



# ***PR 2001/15 - Income tax: 2001 Timbercorp Almond Project***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *13 June 2001*



## Product Ruling

### Income tax: 2001 Timbercorp Almond Project

Contents	Para
What this Product Ruling is about	1
Date of effect	12
Withdrawal	14
Arrangement	15
Ruling	37
Explanations	46
Example	92
Detailed contents list	93

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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.*

*[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

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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 2001 Timbercorp Almond Project, or just simply as 'the Project'.

### Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA1997);
  - section 8-1 (ITAA 1997);
  - section 17-5 (ITAA 1997);
  - Division 27 (ITAA 1997);
  - Division 35 (ITAA 1997);
  - Division 387-C (ITAA 1997)
  - section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - Section 82KZL (ITAA 1936);
  - section 82KZM (ITAA 1936);
  - sections 82KZMB to 82KZMD (ITAA 1936);
  - sections 82KZME and 82KZMF (ITAA 1936); and
  - Part IVA (ITAA 1936).

### Goods and Services Tax

3. In this Ruling all fees and expenditure referred to include Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as a Grower) to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered, or required to be registered, for GST and hold a valid tax invoice.

### Business Tax Reform

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

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change, those changes will take precedence over the application of this Ruling, and to that extent, this Ruling will be superseded.

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 arrangement until it is completed (i.e., being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Growers'.

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

### **Qualifications**

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

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

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

11. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no Product Ruling may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Manager, Legislative Services, AusInfo, GPO Box 1920, Canberra ACT 2601.

## Date of effect

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12. This Ruling applies prospectively from 21 February 2001, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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

## Withdrawal

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

## Arrangement

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15. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- application for Product Ruling dated 16 November 2000;

- draft **Prospectus** prepared for Timbercorp Securities Ltd ACN 092 311 469 ('TSL', the Responsible Entity) received 16 November 2000;
- draft **Constitution** of the 2001 Timbercorp Almond Project dated 13 November 2000;
- draft **Almondlot Management Agreement** (the 'Almondlot Management Agreement') between Timbercorp Securities Limited (the 'Responsible Entity') and each Grower, dated 13 November 2000;
- draft Management Agreement between Timbercorp Securities Limited and Almond Management Pty Ltd, dated 13 November 2000 ('Management Agreement');
- draft Almond Orchard Management Agreement between Almond Management Pty Ltd, Select Harvests Limited, Timbercorp Securities Limited, Timbercorp Limited, Almond Investments Australia Pty Ltd and Almond Land Pty Ltd (the 'Almond Orchard Management Agreement'), dated 10 November 2000;
- draft **Licence and Joint Venture Agreement** (the 'Licence and Joint Venture Agreement') between Almond Land Pty Ltd, Timbercorp Securities Limited and each Grower, dated 13 November 2000;
- draft **Tree Supply and Planting Agreement** (the 'Tree Supply and Planting Agreement') between Almond Land Pty Ltd and each Grower, dated 13 November 2000;
- draft Tree Supply and Capital Works Agreement between Almond Land Pty Ltd and Select Harvests Limited ('the Tree Supply and Capital Works Agreement'), dated 10 November 2000;
- draft Custody Agreement between Permanent Trustee Company Limited and Timbercorp Securities Limited, dated 13 November 2000;
- Correspondence from the applicant dated 21 November 2000, 8 January 2001, 9 January 2001, 12 January 2001, 15 January 2001, 17 January 2001, 24 January 2001 and 21 May 2001.

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

16. The documents highlighted are those Growers enter into or become a party to. There are no other agreements, whether formal or

**PR 2001/15**

informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are part of the arrangements to which this Ruling applies. The effect of these agreements is summarised as follows.

