearly identified and held separately from any other property of the Responsible Entity or other managed investment schemes (cl 4.1). All Project property will be held by the Custodian (cl 4.1(a)). The Compliance Plan outlines the various reports and reconciliations which will be provided to each Grower by the Manager.

Allotment Agreement

26. The Manager grants each Grower a licence to:

- use and occupy the Allotment for the purpose of developing, planting, growing, maintaining and harvesting the trees; and;
- use the Water Licences and Internal Irrigation system to irrigate their Allotments.

27. A fee of \$1,368 for the first year was payable to the Responsible Entity for this licence (cl 7.1(a)). Subsequent years' fees are specified in Schedule 2 to the Allotment Agreement.

28. The Responsible Entity has a right to require the Grower to sell its trees at the end of the Term of the Licence (cl 3.2(a)). The Agreement details the Grower's and the Responsible Entity's obligations for use of the Allotment under the licence (cl 5 and cl 6). The Responsible Entity may assign its rights and interests under this Agreement (cl 9.1).

29. AOAL or an associate thereof, will buy the water licences and pay for the installation of the internal irrigation system to provide the water supplied as part of this agreement (refer the Licence Agreement).

Management Agreement

30. Pursuant to the Management Agreement, AOAL is engaged to develop, maintain and generally manage the Project. The fees payable to AOAL for the provision of these services are set out at cl 5. Growers enter into this Agreement until 30 June 2015. AOAL is entitled to delegate any of its duties and functions for the better performance of its obligations (cl 8.1).

31. In the first financial year of the Project AOAL is to establish the Growers' Trees, maintain the Trees once they are established, and provide management and administrative services to the Growers (cl 4.2).

32. The establishment services to be provided by the Manager in the first year included, among other things:

- prepare the Allotment for planting;
- supply and plant the rootstock;
- supervise the planting of the Trees; and
- prepare and implement an irrigation, drainage and water management plan (cl 4.1).

33. The farming services to be provided by the Manager in the first year included, among other things:

- provide irrigation, fertilisation and nutrients to the trees;
- eradicate any pests or diseases if required; and
- prepare a business plan and annual budget for the Project (cl 4.2 (a)).

34. The administration and management services to be provided by the Manager in the first year included, among other things:

- assisting Growers to complete loan applications;
- preparing reports to Growers on the location of their allotments and the work to be done on the Allotment;
- reviewing the sales and marketing plan for the Project; and
- supervising Select's work (cl 4.2 (b)).

35. For the second and subsequent years the Manager is responsible for farming services, administration and management services, processing and marketing services (cls 4.3(a), 4.3(b), 4.4 and 4.5).

36. Growers have the right to elect to have any almonds harvested from their farm made available to them to sell or deal with as they determine (cl 4.3(a)(xvii)).

37. The Manager will pool for sale all produce of each Grower's business with that of each other Grower and will market and sell all such produce (cl 4.5). The proceeds of the pooled sales will be paid to the Custodian for crediting to the account of each Grower on a proportional basis (cl 15 of the Management Agreement and cl 22 of the Constitution). Where the produce from a Grower's Allotment is of sufficiently reduced quality or quantity, that Grower's share of the pooled sale proceeds may be reduced (cl 4.5(c) of the Management Agreement and clause 22.1 of the Constitution). Income of the Project is to be held on behalf of the Growers by the Custodian and to be applied in payment of the Growers' obligations under the Management and Allotment Agreement. Any net income remaining after the payment of these fees is to be distributed to Growers (cl 22 of the Constitution).

38. The Grower may terminate the Management Agreement in certain instances, including where the Manager defaults in the performance of its duties (cl 10.1).

39. All costs and expenses incurred by the Manager in carrying out its duties are to be borne by it and the Grower has no further obligation to make any payment, save those under cls 5.1 to 5.4 of the Management Agreement (cl 5.5).

40. If in any year of the Project the income resulting from the sale of produce is insufficient to meet the annual Management and Allotment fees of that year, participants are still liable to pay the shortfall pursuant to cl 9.5(e) of the Constitution.

41. There are no sale agreements in place for the almonds that will be produced and harvested under the Project. Growers are paying as part of the management fees an amount to AOAL for it to market and sell the almonds (cl 4.3(a)(xviii)).

