



PR 2001/138 - Income tax: Australian Olives Project

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Product Ruling

Income tax: Australian Olives Project

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Participants 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.*

No guarantee of commercial success

The Australian Taxation Office (ATO) does not sanction or guarantee this product. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Participants must form their own view about the commercial and financial viability of the product. This involves 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 this product fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for participants 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, participants lose the protection of this Product Ruling. Participants may wish to seek assurances from the promoter that the arrangement has been carried out as described in this Product Ruling.

Participants 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 the Australian Olives Project, or simply as 'the Project'.

Tax laws

2. The tax laws 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 any entity (referred to in this Ruling as a Member) 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.

Changes in the Law

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 taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering participating 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 participants in projects such as this. In keeping with that intention, the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

Class of persons

7. The class of persons to whom this Ruling applies is those who entered into the arrangement described below between 17 September 1997 and 17 September 1998. 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. In this Ruling these persons are referred to as 'Members'.

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 the Project.

Qualifications

9. The Commissioner rules on the precise arrangement identified in the Ruling. 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. The Ruling will be withdrawn or modified.

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Date of effect

11. This Ruling applies prospectively from 24 October 2001 for Members who entered into the arrangement described below between 17 September 1997 and 17 September 1998. 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 that private ruling if the income year to which it relates has ended or has commenced but not yet ended. However if the arrangement covered by the private ruling has not commenced, 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 2002. The Ruling continues to apply in respect of the tax laws ruled upon, to all persons within the specified class who entered into the arrangement specified below on or after 17 September 1997 and before 17 September 1998. 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 specified below. This arrangement incorporates the following documents:

- Australian Olives Project Prospectus dated 17 September 1997;
- Supplementary Prospectus for the Project dated 1 December 1997;
- Trust Deed dated 4 August 1997 between Australian Olives Ltd ('Manager'), Collective Olive Groves Limited ('Land Owner'), Australian Olive Holdings Ltd ('Water Owner') and Australian Rural Group Limited ('Trustee');
- **Grove Licence Agreement** between Collective Olive Groves Limited (COGL) ('the Landowner'), Australian Olives Limited (AOL) ('the Manager') and the Member;
- **Grove Agreement** between AOL and the Member;
- **Finance Agreement** between Australian Agricultural Finance Pty Ltd (AAF) ('the Lender') and the Borrower (the Member);
- Water Supply Agreement between AOL and Australian Olives Holdings Ltd (AOHL) ('the Water Owner');
- Articles of Association of the Manager;
- Application Form for the Project;

- Correspondence from the Applicant dated 29 April 1998, 24 July 1998, 20 October 1998, 29 January 2001 and 18 June 2001;
- Correspondence to the Applicant dated 16 April 1998, 19 June 1998, 8 July 1998, 30 October 1998.

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

15. The documents highlighted are those that the Members enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Member, or an associate of the Member will be a party to that are part of the arrangement to which this Ruling applies.

16. 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

17. The salient features and effect of these arrangements are summarised below:

Location	'Yallamundi', 86 kms south west of Toowoomba.
Type of business each participant is carrying on	Commercial growing of a number of varieties of olives.
Number of Groves on offer	1 250.
Size of each Grove	0.16 hectares.
Number of trees per hectare	250.
The term of the project	Until 30 June 2023.
Initial cost	\$8 130 per Grove.
Initial cost per hectare	\$50 812.

Ongoing costs	<ul style="list-style-type: none"> • Management, Licence and Harvesting Fee, Marketing and associated costs. However Members can undertake their own maintenance and harvest and market their olives if they elect to do so. • Insurance in relation to fires and other natural disasters.
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18. The Prospectus invited Members to participate in two specific interests. The first was a right to participate in a project called 'Australian Olives Project'. The second was a right to purchase shares in COGL, the Project's landowning company.

19. Olive growing projects are being conducted on a series of properties collectively called 'Yallamundi', which is 86 km south west of Toowoomba. This particular project involves Lot 17 on RP 35138, Parish of Tummaville, County of Merivale owned by COGL. A Member participated in the Project by:

- subscribing for 150 shares (one parcel) in COGL at \$1 each (total \$150);
- entering into a 'Grove Licence Agreement' with the Landowner in respect of a Grove (0.16 hectares) for the period to 30 June, 2023; and
- entering into a 'Grove Agreement' that relates to initial services to be performed in the first 12 months and for ongoing services for the remaining period to 30 June 2023.