**Overview**

17. The arrangement is the 2001 Timbercorp Almond Project.

Location	Liparoo and Bannerton, north west Victoria
Type of business each participant is carrying on	Cultivating almond trees on their designated 0.25 hectare almond orchards and harvesting the almonds for processing and sale.
Area under cultivation	Up to 500 hectares, divided into 2000 'almond orchards' of 0.25 hectares each. Option to accept oversubscriptions and cultivate additional land.
Minimum subscription	No minimum subscription
Number of almond trees	An average of 247 trees per hectare or 62 trees per almond orchard.
Minimum number of almond orchards per Grower	Two, although the promoter reserves the right in its absolute discretion to accept applications for one.
Expected production	First harvest expected in the year ending June 2004 (year 3 after planting). Expected fruit yield is between 0.38 tonnes/hectare in year 3 after planting and 3.46 tonnes/hectare from year 8.
The term of investment in years	Approximately 18 years commencing on acceptance of a Grower's application and ending on 30 June 2019.
Subscription amount per almond orchard (0.25 hectares)	\$6000 by 30 June 2001 comprising management fee of \$4,598, licence fee of \$852 and \$550, being 50% of the cost of purchasing and planting almond trees.
1. Ongoing fees per almond orchard (0.25 hectares)	<ul style="list-style-type: none"> <li>\$550, being 50% of the cost of purchasing and planting almond trees, payable on 30 September 2001.</li> </ul>

	<ul style="list-style-type: none"> <li>• Management fees of \$1512.50 for each of the years ended 30 June 2002 and 30 June 2003.</li> <li>• Licence Fees of \$852.50 fixed for the years ended 30 June 2002 and 2003 and indexed for CPI each year thereafter.</li> <li>• From the year ending 30 June 2004, Growers will be required to pay management fees that will be estimated by the Responsible Entity and adjusted once the actual costs of managing the Grower's almondlots are determined.</li> <li>• From the financial year ending 30 June 2004, each Grower will pay its proportion (90%) of the following additional annual fees: <ul style="list-style-type: none"> <li>(a) a management fee equal to 6% of annual proceeds from the sale of almonds; and</li> <li>(b) a bonus, being 25% of so much of the annual proceeds (after deducting the fee referred to in paragraph (a) above) payable to a Grower in a financial year as exceeds the proceeds estimated in the prospectus, less any allowance for inflation arriving at such estimate, but indexed from the date of the Almondlot Management Agreement. This fee will be calculated on a 2 year rolling basis to allow for variations in yields from year to year.</li> </ul> </li> </ul>
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18. The 2001 Timbercorp Almond Project will be registered as a managed investment scheme under the Corporations Law. Under the Licence and Joint Venture Agreement, the land owner, Almond Land,



will agree to establish all infrastructure and other capital works necessary to operate a commercial almond orchard on the land. Under this agreement each Grower will be given a right to use and occupy a minimum of two 0.25 hectare allotments of land ('almondlots') for a period of approximately 18 years for the purpose of cultivating the orchard for the production of almonds for processing and sale. The Responsible Entity has the discretion to accept an application for less than 2 almondlots.

19. Each Grower will also enter into a joint venture arrangement with Almond Land (on a 90%:10% basis) in respect of the cultivation and management of their almondlots. As a result, each Grower will be responsible for 90% of all management costs associated with the cultivation and management of their almondlots and will be entitled to 90% of all produce. Growers entering into the Project will also enter into a Tree Supply and Planting Agreement with Almond Land. Under this agreement, Almond Land will sell to each applicant an interest in the almond trees equal to the joint venture interest of the Grower under the Licence and Joint Venture Agreement (i.e., 90%). The Grower will then engage Almond Land to plant the trees on the Grower's almondlots. At the end of the Project, Almond Land will purchase the Grower's interest in the almond trees for a fixed price of \$2,200 per almondlot. Almond Land will engage Select Harvests Limited under the Tree Supply and Capital Works Agreement to establish the infrastructure and other capital works on the land and plant the almond trees.

20. Growers (in joint venture with Almond Land) will enter into the Almondlot Management Agreement with the Responsible Entity, to perform services in relation to the cultivation and management of their almondlots. Under this agreement, the Responsible Entity will also harvest the almonds, procure the processing of almonds and sell the almonds on behalf of the joint venture growers (at market prices) who will be entitled to the proceeds in their respective proportions. Almond Management Pty Ltd ('Almond Management'), to whom the Responsible Entity will delegate its managerial responsibilities, has engaged Select Harvests Limited, to undertake the day to day management of the orchard, harvest and process the almonds and sell the almonds through its established domestic and overseas channels.

21. Generally, Select Harvests Limited will pool the Growers' almonds with all other almonds sold by it. Each Grower will receive the same pooled average price as Select Harvests Limited receives. Accordingly, each Grower will receive a pro rata share of the net sale proceeds less his or her annual costs. There are provisions in the agreement that enable Almond Management, as agent of Growers, to choose to sell the Growers' almonds outside the pooling arrangements operated by Select Harvests Limited and to direct Select Harvests Limited to sell the almonds separately. Select Harvests Limited

guarantees to Almond Management that the entire annual crop of almonds available for harvest in a particular season will be sold by 30 June in the financial year after the year in which the harvest for that season commences. However, Select Harvest Limited does not guarantee the sale price of the almonds.