Almond Orchard Management Agreement

42. Pursuant to its right to delegate any functions required of it, AOAL has contracted with Select to undertake the obligations under the Management Agreement to establish the Orchard in the first year and undertake all necessary horticultural work in future years. An Almond Orchard Management Agreement exists between the

Manager, Select and AMA, detailing those services to be undertaken by Select in each year.

43. Select was required to acquire rootstock for the Growers in the Project by 31 May 2000. Select was contracted to plant those trees by 30 June 2000, subject to the planting being undertaken in appropriate climatic and horticultural conditions (cls 4.1(a) and (c)). Select was then required to undertake cultivation, maintenance and management services over the life of the Project (cl 4.3).

44. Select is required to harvest the almonds on behalf of the Growers (cl 4.4) and process those almonds (cl 5). Select guarantees the sale of those almonds by the end of the Season following harvest and will endeavour to maximise the price obtained for the sale (cl 6.1). Select is entitled to charge fees for the processing and marketing of the almonds at an agreed rate per kilogram of processed Almonds (cls 12.1, 12.2 and 13.1) as well as any drying fee that may be applicable (cl 5.6). A Bonus fee of 10% of the amount by which the net income from sales for a financial year exceeds forecast may be payable (cl 14A).

Finance

45. This Ruling does not apply if a Grower enters into a finance agreement 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 AOAL) are involved in the provision of finance 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 will be granted to the borrowers for the purpose of section 82KL (ITAA 1936) or the funding arrangements transform the project into a 'scheme' to which Part IVA (ITAA 1936) applies;
- the loan 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) back to the lender or any associate; or

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

Ruling

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

Section 35-55 - Commissioner’s discretion

46. For a Grower who is an individual and who entered the Project on or after 19 April 2000 and before 31 May 2000 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 has decided for the income years ended 30 June 2001 to 30 June 2004 that the rule in section 35-10 does not apply to this business activity provided that the Project has been, and continues to be carried on in a manner that is not materially different to the arrangement described in this Ruling.

47. 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 53 in the Explanations part of this Ruling, below).

48. 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, i.e., 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.

49. Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner’s decision to exercise the discretion in paragraph 35-55(1)(b) as an indication that the Tax Office sanctions or guarantees the Project or the product to be a commercially viable investment. An assessment of the Project or the product from this perspective has not been made.

Explanations

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

50. 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.

51. 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.

52. Under the loss deferral rule in subsection 35-10(2) the relevant loss is not able to be taken into account in the calculation of taxable income in the year that loss arose. Instead, in a later year it may be offset against any income from the same or similar business activity, or, if one of the objective tests is passed, or the Commissioner’s discretion exercised, against other income.

53. 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 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.

54. 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 is used on a continuing basis in carrying on the business activity in that year (section 35-45).

55. A Grower who was accepted into, and who has participated in the Project since 19 April 2000 is carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling and additional information provided since, indicates that a Grower who acquires the minimum investment of one interest in the Project is unlikely to pass one of the objective tests or produce a taxation profit until the income year ended 30 June 2005. Growers who acquired more than one interest in the Project may however, pass one of the tests in an earlier income year.

56. 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.

57. 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 acquired an interest(s) in the Project on or after 19 April 2000 and before 31 May 2000, the Commissioner has decided that it would be unreasonable not to exercise the second arm of the discretion in paragraph 35-55(1)(b) for the years ended 30 June 2001 to 30 June 2004.

58. 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.

59. Information provided by the applicant states that the business activity comprised by a Grower's involvement in this Project has started to be carried on, and will continue to be carried on in a manner that is not materially different to that described in the Arrangement in this Product Ruling.

60. In deciding to exercise the discretion in paragraph 35-55(1)(b) the Commissioner has relied upon:

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- the horticultural experts' report provided by the Responsible Entity with the application and subsequently, in further information requested by the Commissioner; and
- independent, objective, and generally available information relating to the almond industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity.

Detailed contents list

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

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Commissioner of Taxation

 15 August 2001

Previous draft:

Not previously issued in draft form

Legislative references:

- ITAA 1936 318
- ITAA 1936 82KL
- ITAA 1936 Part IVA
- 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)

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

- carrying on a business
- commencement of a business
- management fees
- primary production
- producing assessable income
- product rulings
- public rulings
- schemes
- tax avoidance
- tax benefits
- viticultural expenses

ATO references:

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