20. A Member entering into the Grove Licence Agreement and the Grove Agreement was liable to pay the following amounts:

- \$180 for the purchase of olive seedlings payable on application;
- a Grove Agreement fee of \$7,780 payable for the first 12 months of services provided by the Manager;
- a Grove Licence Agreement fee of \$20 payable to the Landowner on application. Thereafter, the fee are payable annually and are increased by the proportional increase in the All Groups Consumer Price Index for Brisbane ('the CPI');
- a Grove Agreement fee of \$1,260 payable at the commencement of month 13 after acceptance for services performed until the end of the second year. A further fee became payable on the first day of the

third year after acceptance of the Agreement and is payable annually thereafter, increased by movements in the CPI; and

- a harvesting fee of \$0.27 per kilogram of olives attributable to the Member's Grove from the first harvest, indexed by the CPI for the remaining years. The first harvest is predicted to occur in year 4 of the Project.

21. Each Member's Grove was allocated by AOL upon acceptance and planted with 40 olive trees. There is no variation between individual Members' Groves within the Project or between rights attached thereto, except that the Manager was entitled to plant different varieties of Olive trees on individual Groves based on overall Project objectives.

22. The projected returns from the Grove are outlined on pages 12 to 14 of the Prospectus. There is no assurance or guarantee by the promoter in respect of the future success of, or financial returns associated with the Project apart from a guarantee that the Manager will replace any trees that fail (for whatever reason) until the first harvest predicted to be year 4 of the Project.

Shares in COGL

23. Under the Project, a Member could purchase a minimum of one parcel of 150 ordinary \$1 shares in COGL from AOHL. The Prospectus offered 1250 parcels of 150 shares. Members who purchased shares waived all or any other pre-emptive rights they may have held by virtue of being a Member in relation to the issue of new shares or the transfer of existing shares. COGL derives income from licence fees and possibly may eventually derive capital gains from the sale of Project land. There is an expectation that Members will derive dividends. However the taxation consequences of any subsequent dealing or disposal of shares in COGL do not form part of this Ruling.

Grove Licence Agreement

24. The Landowner leases the Project land to the Trustee, which subleases the land back to the Landowner. The Landowner entered into licence agreements with the Members.

25. Members entering the Grove Licence Agreement pay occupancy fees (clause 6.1) for a licence to use and occupy the Grove for the limited purposes of planting, growing, harvesting and marketing olives for a period ending on 30 June 2023. A licence relates to an identifiable area of land and the Member has the option

of appointing an agent under a Grove Agreement to perform the licensed activities (clause 7.2).

26. The licence fee was payable on allocation of the Grove for the first 12 months and then payable annually until the end of the agreement.

Grove Agreement

27. Members enter into an Agreement appointing AOL, as Manager, to manage the Member's interest in the Project on the terms and conditions set out in the Grove Agreement. A summary of the key aspects of this Agreement is found in the Prospectus at pages 46 and 47.

28. Members enter into the Agreement until the year ended 30 June 2023 (clause 3) unless the Agreement is terminated earlier. The Agreement may be terminated by either the Manager or the Member under specific conditions (clause 12). Upon termination of the Agreement by the Manager, the Member's interest in the Project may be sold to meet any unpaid fees (clause 12.3 of the Grove Agreement and clause 6.4 of the Trust Deed). The arrangement ruled on does not include the circumstance where the Grove Agreement is terminated or the Manager is otherwise removed. In such circumstance this Ruling will cease to have effect. The Grove Agreement covers two periods, namely, the first 12 months and the remaining period to 30 June 2023. The duties to be performed by the Manager specific to the first 12 month period are listed at clause 4.1 of the Agreement and include:

- supply of 40 olive seedlings for the Member ;
- installing irrigation works;
- undertaking drainage and soil loss prevention works;
- preplanting preparation and the planting of the olive trees;
- tending the Member's Grove and, if necessary, tending the olive seedlings;
- supplying water;
- eradicating weeds and repairing damage caused by the Manager; and
- undertaking certain preventative measures concerning land degradation.

29. After these initial duties have been performed, AOL must provide continuing maintenance of the Groves (clause 4.3)), unless the

Member has elected to undertake the ongoing maintenance of the Grove.

30. The Manager has further guaranteed the replacement of olive trees on a Member's Grove until the first harvest (year 4 - page 7 of the Prospectus).

31. A Member has a right to elect to undertake the ongoing maintenance of the Grove and only pay for the services (including water) supplied by the Manager (clause 5.1). Members can also elect to have their olives harvested separately and/or to receive any olives from their Grove to sell, market or deal with as they determine (clause 5.3). Members electing to conduct their own harvest and/or maintenance must ensure the work is of a similar standard to that of the work conducted by the Manager of the other Groves (page 6 of the Prospectus). Members who either elect to maintain or harvest their Grove or who enter into other subcontracting arrangements will be outside the arrangements to which this Ruling relates and will be unable to rely on this Ruling.

32. The Manager may employ agents, contractors, professional advisers and other consultants to perform its obligations under the Agreement (clause 10.1).