### **Licence and Joint Venture Agreement**

22. Under the Licence and Joint Venture Agreement, Almond Land will establish almond orchards by 30 June 2001 including construction of necessary infrastructure and carrying out capital works but not including the planting of almond trees. This will be done on almondlots which are separate identifiable areas of land comprising allotments of 0.25 hectares.

23. In return for paying an annual licence fee, each applicant Grower obtains a non-exclusive licence to use and occupy almondlots (in joint venture with Almond Land). Under the terms of the agreement, a Grower may only use the land for the purpose of cultivating and harvesting almonds for processing and sale.

24. At the expiration of the term, each Grower must return the almondlots to Almond Land in good condition but is not required to remove the almond trees or restore the almondlots to their original condition. Almond Land will purchase the Grower's interest in the almond trees planted on each almondlot licenced to the Grower at the rate of \$2,200 per almondlot.

25. The agreement provides that Almond Land and each Grower will enter into the Almondlot Management Agreement as joint venturers. It provides that the Grower will be entitled to 90% of the joint venture assets and will be entitled to 90% of the almonds and of the proceeds of sale. The Grower will also be responsible for 90% of the management fees.

### **Tree Supply and Planting Agreement**

26. Under the Tree Supply and Planting Agreement, Almond Land, as vendor, will sell to each Grower an interest in the almond trees equal to the joint venture interest of the Grower under the Licence and Joint Venture Agreement (i.e., 90%). Almond Land will then plant the trees on the Grower's almondlots. The Grower will pay \$1,100 for a 90% interest in the trees, 50% on application and the balance on 30 September 2001.

**Almondlot Management Agreement**

27. Under the Almondlot Management Agreement, each Grower (in joint venture with Almond Land) engages the Responsible Entity to manage and cultivate the orchard on behalf of the Grower in accordance with the management plan, harvest the almonds, procure the processing of the almonds and market the almonds for the duration of the term. The Responsible Entity is required to perform the services listed in a proper and efficient manner in accordance with good horticultural and environmental practices.

28. The Responsible Entity is also required to oversee the establishment of the infrastructure and capital works on the land by Almond Land to ensure that the work is carried out in accordance with good horticultural and environmental practices.

29. The Responsible Entity will endeavour to arrange insurance on the Growers' behalf. Where this is available, Growers are required to insure their almondlots against damage or destruction by fire and other insurable risks. The Responsible Entity will arrange payment of insurance premiums to the appropriate insurers.

30. The almonds from the orchard will be pooled with almonds from other Grower's almondlots and Growers will be entitled to their pro rata proportion of the almonds produced.

**Fees**

31. Under the terms of the Licence and Joint Venture Agreement the Almondlot Management Agreement and the Tree Supply and Planting Agreement, a Grower will make the following payments per almondlot:

- the initial management fee of \$4598 payable on application;
- management fees of \$1,512.50 per almondlot for the year ending 30 June 2002 payable on 30 September 2001 (but not before 1 July 2001) and \$1,512.50 for the year ending 30 June 2003 on 30 September 2002 (but not before 1 July 2002);
- from the financial year ending 30 June 2004, ongoing management fees that will be estimated, in the first instance, by the Responsible Entity and adjusted once the actual costs of managing the Grower's almondlots are determined, payable on 30 September each year;
- licence fees of \$852.00 per almondlot payable on application, \$852.50 on 30 September 2001 (but not before 1 July 2001) and on 30 September 2002 (but not

before 1 July 2002) and thereafter (from year 4) indexed to CPI (using 2003 as the base year) on 30 September (but not before 1 July) of each subsequent year;

- two instalments of \$550 each for the cost of purchasing and planting almond trees on each almondlot, the first instalment payable on application and the second on 30 September 2001;
- from the financial year ending 30 June 2004, a management fee of 6% of proceeds of sale;
- from the financial year ending 30 June 2004, an incentive fee, being the Grower's proportion (i.e., 90%) of 25% of so much of the proceeds of sale (after deducting the fee referred to in the previous dot point) payable to a Grower in a financial year as exceeds the proceeds estimated in the prospectus, less any allowance for inflation arriving at such estimate, but indexed from the date of the Almondlot Management Agreement. This fee will be calculated on a 2 year rolling basis to allow for variations in yields from year to year.

