

# ***PR 2001/32 - Income tax: OPAL Olive Project***

 This cover sheet is provided for information only. It does not form part of *PR 2001/32 - Income tax: OPAL Olive Project*

 This document has changed over time. This is a consolidated version of the ruling which was published on *11 April 2001*



## **Product Ruling**

### **Income tax: OPAL Olive Project**

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

#### **Preamble**

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

## **No guarantee of commercial success**

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

Potential investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

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

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

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

## **Terms of Use of this Product Ruling**

This Product Ruling has been given on the basis that the person(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

## What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the OPAL Olive Project, or 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* ('ITAA 1997');
- Section 8-1 (ITAA 1997);
- Section 17-5 (ITAA 1997);
- Division 27 (ITAA 1997);
- Division 35 (ITAA 1997);
- Section 42-15 (ITAA 1997);
- Section 387-55 (ITAA 1997);
- Section 387-125 (ITAA 1997);
- Section 387-165 (ITAA 1997);
- Section 388-55 (ITAA 1997);
- Section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- Section 82KZL (ITAA 1936);
- Section 82KZM (ITAA 1936);
- Sections 82KZMA - 82 KZMD (ITAA 1936);
- Sections 82KZME - 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., remain a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Growers'.

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

**Qualifications**

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

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

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

11. A Product Ruling may only be reproduced in its entirety.

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## **Date of effect**

12. This Ruling applies prospectively from 11 April 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 taxation dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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

## **Withdrawal**

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

## **Arrangement**

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

- Product Ruling application dated 25 September 2000, received 27 September 2000;
- Prospectus for the OPAL Olive Project issued collectively by the Responsible Entity and Manager, Olive Plantations of Australia Limited (OPAL) and the Landowner, Shepparton Land Company Limited ("the Landowner"), dated 8 November 2000;
- Supplementary Prospectus for the OPAL Olive Project issued collectively by OPAL and the Landowner, dated 20 December 2000;
- Draft Supplementary Prospectus for the OPAL Olive Project issued by OPAL and the Landowner, undated, received on 16 March 2001;
- **Constitution and Schedules for the OPAL Olive Project between OPAL, the Landowner and each Grower, dated 19 October 2000;**
- **Licence and Management Agreement between OPAL, the Landowner and each Grower. This agreement is contained in Schedule 1 and 2 to the Constitution for the OPAL Olive Project;**
- **First Supplemental Deed to the Constitution and Schedules for the OPAL Olive Project between OPAL, the Landowner and each Grower, dated 8 November 2000;**
- **Draft Second Supplemental Deed to the Constitution and Schedules for the OPAL Olive Project between OPAL, the Landowner and each Grower, undated, received on 2 March 2001;**
- Compliance Plan for the OPAL Olive Project, dated 19 October 2000;
- Constitution for the Landowner, dated 8 November 2000;
- Certificate Of Registration of a Company for the Landowner, dated 4 October 2000
- Draft copy of Water Supply Agreement between OPAL and the Landowner, undated, received on 8 December 2000;

- Draft copy of Agency Agreement-Custodian between OPAL and the Custodian, Australian Rural Group Limited, undated, received 27 September 2000;
- Draft copy of Lease between the Landowner and Australian Rural Group Limited, undated, received 8 December 2000;
- Draft copy of Sub-Lease between Australian Rural Group Limited and the Landowner, undated, received 8 December 2000;
- Option deed between OPAL and the owners to purchase the property containing Parts of C/A's 25, 26, 29 and 30 and C/A 31A Parish of Murchison North and being the land comprised in Certificates of Title Volumes 9959 Folios 456, 446, 455, 445, 454, 444, 453, 443 and the land remaining untransformed in Crown Grant Volume 5147 Folio 336 and being the property known as "Stage 1", Orr Road, Murchison, dated 10 July 2000;
- Agricultural and viability report of Independent Horticulturalist, dated 20 September 2000;
- Letter and attachments to ATO from the applicant's representative, dated 8 December 2000;
- Letter and attachments to ATO from the applicant's representative, dated 16 February 2001;
- Letter and attachments to ATO from the applicant's representative, dated 1 March 2001;
- E-Mail and attachments to ATO from the applicant's representative, dated 2 March 2001;
- E-Mail to ATO from the applicant's representative, dated 6 March 2001;
- Letter and attachments to ATO from the applicant's representative, dated 16 March 2001;
- E-Mail and attachments to ATO from the applicant's representative, dated 23 March 2001;
- Facsimile and attachments to ATO from the applicant's representative, dated 27 March 2001; and
- E-Mail and attachments to ATO from the applicant's representative, dated 5 April 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 the Growers enter into or become a party to. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of the Grower, will be party to, which are part of the arrangement to which this Ruling applies. The effect of these agreements is summarised as follows.

### **Overview**

17. The arrangement is called the OPAL Olive Project.

Location	A property situated near Murchison in the Goulburn Valley region of Northern Victoria.
Type of business each participant is carrying on	Commercial growing and cultivation of olive groves for the purpose of producing olive oil.
Number of hectares under cultivation	On minimum subscription, 96.5 hectares are to be planted, increasing to 176.5 with maximum subscription.
Size of each Grove interest	Approximately 0.18 hectares.
Number of olive trees per Grove interest	45
The term of the investment	Approximately 25 years – until 1 July 2025.
Initial fees per Grove interest	\$13,600
Ongoing annual fees per Grove interest	Commencing in the year ended 30 June 2006 and for each subsequent Financial Year, the Grower must pay annual fees comprising Management Fee, Grove Operations Fee, Annual Harvest Fee and Licence Fee as advised in Schedule 2 of the Licence and Management Agreement.