The Trust Deed

33. The Trust Deed sets out the terms and conditions under which the Trustee agrees to act for the Members as their representative and the terms under which the Manager agrees to manage the project. Members are bound by the Trust Deed by virtue of their participation in the Project.

34. The Trust Deed details a number of procedures including:

- processing of applications;
- handling of subscription monies;
- maintenance of Members register;
- making of assignments and transmissions;
- meetings;
- provision of reports;
- payment of fees and expenses;
- accounts to be audited;
- Member's rights;
- any fees payable;
- termination and retirement provisions; and

- Member's protection and safeguards.

Application Form

35. Members enter into the arrangement through the completion of an Application Form together with the payment of application monies. The Application Form appoints AOL to act as Attorney for the Member for the purposes of entering into the Grove Agreement and Grove Licence Agreement. The Application Form also provides for the transfer of COGL shares from AOHL to the Member.

Minimum Subscription

36. The minimum number of Groves required for the commencement of the Project was one hundred and seventy (170) Groves.

Finance

37. Members are entitled to fund their participation in the Project themselves, borrow from AAF (a lender associated with the Manager), or borrow from an independent lender.

38. This Ruling does not apply if a Member 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 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 the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender, or any associate of the lender; or

- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers;
- entities associated with the Project other than AAF, are involved or become involved in the provision of finance to Members for the Project.

Ruling

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

Section 35-55 – Commissioner’s discretion

39. For a Member who is an individual and who entered the Project on or after 17 September 1997 and before 17 September 1998 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 that for the income years ended 30 June 2001 and 30 June 2002, 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.

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

- a Member’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 46 in the Explanations part of this Ruling below).

41. Where, either the Member’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 the deductions attributable to a Member’s business activity in excess of any assessable income from that activity, i.e., any ‘loss’ from that activity, will not be required to be deferred to a later year. Instead, this ‘loss’ can be offset against other assessable income for the year in which it arises.

42. Members are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Members 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 commercially viable. 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

43. Under the rule in subsection 35-10(2) a deduction for a loss incurred by an individual 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.

44. 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.

45. 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.’

46. 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 Members who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

47. 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) that 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).

48. A Member who was accepted into the Project between 17 September 1997 and 17 September 1998 and who has participated in the Project since this time, 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 Member who acquires the minimum allocation for the Project of one Grove is unlikely to pass one of the objective tests until the income year ended 30 June 2005. Members who acquired more than one Grove may however, pass one of the tests in an earlier income year.

49. 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 Member's participation in the Project.

50. 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, 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;
- (ii) because of its nature, it has not satisfied one of the objective tests; and
- (iii) 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.

51. Information provided with the application for this Product Ruling indicates that a Member who acquires the minimum allocation for the Project of one Grove is expected to be carrying on a business activity that will either pass one of the objective tests, or produce a taxation profit, for the year ended 30 June 2003. The Commissioner has decided that for such a Member that it would be reasonable to exercise the second arm of the discretion until the year ended 30 June 2002. Subsection 35-55(2) prevents the Commissioner exercising the discretion for these Members beyond the year ended 30 June 2002.

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52. The applicant has stated that the business activity comprised by a Member'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. If, however, the Project is not carried on during the income years specified above (see paragraph 39), in the manner described in the Arrangement (see paragraphs 14 to 38), this Ruling, and specifically the decision in relation to paragraph 35-55(1)(b), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) not apply, may be affected, because the Ruling no longer applies (see paragraph 9). Members may need to apply for private rulings on how paragraph 35-55(1)(b) will apply in such changed circumstances.

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

- the report of the independent agricultural consultant and additional expert or scientific evidence provided by the Applicant;
- independent, objective, and generally available information relating to the olive industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Applicant.

Detailed contents list

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

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Commissioner of Taxation

24 October 2001

<i>Previous draft:</i>	- ITAA 1936 82KL
Not previously issued in draft form	- ITAA 1997 Div 35
	- ITAA 1997 35-10
<i>Related Rulings/Determinations:</i>	- ITAA 1997 35-10(2)
PR 1999/95; TR 92/1; TR 97/16;	- ITAA 1997 35-10(3)
TR 92/20; TR 98/22; TD 93/34	- ITAA 1997 35-10(4)
	- ITAA 1997 35-30
<i>Subject references:</i>	- ITAA 1997 35-35
- product rulings	- ITAA 1997 35-40
- public rulings	- ITAA 1997 35-45
- non-commercial losses	- ITAA 1997 35-55
- primary production expenses	- ITAA 1997 35-55(1)
	- ITAA 1997 35-55(1)(a)
	- ITAA 1997 35-55(1)(b)
<i>Legislative references:</i>	
- ITAA 1936 Part IVA	

ATO references:
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