32. The Manager will only provide services following the execution of the Licence and Joint Venture Agreement, the Almondlot Management Agreement and the Tree Supply and Planting Agreement.

33. Applications will not be accepted after 30 June 2001. The subscription moneys payable on application are payable in respect of services to be wholly provided by 30 June 2001. The fees payable on 30 September 2001 and 30 September 2002 are payable in respect of services to be wholly provided by 30 June 2002 and 30 June 2003 respectively.

## **Finance**

34. Growers can either fund their investment in the Project themselves, borrow from an independent lender, or may elect to use proposed financing packages through Timbercorp Finance Pty Ltd. All interest payments will be made in arrears.

35. The provision of finance involves full recourse loans and the finance provider will pursue legal action against defaulting borrowers.

36. This Ruling does not apply if a Grower enters into a finance agreement that includes 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 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 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 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;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Timbercorp Finance Pty Ltd, are involved or become involved in the provision of finance to Growers for the Project.

## **Ruling**

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### **Assessable Income**

37. A Grower's share of the gross sale proceeds from the sale of the product of the joint venture Project, less any GST payable on those proceeds, will be assessable income under section 6-5 of ITAA 1997. Section 17-5 ITAA 1997 excludes from assessable income an amount relating to GST payable on a taxable supply. Please note that the term 'joint venture' is used in this Product Ruling in a general accounting and legal sense, and **not** as a reference to entities that are entitled to apply to the Commissioner to be treated as an approved GST joint venture within the meaning of Division 51 of *A New Tax System (Goods and Services Tax) Act 1999*.

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

38. A Grower may claim the deductions in the following Table, where the Grower:

- participates in the project by 30 June 2001 to carry on the business of growing almonds for processing and sale;
- incurs the fees shown in paragraph 31; and
- is not registered nor required to be registered for GST.

Fee Type	ITAA 1997 Section	Year 1 deductions	Year 2 deductions	Year 3 deductions
Management Fee	8-1	\$4,598 See note (i) below	\$1,512.50 See note (i) below	\$1,512.50 See note (i) below
Licence Fee	8-1	\$852 See note (i) below	\$852.50 See note (i) below	\$852.50 See note (i) below
Interest	8-1	As incurred See note (ii) below	As incurred See note (ii) below	As incurred See note (ii) below

Notes:

- (i) Where a Grower incurs the management and licence fees as required by the Almondlot Management Agreement and the Licence and Joint Venture Agreement those fees are deductible in full in the year incurred. However, if a Grower **chooses** to prepay fees for the doing of things (e.g., the provision of management services) that will not be wholly done in the same income year as the fees are incurred, then the prepayments rules of the ITAA may apply to apportion those fees. In such cases, the tax deduction for the prepaid fee **MUST** be determined using the formula shown in paragraphs 75 to 82 unless the expenditure is 'excluded expenditure'. 'Excluded expenditure', being expenditure of less than \$1,000, is an 'exception' to any prepayment rules that apply and is deductible in full in the year in which it is incurred.
- (ii) The deductibility or otherwise of interest arising from agreements entered into with financiers other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling. However, all Growers who finance their participation in the Project other than with Timbercorp Finance Pty Ltd should read carefully the discussion of the prepayment rules in paragraphs 57 to 59 below, as those rules may be applicable if interest is prepaid.

**Tax deductions for capital expenses**

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

<b>Fee Type</b>	<b>ITAA 1997 Section</b>	<b>Year 1 deductions</b>	<b>Year 2 deductions</b>	<b>Year 3 deductions</b>
<b>Establishing Horticultural Plants</b>	387-165	Nil - see note (iii) below	Nil - see note (iii) below	Nil - see note (iii) below

Note:

- (iii) A deduction is allowable under section 387-165 for capital expenditure incurred for the acquisition and establishment of the almond trees for use in a horticultural business. The deduction is allowable when the almond trees, as horticultural plants, enter their first commercial season. If the almond trees have an 'effective life' for the purposes of section 387-185 of greater than '13 but fewer than 30 years', this results in a write-off rate of rate of 13% prime cost. The Project's manager will inform Growers of when the almond trees enter their first commercial season.