Other costs	<p>Commencing in the year ended 30 June 2006 and for each subsequent Financial Year, the Manager is entitled to be reimbursed for all expenses in relation to the proper performance of its duties.</p> <p>The Manager is entitled to be paid Sales Commission for proper performance of its duties.</p> <p>Insurance.</p>
Minimum subscription	536 Stapled Securities being 96.5 Hectares.
Other Features	<p>The interest in the Scheme and the shares in the Landowner are stapled and cannot be bought or sold independently of each other for the life of the Project.</p> <p>A Grower may elect to market and sell their own olive produce instead of using the Manager. A person making this election is an Electing Grower. For all other Growers (Non-Electing Growers), the Manager will harvest, transport and process olives into olive oil and market and sell the oil as agent for the Grower.</p>

### **The Project Land**

18. The Issuers propose to develop and operate large olive plantations on a property situated near Murchison in the Goulburn Valley region of Northern Victoria.

19. The objective is to grow and process premium quality olives on a scale large enough to satisfy the supply of olive oil to major purchasers, with a focus on selling in the total world olive market.

20. The Groves for this Project will be located on a 202.2 hectare property that will be owned by the Landowner.

### **Interest applied for**

21. The offer is for a minimum of one Stapled Security per investor. The Application Price for each Stapled Security is \$13,600

and comprises 1,800 shares in the Landowner and an interest in the Scheme.

22. The Project seeks to raise \$12,920,000 by offering up to 950 interests.

23. No Stapled Securities will issue unless 536 Stapled Securities have been received and accepted by the issuers by the end of 4 months after the date of the issue of the Supplementary Prospectus.

24. Under the prospectus dated 8 November 2000, applications for an interest in the Project can be accepted up to 7 December 2001. Therefore an Applicant can be accepted into the Project in either the year ended 30 June 2001 or the year ended 30 June 2002.

25. On acceptance of an Applicant and if the Minimum Subscription is reached, a Grower will enter into a Licence and Management Agreement with the Landowner for a Licence to use approximately 0.18 hectares of land ("Grove") per Stapled Security, and with OPAL to develop and manage the Grove until 1 July 2025. Upon expiry of the Licence and Management Agreement, the Growers interest in the Grove will revert to the Landowner, the company in which the Grower will hold shares. Growers will remain shareholders in the Landowner.

### **Fees – On application**

26. Growers on application to the Project will pay \$13,600 per Stapled Security (Application Price). These fees are in relation to the establishment, planting and maintenance services for the period from the Grower entering the Project to 30 June 2005 and are allocated as follows:

• 1,800 Ordinary Shares of \$1.00 in the Landowner	\$1,800
• Purchase and Planting of Olive Trees	\$699
• Irrigation System	\$1,650
• Commission	\$825
• Licence Fee	\$110
• Management Fee	\$7,069
• Grove Operations Fees	\$1,337
• Annual Harvest Fee	<u>\$70</u>
Total	\$13,600

27. The Application amount will be held by the Custodian until minimum subscription and the Conditions of Release are satisfied. The Custodian will then release from this amount the annual fee at the

beginning of each of the 1<sup>st</sup> five Financial Years in relation to the proper performance of the Managers duties.

### **Grower's election**

28. The Manager has an obligation to harvest olives for all Growers, but will only process olives into olive oil and market the olive oil for Growers who appoint OPAL as their agent to do so – these Growers are called Non-Electing Growers.

29. A Grower may market their own olive produce instead of using the Manager. This is done by making an election in the Application Form to the Manager to have their trees harvested separately to the olive trees on other Groves. A person making this election is an Electing Grower.

30. It is expected that most Growers will not make the election and that the Manager will market all olives together.

31. This ruling does not apply to persons who enter the arrangement and become Electing Growers.

### **Constitution**

32. The Constitution of the Project is intended to establish a Managed Investment Scheme to be known as the OPAL Olive Project.

33. The Constitution appoints OPAL as the Manager of the Project for the purpose of conducting a primary production business of planting, growing, cultivating and harvesting olives and of marketing olive oil for domestic and overseas sale.

34. Under the Constitution, OPAL proposes to invite prospective Growers to invest in the Project by entering into a Licence and Management Agreement in respect of the Project. An interest in the Project will be stapled to 1,800 Shares in the Landowner valued at \$1,800 that form part of the Application Price and is payable when a Grower makes an application pursuant to the prospectus.

35. The Licence and Management Agreement is contained in Schedule 1 to the Constitution.

36. The Constitution provides that assets of the Project are vested in and held by the Responsible Entity on trust for the Growers.

37. The Constitution allows for the creation of a fund consisting of:

- An Application Portion, which is the sum lodged into a trust bank account of the application money received from each Grower by the Responsible Entity before it is released in accordance with the Constitution; and

- A Proceeds Portion, which is the sum lodged into a trust bank account of the proceeds received by the Responsible Entity from the sale of olive products on behalf of Growers.

38. The Constitution binds Growers and allows them the benefits of the Constitution.

### **Licence and Management Agreement**

#### **Grant of Licence and Licence Fee payable**

39. Each Grower shall enter into a Licence and Management Agreement with the Landowner and Manager.

40. Under the Licence and Management Agreement, each Grower is granted a non-exclusive licence to occupy and use the Growers Grove comprising 0.18 hectares for the purpose of planting, growing, harvesting and marketing olive produce during the term of the Project.

41. For a Grower who is accepted into the Project in the year ended 30 June 2001, the following Licence Fee is payable in respect of each Growers Grove interest.

The 1 <sup>st</sup> Financial Year	\$15
The 2 <sup>nd</sup> Financial Year	\$23
The 3 <sup>rd</sup> Financial Year	\$23
The 4 <sup>th</sup> Financial Year	\$24
The 5 <sup>th</sup> Financial Year	<u>\$25</u>
<b>Total</b>	<b>\$110</b>

42. For a Grower who is accepted into the Project in the year ended 30 June 2002, the following Licence Fee is payable in respect of each Growers Grove interest.

The 2 <sup>nd</sup> Financial Year	\$38
The 3 <sup>rd</sup> Financial Year	\$23
The 4 <sup>th</sup> Financial Year	\$24
The 5 <sup>th</sup> Financial Year	<u>\$25</u>
<b>Total</b>	<b>\$110</b>

43. The Licence Fees totalling \$110 form part of the Application Price.

44. Commencing in the year ended 30 June 2006 and for each subsequent Financial Year, the Grower must pay an annual Licence Fee as advised in Schedule 2 of the Licence and Management Agreement. The maximum Licence Fee may be up to twice the

amount stated in the Schedule, plus the amount of any increase in the Consumer Price Index above 2.5% and the rate of GST above 10%. Subject to this cap, if these fees exceed the amounts stated in the Schedule, the maximum amount that can be charged is the amount determined by an independent expert selected by the Responsible Entity to be a reasonable amount to cover all outgoings and expenses plus 10% of this amount. Investors will be given prior notice if these fees exceed the amount stated in the Schedule.

45. All annual Licence Fees will be offset against the proceeds of olive sales for Growers. However if the proceeds from olive sales for Growers does not cover the amount of Licence Fees payable, the Manager will invoice the Grower for the fees.

#### **Managers duties and fees payable**

46. Under the Licence and Management Agreement, the Growers will also engage the Manager to manage the Growers interest on the following terms and conditions.

##### *First to fifth Financial Years - Managers planting and maintenance duties*

47. From the first Financial Year to the year ended 30 June 2005, the Manager agrees to carry out the duties which are usual or necessary for carrying on the business of planting olive trees on the Growers Grove and bringing the trees to initial harvest. Duties performed by the Manager will include the following:

- (a) supply at least 45 trees to the Grower selected from high yield stock in healthy condition;
- (b) carry out irrigation works to benefit the Grower's Grove;
- (c) carry out drainage work and work to help prevent soil erosion on the Grower's Grove;
- (d) prepare the Grower's Grove so that it will be suitable for the planting and growing of at least 45 olive trees;
- (e) plant the Olive trees supplied to the Grower on the Grower's Grove;
- (f) tend the trees and Grower's Grove in a proper and skilful manner;
- (g) eradicate as far as reasonably possible any pests and competitive weeds which may affect the growth or yield of the trees;

- (h) repair damage to roads, tracks or fences on the Grove or on neighbouring land resulting from the actions of the Manager or its contractors; and
- (i) embark on such operations as may be required to prevent or combat land degradation on the Grower's Grove or land surrounding the Grower's Grove.

48. For a Grower who is accepted into the Project in the year ended 30 June 2001, the following Management Fee, Grove Operations Fee and Annual Harvest Fee is payable in respect of each Growers Grove interest.

***Management Fee***

\$10,243 is payable in respect of services to be provided from the date advised by the Project Manager and ending on 30 June 2005.

***Grove Operations Fee***

\$1,377 is payable in respect of services to be provided from the date advised by the Project Manager and ending on 30 June 2005.

***Annual Harvest Fee***

\$70 is payable in respect of services to be provided in the fifth financial year.

49. An amount of \$3,174 that forms part of the Management Fee is attributable to the following capital items:

Purchase and Planting of Olive Trees	\$699
Irrigation System	\$1,650
Commission	<u>\$825</u>
<b>Total</b>	<b>\$3,174</b>

The balance of \$7,069 are fees attributable to establishment, planting and maintenance services.

50. For a Grower who is accepted into the Project in the year ended 30 June 2002, the following Management Fee, Grove Operations Fee and Annual Harvest Fee is payable in respect of each Growers Grove interest.

***Management Fee***

\$10,243 is payable in respect of services to be provided from the date advised by the Project Manager and ending on 30 June 2005.

***Grove Operations Fee***

\$1,377 is payable in respect of services to be provided from the date advised by the Project Manager and ending on 30 June 2005.

***Annual Harvest Fee***

\$70 is payable in respect of services to be provided in the fifth financial year.

51. An amount of \$3,174 that forms part of the Management Fee is attributable to the following capital items:

Purchase and Planting of Olive Trees	\$699
Irrigation System	\$1,650
Commission	<u>\$825</u>
<b>Total</b>	<b>\$3,174</b>

The balance of \$7,069 are fees attributable to establishment, planting and maintenance services.

52. The Management Fee (\$10,243), Grove Operations Fee (\$1,377) and Annual Harvest Fee (\$70) will form part of the Application Price.