**Deductions where a Grower is registered or is required to be registered**

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

- participates in the project by 30 June 2001 to carry on the business of growing almonds for processing and sale;
- incurs the fees shown in paragraph 31; and
- is entitled to an input tax credit for the fees,

then the deductions shown in the Tables above will exclude any amounts of input tax credit (Division 27 of the ITAA). See Example 1 at paragraph 92.

**Division 35 – losses from non-commercial business activities****Section 35-55 – Commissioner's discretion**

41. For a Grower who is an individual and who enters the Project during the year ended 30 June 2001 the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner will decide for the income years ending 30 June 2001 to 30 June 2005 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.

42. 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 67 in the Explanations part of this Ruling, below).

43. 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.

44. 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 sub-section 35-55(1) 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.

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

45. For a Grower who invests in the Project and incurs expenditure as required by the Almondlot Management Agreement and the Licence and Joint Venture Agreement the following provisions of the ITAA 1936 have application as indicated:

- expenditure by the Grower does not fall within the scope of section 82KZM (but see paragraphs 75 to 82);
- expenditure by the Grower does not fall within the scope of sections 82KZMB-82KZMD (but see paragraphs 75 to 82);
- expenditure by the Grower does not fall within the scope of sections 82KZME-82KZMF (but see paragraphs 75 to 82);
- section 82KL does not apply to deny the deductions otherwise allowable; and



- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

## **Explanations**

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### **Section 8-1**

46. Consideration of whether management fees and licence fees are deductible under section 8-1, begins with the first limb 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 the second limb 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 the second limb applies. However, that does not preclude the application of the first limb and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

### **Is the Grower carrying on a business?**

47. An almond growing scheme can constitute the carrying on of a business. Where there is a business, or a future business, the gross sale proceeds from the sale of almonds from the scheme will constitute gross assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income. These operations will be the tending, maintaining and harvesting of the almond trees and the processing and marketing of the almonds. Generally, a Grower will be carrying on a business of growing almonds where:

- the Grower has an identifiable interest in specific growing trees coupled with a right to harvest and sell the almonds produced from the trees;

- the almond growing 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.

48. For this Project, Growers have rights under the Licence and Joint Venture Agreement in the form of a licence to use and occupy an identifiable area of land ('almondlot') consistent with the intention to carry on a business of almond growing. Under the Almondlot Management Agreement, Growers appoint the Responsible Entity, as manager, to provide services including cultivating and harvesting the almonds, procuring the processing of almonds and marketing the almonds. Growers are considered to have control of their operations.

49. The Licence and Joint Venture Agreement provides Growers with more than a chattel interest in the almond trees. The Project documentation contemplates Growers will have an ongoing interest in the trees.

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

51. 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. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections contained in the Prospectus that suggest the Project should return a 'before-tax' profit to the Growers, i.e., a 'profit' in cash terms that does not depend, in its calculation, on the fees in question being allowed as a deduction.

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

53. Growers have a continuing interest in their almondlots from the commencement of the arrangements. The almond growing 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' almond growing activities will constitute the carrying on of a business.

54. The licence fees and management fees associated with the almond growing 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 almonds) 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 fees is identifiable from the arrangement. The fees 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.

### **Interest Deductibility**

#### ***(i) Growers who use Timbercorp Finance Pty Ltd as the finance provider***

55. Some Growers may finance their participation in the Project through a loan facility with Timbercorp Finance Pty Ltd. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of licence and management fees.

56. The interest incurred for the year ended 30 June 2001 and in subsequent years of income will be in respect of a loan to finance the Project business operations of cultivating and managing almond orchards for the production of almonds and is therefore, directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

#### ***(ii) Growers who DO NOT use Timbercorp Finance Pty Ltd as the finance provider***

57. 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 Timbercorp Finance Pty Ltd 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.

58. 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 for a period that is wholly or partly outside the income year in which the interest is incurred. Unless such prepaid interest is 'excluded expenditure' any tax deduction that may be allowable will be subject to the relevant prepayments provisions of the ITAA. 'Excluded expenditure' is an amount of expenditure of less than \$1,000.

59. The prepayments provisions are discussed in detail at paragraphs 75 to 82 of this Ruling. However, in broad terms, where interest is prepaid and the period to which the interest relates is wholly or partly outside the income year in which it is incurred, then any tax deduction that is allowable must be determined using the following formula;

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

In the formula, the 'eligible service period' means, generally, the period to which the interest relates.

### **Expenditure of a capital nature**

60. Any part of the expenditure of a Grower entering into an almond growing business that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, the costs of the establishment of horticultural plants are considered to be capital in nature. The fees for these expenditures are not deductible under section 8-1. However, this expenditure falls for consideration under specific write-off provisions of the ITAA 1997.

### **Subdivision 387-C: horticultural provisions**

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

62. Under this Subdivision, if the effective life of the plant is less than three years, the expenditure can be written off in full. If the effective life of the plant is more than three years, an annual deduction is allowable on a prime cost basis during the plant's maximum write-off period. The period starts from the time the plant enters its first commercial season. The write-off rate is detailed in section 387-185. For a plant, such as the almond trees in this Project, with an effective life of 13 to 30 years, that rate is 13%.

***Alternative view***

63. The applicant has indicated disagreement with the ATO view that the almond trees do not commence to be used for the purpose of producing assessable income in a horticultural business until their first commercial season, and has submitted an alternative view that the almond trees commence to be so used immediately after their planting.

**Division 35 - Losses from non-commercial business activities**

64. 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.

65. 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.

66. 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.

67. 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.

68. In broad terms, the objective tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);

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

69. 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 in the Project is unlikely to pass one of the objective tests or produce a taxation profit until the income year ended 30 June 2007. Growers who acquire more than the minimum investment in the Project may however, pass one of the tests in an earlier income year.

70. 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.

71. The first arm of the discretion in subsection 35-55(1) 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 subsection 35-55(1) until the year ended 30 June 2005.

72. The second arm of the discretion in in subsection 35-55(1) 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.

73. This Product Ruling is issued on a prospective basis (i.e., before an individual Grower's business activity starts to be carried on). Therefore, if the Project fails to be carried on during the income years specified above (see paragraph 41), in the manner described in the Arrangement (see paragraphs 15 to 36), the Commissioner's discretion will not have been exercised, because one of the key conditions in sub-section 35-55(1) will not have been satisfied.

74. 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 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.

**Prepayments provisions – sections 82KZM, 82KZMB – 82KZMD, and 82KZME – 82KZMF**

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

76. In this Project, the application fee of \$6,000 per almondlot will be incurred on execution of the Almondlot Management Agreement, the Licence and Joint Venture Agreement and the Tree Supply and Planting Agreement. The fees charged under the Almondlot Management Agreement and the Licence and Joint Venture Agreement are charged for providing services to a Grower by 30 June of the year of execution of the Agreements. In particular, the Application Fee is expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the description of the arrangement that the Application Fee has been inflated to result in reduced fees being payable for subsequent years.

77. There is also no evidence that might suggest the services covered by the fee could not be provided within the same year of income as the expenditure in question is incurred. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial fee is for the Manager doing ‘things’ that are not to be wholly done within the year of income of the fee being incurred. On this basis, provided a Grower incurs expenditure as required by the agreements as set out in paragraph 31, then the basic precondition for the operation of the prepayment provisions is not satisfied and fees will be deductible in the year in which they are incurred.

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

78. Although not required under either the Almondlot Management Agreement or the Licence and Joint Venture Agreement,

a Grower participating in the Project may choose to prepay fees for a number of years. Where this occurs, contrary to the conclusion reached in paragraph 77 above, the prepayments provisions of the ITAA will operate to apportion the expenditure and allow an income tax deduction over the period that the prepaid benefits are provided.

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

80. Where a Grower participating in this Project incurs expenditure in respect of an eligible service period that ends 13 months or less from the time the *expenditure was incurred*, but also in respect of the doing of a thing not to be wholly done within the income year in which that expenditure has been incurred, and the other tests in section 82KZME are met, then section 82KZMF will apply in the manner set out in the formula below.

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

81. Where a Grower participating in this Project incurs expenditure in respect of a period that ends more than 13 months after that *expenditure has been incurred*, then section 82KZM will apply if the Grower is a 'small business taxpayer' or section 82KZMD if the Grower is not a 'small business taxpayer'. For a 'small business taxpayer' (see paragraphs 83 to 85) the amount and timing of the allowable deductions will then be calculated using the formula in subsection 82KZM(1) and for non-small business taxpayers using the formula in subsection 82KZMD(2). Both formulae are the same or effectively the same as that shown in paragraph 80 above, concerning section 82KZMF.

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



**Small business taxpayers**

83. 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.

84. '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).

85. 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 82KL - recouped expenditure**

86. 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'.