***Sixth and subsequent Financial Years - Managers on-going management and harvest duties***

53. From the year ended 30 June 2006 until completion of the Project, the Manager must continue to maintain the Grower's Grove. Ongoing duties to be performed by the Manager will include the following:

- (a) eradicate as far as reasonably possible any pests and competitive weeds which may affect the growth or yield of the trees;
- (b) repair damage to roads, tracks or fences on the Growers Grove or surrounding the Growers Grove resulting from the actions of the Manager or its contractors;
- (c) embark on such operations as may be required to prevent or combat land degradation on the Grower's Grove or land surrounding the Grower's Grove;
- (d) harvesting the trees on the Grower's Grove at or around the time estimated by the Manager to maximise the produce from all of the Groves established at or around the same time as the Grower's Grove;

- (e) subject to the Grower's election to personally take and market the olives, market and sell the olives using reasonable endeavours to obtain the maximum price having regard to the agreements entered into by OPAL to supply olive produce; and
- (f) ensuring due maintenance of the Grower's Grove and surrounds.

54. Commencing in the year ended 30 June 2006 and for each subsequent Financial Year, the Grower must pay annual fees comprising Management Fee, Grove Operations Fee and Annual Harvest Fee as advised in Schedule 2 of the Licence and Management Agreement. The maximum Management Fee, Grove Operations Fee and Annual Harvest Fee payable may be up to twice the amount stated in the Schedule, plus the amount of any increase in the Consumer Price Index above 2.5% and the rate of GST above 10%. Subject to this cap, if these fees exceed the amounts stated in the Schedule, the maximum amount that can be charged is the amount determined by an independent expert selected by the Responsible Entity to be a reasonable amount to cover all outgoings and expenses plus 10% of this amount. Investors will be given prior notice if these fees exceed the amount stated in the Schedule.

55. All annual fees will be offset against the proceeds of olive sales for Growers. However if the proceeds from olive sales for Growers does not cover the amount of fees payable, the Manager will invoice the Grower for the fees.

#### **Annual costs and expenses payable**

56. Commencing in the year ended 30 June 2006 and for each subsequent Financial Year, the Manager is entitled to be reimbursed for all costs and expenses in relation to the proper performance of its duties.

57. To the extent that costs and expenses are not offset against the proceeds of olive sales for Growers, the Manager will invoice the Grower for the fees.

#### **Sales Commission payable**

58. On commencement of olive oil sales, if the price paid by a purchaser of olive oil produced by the Project is more than \$10.00 per litre, the Manager is entitled to retain 20% of the Sale Proceeds.

## **Agency Agreement**

59. An Agency Agreement will be entered into between OPAL and the Custodian. Under this agreement:

- OPAL appoints the Custodian as its agent.
- The Custodian holds the Project Property as agent for OPAL and must provide regular reports to OPAL on all matters relevant to the Custodian's holding of the property.

60. OPAL is to indemnify the Custodian for any liabilities incurred by the Custodian by reason of performing its duties as agent of OPAL.

## **Water Supply Agreement**

61. OPAL will enter into an agreement with the Landowner, for the Landowner to supply OPAL with water to meet OPAL's requirements for the Project.

## **Option Deed to purchase Property and Property Purchase Agreement**

62. An Option Deed made on 10 July 2000 grants OPAL the option to buy the property on which the Project will be conducted. Upon exercise of the option, a formal Property Purchase Agreement will be entered into.

## **Finance**

63. Growers can fund their investment in the Project themselves, borrow from Capital Finance Australia Limited (a preferred lender of the Responsible Entity) or borrow from an independent lender.

64. This Ruling does not apply if a Grower enters into any 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;
- 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 Capital Finance Australia Limited, are involved or become involved, in the provision of finance to Growers for the Project.

## **Ruling**

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### **Assessable Income**

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

### **Minimum subscription**

66. A Grower will not incur the fees shown in the Table below before the minimum subscription for the Project is reached and the Grower's application to enter the Project is accepted (the date the investment is made). A Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 536 interests is achieved. If minimum subscription is not obtained within four months after the date of the issue of the Supplementary Prospectus all monies received by OPAL shall be returned to all Applicants less bank fees and charges. Tax deductions are not allowable until the minimum subscription requirements are met. If the Project's minimum subscription requirements (described above) are reduced or altered in any way (for example, through the issue of a supplementary prospectus), this Product Ruling, including the deductions it describes, will have no application to any Grower.

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

67. A Grower who is accepted into the Project in the year ended 30 June 2001 may claim tax deductions using the methods and Table in paragraphs 70, 71 and 72, where the Grower:

- participates in the Project to carry on the business of growing and processing olives;
- incurs the fees shown in paragraph 26; and
- is not registered nor required to be registered for GST.

**Section 8-1 – Prepaid fees**

68. Expenditure incurred by a Grower who participates in the Project is subject to the prepayment rules contained in sections 82KZM and 82KZMD. Therefore, a Grower who prepays fees that are otherwise allowable under section 8-1 **cannot** claim a tax deduction for the full amount of the fees in the year in which the expenditure is incurred unless it is ‘excluded expenditure’.

69. The amount and timing of tax deductions allowable each year for such fees must be determined using the formula in subsection 82KZM(1) where a Grower is a ‘small business taxpayer’ and subsection 82KZMD(2) where a Grower is not a ‘small business taxpayer’.

70. A Grower, who is a small business taxpayer will calculate their deduction using the formula in 82KZM(1). The formula is shown below.

$$\frac{\text{Period in year}}{\text{Eligible service period}}$$

where:

“Period in year” is the number of days in the whole or the part of the eligible service period that occurs in the year of income; and

“Eligible service period” is the number of days in the eligible service period.

71. A Grower, who is not a ‘small business taxpayer’ will calculate their deduction using the formula in subsection 82KZMD(2). In the formula, shown below, the ‘eligible service period’ means, generally, the period over which the services are to be provided.

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

72. In this Project, the tax deductions allowable for the Management Fee, Grove Operations Fees, Annual Harvest Fee and

Licence Fees (detailed at paragraph 26 in the Arrangement) must be calculated by applying the relevant formula to the amount incurred by the Grower. Both of these formula, although slightly different in form, apportion deductible expenditure over the 'eligible service period' in the same way. The application of the formula in paragraph 71 is shown in Example 2 at paragraph 154.

Fee type	ITAA 1997 section	Year 1 ending 30/06/2001	Year 2 ending 30/06/2002	Year 3 ending 30/06/2003
Management Fee	8-1	Amount must be calculated – see notes (i) below	Amount must be calculated – see notes (i) below	Amount must be calculated – see notes (i) below
Grove Operations Fee	8-1	Amount must be calculated – see notes (i) below	Amount must be calculated – see notes (i) below	Amount must be calculated – see notes (i) below
Annual Harvest Fee	8-1	\$70 – see notes (ii) below	– see notes (ii) below	– see notes (ii) below
Licence Fee	8-1	\$110 – see notes (ii) below	– see note (ii) below	– see note (ii) below
Interest	8-1	As incurred - see notes (ii) (iii) & (iv) below	As incurred - see notes (ii) (iii) & (iv) below	As incurred - see notes (ii) (iii) & (iv) below

**Notes:**

- (i) The Management Fee (\$7069) and Grove Operations Fee (\$1,377) payable on application for services provided over the first five financial years and shown at paragraph 26 above are **NOT** deductible in full in the year incurred.

As neither of these fees have discrete eligible service periods under the Licence and Management Agreement, for the purposes of calculating a Grower's deduction the fees are to be aggregated and the eligible service period will commence from the date advised by the Project Manager and end on 30 June 2005.

The deduction for each year's fees must be determined using the formula above (see paragraphs 70 & 71).

For Growers accepted into the Project in the year ended 30 June 2001, the Project Manager will inform Growers of the number of days in the eligible service period in the first expenditure year. For Growers accepted into the Project in the year ended 30 June 2002, the Project Manager will inform Growers of the number of days in the eligible service period in the first expenditure year. This figure is necessary to calculate the deduction allowable for the fees incurred. See Example 2 at paragraph 154.

- (ii) Amounts of less than \$1,000 will be 'excluded expenditure'. Excluded expenditure is deductible in full in the year in which it is incurred (See Example 3 at paragraph 155). Deductibility of amounts of \$1,000 or more, such as may occur where a Grower acquires a number of interests in the Project, will be determined on the same basis as the prepaid Management fees, i.e., using the formula shown above (in paragraphs 70 or 71).
- (iii) The deductibility or otherwise of interest arising from agreements entered into with financiers other than Capital Finance Australia Limited is outside the scope of this Ruling. However, all Growers who finance their participation in the Project other than with Capital Finance Australia Limited should read carefully the discussion of the prepayment rules in paragraphs 103 to 105 below as those rules may be applicable if interest is prepaid.
- (iv) Where a Grower **chooses** to prepay Interest beyond 13 months, the amount and timing of the tax deductions is determined under either subsection 82KZM(1) or subsection 82KZMD(2) (see paragraphs 106 to 108), unless the expenditure is 'excluded expenditure'. To apportion the expenditure over the eligible service period, these provisions, which apply respectively to 'small business taxpayers' and taxpayers who are not 'small business taxpayers', effectively use the same formula as that shown above.

73. A Grower who is accepted into the Project in the year ended 30 June 2002, may claim tax deductions using the methods in paragraphs 70 and 71. The deductions available to them for the year ended 30 June 2002 will be as calculated in the Table at paragraph 72 for Year 1, and for the year ended 30 June 2003 will be as calculated in the Table at paragraph 72 for Year 2, where the Grower:

- participates in the Project to carry on the business of growing and processing olives;
- incurs the fees shown in paragraph 26; and
- is not registered nor required to be registered for GST.

### **Tax deductions for capital expenses**

74. A Grower who is accepted into the Project in the year ended 30 June 2001 will also be entitled to the following tax deductions:

<b>Fee type</b>	<b>ITAA 1997 section</b>	<b>Year 1 ending 30/06/2001</b>	<b>Year 2 ending 30/06/2002</b>	<b>Year 3 ending 30/06/2003</b>
Guards	42-15	Amount must be calculated - See note (v) below	Amount must be calculated - See note (v) below	Amount must be calculated - See note (v) below
Irrigation costs	387-125	\$550 - see notes (vi) & (vii) below	\$550 - see notes (vii) & (viii) below	\$550 – see notes (vii) & (viii) below
Establishment of horticultural plants	387-165	Nil - see note (viii) below	Nil	Nil
Shares in the Landowner	8-1	Non-deductible - see note (ix) below		
Commission	8-1	Non-deductible - see note (ix) below		
Olive Trees - Land Clearing	8-1	Non-deductible - see note (ix) below		

#### **Notes:**

- (v) The tax deduction for depreciation of guards will depend upon whether or not the Grower is a 'small business taxpayer' (see paragraphs 117 to 119 below).