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

88. Section 82KL's operation depends, among other things, on the identification of a certain quantum of 'additional benefits'. Here, there may be a loan provided to the Grower. The loan will be provided on a full recourse basis, and on commercial terms. Insufficient 'additional benefits' will be provided in respect of this Project to trigger the application of section 82KL. It will not apply to deny the deductions otherwise allowable under section 8-1.

**Part IVA - general tax avoidance provisions**

89. 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).

90. The 2001 Timbercorp Almond Project will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 38 and 39 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.

91. 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 almonds from the almond trees. 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.

## **Example**

### **Example 1 – Entitlement to 'input tax credit'**

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

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

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

**Detailed contents list**

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

	Paragraph
<b>What this Product Ruling is about</b>	<b>1</b>
Tax law(s)	2
Goods and Services Tax	3
Business Tax Reform	4
Note to promoters and advisers	6
Class of persons	7
Qualifications	9
<b>Date of effect</b>	<b>12</b>
<b>Withdrawal</b>	<b>14</b>
<b>Arrangement</b>	<b>15</b>
Overview	17
Licence and Joint Venture Agreement	22
Tree Supply and Planting Agreement	26
Almondlot Management Agreement	27
Fees	31
Finance	34
<b>Ruling</b>	<b>37</b>
Assessable Income	37
Deductions where a Grower is not registered nor required to be registered for GST	38
Tax deductions for capital expenses	39
Deductions where a Grower is registered or is required to be registered	40
Division 35 – losses from non-commercial business activities	41
Section 35-55 – Commissioner’s discretion	41
Sections 82KZM, 82KZMB – 82KZMD, 82KZME – 82KZMF and Part IVA	45
<b>Explanations</b>	<b>46</b>
Section 8-1	46
Is the Grower carrying on a business?	47

Interest Deductibility	55
<i>(i) Growers who use Timbercorp Finance Pty Ltd as the finance provider</i>	55
<i>(ii) Growers who DO NOT use Timbercorp Finance Pty Ltd as the finance provider</i>	57
Expenditure of a capital nature	60
Subdivision 387-C: horticultural provisions	61
Alternative view	63
Division 35 – Losses from non-commercial business activities	64
Prepayments provisions – sections 82KZM, 82KZMB – 82KZMD and 82KZME – 82KZMF	75
Growers who choose to pay fees for a period in excess of that required by the Project’s agreements	78
Small business taxpayers	83
Section 82KL – recouped expenditure	86
Part IVA – general tax avoidance provisions	89
<b>Example</b>	<b>92</b>
Example 1 – Entitlement to ‘input tax credit’	92
<b>Detailed contents list</b>	<b>93</b>

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## **Commissioner of Taxation**

21 February 2001

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### *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 1936 82KH(1)
- ITAA 1936 82KH(1F)(b)
- ITAA 1936 82KL
- ITAA 1936 82KL(1)
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZM
- ITAA 1936 82KZM(1)
- ITAA 1936 82 KZMA(4)
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZMD(2)
- ITAA 1936 82KZME
- ITAA 1936 82KZME(4)
- ITAA 1936 82KZME(7)

# PR 2001/15

- |                       |                          |
|-----------------------|--------------------------|
| - ITAA 1936 82KZMF    | - ITAA 1997 35-30        |
| - ITAA 1936 82KZMF(1) | - ITAA 1997 35-35        |
| - ITAA 1936 Pt IVA    | - ITAA 1997 35-40        |
| - ITAA 1936 177A      | - ITAA 1997 35-45        |
| - ITAA 1936 177C      | - ITAA 1997 35-55        |
| - ITAA 1936 177D      | - ITAA 1997 35-55(1)     |
| - ITAA 1936 177D(b)   | - ITAA 1997 35-55(1)(a)  |
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| - ITAA 1997 6-5       | - ITAA 1997 Subdiv 387-C |
| - ITAA 1997 8-1       | - ITAA 1997 387-165      |
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| - ITAA 1997 Div 27    | - ITAA 1997 387-210      |
| - ITAA 1997 27-5      | - ITAA 1997 960-335      |
| - ITAA 1997 27-30     | - ITAA 1997 960-340      |
| - ITAA 1997 Div 35    | - ITAA 1997 960-345      |
| - ITAA 1997 35-10     | - ITAA 1997 960-350      |
| - ITAA 1997 35-10(2)  | - ANTS(GST)A 99 Div 51   |
| - ITAA 1997 35-10(3)  |                          |
| - ITAA 1997 35-10(4)  |                          |
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