For a Grower who is a 'small business taxpayer' and who complies with the conditions in section 42-345, the tax deduction for depreciation of **guards** is determined using the rates in section 42-125 and the formula in either subsection 42-160(1) ('diminishing value method') or subsection 42-165(1) ('prime cost method'). The tax deduction calculated under these formulae depends upon the number of 'days owned', being the number of days in the income year in which the Grower owned an interest in the guards and the extent to which the guard is installed ready for use during the year. For Growers accepted into the Project

on or before 30 June 2001, the Project Manager is to advise Growers of relevant details to calculate their depreciation deductions for the year ended 30 June 2001. For Growers accepted into the Project between 1 July 2001 and 7 December 2001, the Project Manager is to advise Growers of relevant details to calculate their depreciation deductions for the year ended 30 June 2002. Depending upon the method the Grower elects to use, the rate for calculating the tax deduction will be 27% prime cost method or 40% diminishing value method.

Under section 42-167, a Grower who is a 'small business taxpayer' is also entitled to an immediate tax deduction for 100% of the cost of **guards** being plant the cost of which is \$300 or less.

Note: The depreciation deductions for 'small business taxpayers' discussed above apply until the introduction of the Simplified Tax System on 1 July 2001 (see paragraphs 113 to 116).

For a Grower who is NOT a 'small business taxpayer' or who is a 'small business taxpayer' who does not satisfy the conditions in section 42-345, the tax deductions for depreciation of **guards** is determined using the formula in either subsection 42-160(3) ('diminishing value method') or subsection 42-165(2A) ('prime cost method'). The tax deduction calculated under these formulae depends upon the number of 'days owned', being the number of days in the income year in which the Grower owned an interest in the guards and the extent to which each is installed ready for use during the year. The formulae use 'effective life' rather than specific rates to determine the deduction for depreciation. For Growers accepted into the Project on or before 30 June 2001, the Project Manager is to advise Growers of relevant details to calculate their depreciation deductions for the year ended 30 June 2001. For Growers accepted into the Project between 1 July 2001 and 7 December 2001, the Project Manager is to advise Growers of relevant details to calculate their depreciation deductions for the year ended 30 June 2002. Note: This is only applicable to plant acquired after 21 September 1999 (see paragraphs 121 to 123).

A Grower who is NOT a 'small business taxpayer' has the option of allocating the **guards** to a 'low value

pool' and calculating the depreciation deduction under section 42-470 using the diminishing value method (see paragraphs 126 to 130 below).

- (vi) A deduction is allowable under section 387-125 for capital expenditure incurred for acquisition and installation of the irrigation system. The deduction is calculated on the basis of one third of the capital expenditure in the year in which the expenditure is incurred, and one third in each of the next 2 years of income.
- (vii) A tax offset is available to certain low income primary producers under section 388-55 in respect of expenditure incurred on landcare operations and/or facilities to conserve or convey water. This is an alternative to claiming deductions under sections 387-55 and 387-125.
- (viii) A deduction is allowable under section 387-165 for capital expenditure incurred for the acquisition and establishment of olive trees for use in a horticultural business. The deduction is allowable when the olive trees, as horticultural plants, enter their first commercial season. If the olive trees have an 'effective life' for the purposes of section 387-185 of greater than 30 years, this results in a write-off rate of 7% prime cost. The Project's manager will inform Growers of when the olive trees enter their first commercial season.
- (ix) These expenditures are capital or capital in nature and therefore not allowable deductions under section 8-1 ITAA 1997. Furthermore, these expenditures do not fall for consideration under any specific write-off provisions of the ITAA 1936 and ITAA 1997.

75. For a Grower who is accepted into the Project in the year ended 30 June 2002, the deductions available to them for the year ended 30 June 2002 will be as calculated in the Table at paragraph 74 for Year 1, and for the year ended 30 June 2003 will be as calculated in the Table at paragraph 74 for Year 2.

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

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

- is accepted into the Project in either the year ended 30 June 2001 or the year ended 30 June 2002:

- participates in the Project to carry on the business of growing and processing olives;
- incurs the fees shown in paragraph 26; and
- is entitled to an input tax credit for the fees

then the tax deductions calculated using the methods and Table(s) above will exclude any amounts of input tax credit (Division 27 of the ITAA 1997). See Example 1 at paragraph 153.

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

#### **Section 35-55 – Commissioner's discretion**

77. For a Grower who is an individual and who is accepted into the Project during either the year ended 30 June 2001 or the year ended 30 June 2002, the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner will decide for the income years ending 30 June 2001 to 30 June 2006 that the rule in section 35-10 does not apply to this activity provided that the Project is carried out in the manner described in this Ruling.

78. 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 139 in the Explanations part of this ruling, below).

79. 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 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.

80. 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.

**Section 82KL**

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

**Part IVA**

82. 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.

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**Explanations****Section 8-1**

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

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

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

84. An olive growing and processing scheme can constitute the carrying on of a business. Where there is a business, or a future business, the gross proceeds from the sale of olive produce from the Groves 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 planting, growing, cultivating, harvesting and processing of olives.

85. Generally, a Grower will be carrying on such a business where:

- the Grower has an identifiable interest in specific trees coupled with a right to harvest, process and sell olive produce;
- the above activities are carried out in a business like way either by the Grower or on behalf of the Grower; and
- overall, the weight and influence of the general indicators used by the Courts point to the person carrying on a business.

86. For this Project, Growers have rights under the Licence and Management Agreement, in the form of a Licence over an identifiable area of land consistent with the intention to carry on a business of growing and processing olives. Under the Licence and Management Agreement, Growers engage the Project Manager to supply and plant olive trees on the licensed land and to provide ongoing services to care and maintain the olive trees and to process the olives for sale. Growers are considered to have control of their operations.

87. The Licence and Management Agreement and Constitution gives Growers an interest in the olives grown on their Grove and the right to have those olives processed and sold for their benefit.

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

89. 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.

90. 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 olive growing and processing practices and are of the type ordinarily found in such ventures that would commonly be said to be businesses.

91. Growers have a continuing interest in the trees from commencement of the Licence and Management Agreement until the cessation of the Project. The olive growing and processing activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. The Growers olive growing and processing activities will constitute the carrying on of a business.

92. The management and licence fees associated with the olive growing and processing 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 sale of olive oil is to be gained from this business. They will thus be deductible under the first limb of section 8-1, except to the extent that they are capital or capital in nature. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

### **Sections 82KZM and 82KZMD – Prepaid fees**

93. The prepayments provisions of the ITAA 1936 operate to spread over more than one income year a deduction for prepaid expenditure that would otherwise be immediately deductible, in full, under section 8-1. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (e.g., the performance of management services or the leasing of land) that is not wholly done within the same year of income as the year in which the expenditure is incurred.

94. The amount and timing of tax deductions for any prepaid management fees or prepaid lease 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.

95. 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 117 to 119), 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).

96. Under the Licence and Management Agreement, the application monies that a Grower pays include the following fees that are otherwise deductible under section 8-1 and which cover the period from the Grower entering the Project until the year ended to 30 June 2005:

- \$ 7,069 for the Management Fee;
- \$1,377 for the Grove Operations Fee;
- \$70 for the Annual Harvest Fee; and
- \$110 for the Licence Fee.

Section 82KZM or section 82KZMD, depending upon the nature of the taxpayer, has application to both of these agreements as the amounts incurred relate to services to be provided over a period of time in excess of 13 months.

97. Accordingly, to determine the proportion of the amount paid on application under these two agreements which is an allowable deduction in the applicable year, the relevant formula in paragraphs 70 or 71 must be applied.

98. The prepaid Licence Fees and Annual Harvest Fees, being an amount of less than \$1,000 in total, constitutes 'excluded expenditure' as defined in subsection 82KZL(1). Subsections 82KZM(1) 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 Licence Fees is \$1,000 or more, then the deduction allowable for those amounts will also be subject to apportionment under section 82KZM or 82 KZMD, depending upon the nature of the taxpayer.

### **Interest deductibility**

#### ***(i) Growers who use Capital Finance Australia Limited as the finance provider***

99. Growers may finance their participation in the Project through a loan facility with Capital Finance Australia Limited.

100. The interest incurred in the year ended 30 June 2001 and subsequent years of income will be in respect of a loan to finance the Project business operations of olive growing and processing 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. As the loan facility offered by Capital Finance Australia Limited does not require a Grower to prepay interest, section 82KZME or 82KZMF will not apply. The interest will be deductible in full in the year in which it is incurred.

101. However, a Grower who, contrary to the requirements of the loan contracts offered by Capital Finance Australia Limited, chooses to prepay interest will be required to determine any tax deduction under the prepayment provisions of the ITAA 1936.

102. Therefore, unless the prepaid interest is ‘excluded expenditure’, where a Grower chooses to prepay interest and the requirements of section 82KZME are met, relevant Growers will be required to determine any tax deduction using the formula in subsection 82KZMF(1). Where a prepayment is for more than 13 months, any tax deduction must be determined under section 82KZM (for a ‘small business taxpayer’) or section 82KZMD (for a taxpayer who is not a ‘small business taxpayer’). The relevant formulas shown above in paragraphs 70 and 71).

***(ii) Growers who DO NOT use Capital Finance Australia Limited as the finance provider***

103. 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 Capital Finance Australia Limited 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.

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

105. Therefore, unless the prepaid interest is ‘excluded expenditure’, where such a loan facility requires interest to be prepaid and the requirements of section 82KZME are met, relevant Growers will be required to determine any tax deduction using the formula in subsection 82KZMF(1). The relevant formula is similar to the

formula shown above in paragraph 71 and the method is explained in the Examples at paragraphs 154 and 155.

### **Prepayments where the eligible service period exceeds 13 months**

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

107. Instead, for a Grower who is a 'small business taxpayer' (see paragraphs 117 to 119) subsection 82KZM(1) applies to apportion the expenditure and determine the amount and timing of the deductions. Alternatively, for a Grower who is not a 'small business taxpayer', subsection 82KZMD(2) applies to apportion the expenditure and determine the amount and timing of the deductions.

108. Both of these provisions, although slightly different in form, apportion deductible expenditure over the 'eligible service period' in the same way. The relevant formulas are shown above in paragraphs 70 or 71. However, expenditure, which is 'excluded expenditure', is an exception to both provisions (subparagraph 82KZM(1)(b)(ii) and subsection 82KZMA(4) respectively). A tax deduction for 'excluded expenditure' can be claimed in full in the year in which the expenditure is incurred.

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

109. Any part of the expenditure of a Grower entering into an olive growing business that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. The Projects Licence and Management Agreement and Constitution indicates that certain payments forming part of the fees in respect of the First Financial Year are attributable to the acquisition of capital assets.

110. In this Project, the amounts summarised in the Table below are considered to be capital in nature. The fees for these expenditures are not deductible under section 8-1. However, some of this expenditure falls for consideration under specific write-off provisions of the ITAA 1997.

Shares in the Landowner	\$1,800.00
Commission	\$825.00
Irrigation System	\$1,650.00
Olive Trees - Land Clearing	\$55.00
Olive Trees - Guards	\$49.50
Olive Trees – Purchase of Olive Trees	\$445.50
Olive Trees - Initial Planting	\$148.50
<b>Total capital expenditure</b>	<b>\$4,973.50</b>

### **Section 42-15 – Depreciation of guards**

111. Growers entering into the Project will incur in respect of each Grove interest an expense of \$49.50 relating to the acquisition and installation of olive tree guards. Under section 42-15, a taxpayer can deduct an amount for depreciation of a unit of plant used for the purpose or purposes of producing assessable income where they are the owner or quasi-owner of that plant. However, where an item is affixed to land so that it becomes a fixture, at common law it becomes part of the land and is legally, absolutely owned by the owner of the land.

112. It is, however, accepted in certain circumstances that a licensee is entitled to claim depreciation where they are considered to be the owner of those improvements. Taxation Ruling IT 175 sets out the views of the Tax Office on this issue. Where a lessee is considered to own the improvements under a state law, as detailed in the Ruling, or where they have a right to remove the fixture or are entitled to receive compensation for the value of the fixture, the ATO accepts the lessee is entitled to claim depreciation for the fixture.

113. Under section 42-15, Growers in the Project are entitled to depreciation deductions for capital expenditure in relation to the acquisition and installation of guards. The deduction available, however, will depend upon the date the investment is made, when the plant is installed ready for use and whether or not a Grower is a ‘small business taxpayer’ (see paragraphs 117 to 119).

114. For plant acquired or constructed after 11:45am by legal time in the Australian Capital Territory on 21 September 1999, accelerated rates of depreciation are no longer available except to some ‘small business taxpayers’. The Government has announced that ‘small business taxpayers’ who meet the conditions in section 42-345 will have access to accelerated rates of depreciation until the introduction of the proposed Simplified Tax System on 1 July 2001.

115. The immediate deduction for items of plant costing \$300 or less has been removed from 1 July 2000, except for 'small business taxpayers'. The Government has announced that 'small business taxpayers' will be able to claim the immediate deduction until the introduction of the proposed Simplified Tax System.

116. The depreciation of guards as explained in this Product Ruling is based on existing legislation and may be subject to change.

### **Small business taxpayers**

117. 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.

118. '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).

119. 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'.

### **Depreciation deductions for Growers who are 'small business taxpayers'**

120. The depreciation deduction for **guards** available to a Grower who is a 'small business taxpayer' and who complies with the conditions contained in section 42-345 is calculated using the formula in either subsection 42-160(1) or subsection 42-165(1). The depreciation deduction depends on the cost of the guards and the number of days the guards were owned by the Grower during the income year. It also depends on the extent to which the guards is installed ready for use during the year.

121. The deduction is calculated using a rate of 27% prime cost or 40% diminishing value. These accelerated rates of depreciation are shown in section 42-125 and apply to plant with an effective life of between 5 and 6 years. The Project Manager will advise Growers of the date that the guards are installed and begins to be used for the purpose of producing assessable income.

122. Until the introduction of the Simplified Tax System on 1 July 2001, under section 42-167, a Grower who is a 'small business

taxpayer' is entitled to a 100% depreciation deduction for expenditure on **guards**, being items of plant with a cost of \$300 or less.

### **Depreciation deductions for Growers who are NOT small business taxpayers**

123. A Grower who is NOT a 'small business taxpayer' or is a 'small business taxpayer' who does not satisfy the conditions in section 42-345 will not be able to claim accelerated depreciation on plant used in the Project because of section 42-118. The depreciation deduction for guards for such a Grower is calculated using the formula in either subsection 42-160(3) or subsection 42-165(2A).

124. The deduction depends on the cost of the plant, the number of days the plant was owned by the Grower during the income year and the 'effective life' of the plant (see paragraph 125). It also depends upon the extent to which the plant is installed ready for use during the year. The Project Manager will advise Growers of the date that the guards are installed and begin to be used for the purpose of producing assessable income.

### **Determination of effective life**

125. Subdivision 42-C provides the choice of methods for determining the 'effective life' of plant. Growers can either self-assess the effective life of plant or use the effective life specified by the Commissioner. In the schedule, the Commissioner has determined that the effective life of guards is not given.

### **Low value pool option**

126. From 1 July 2000 the immediate 100% depreciation deduction for plant costing \$300 or less has been replaced by a 'low value pool' arrangement for all taxpayers except 'small business taxpayers'.

127. Under subsection 42-455(1), a Grower who is not a 'small business taxpayer' can choose to allocate 'low cost plant' to a 'low value pool' in the year of acquisition. 'Low cost plant' is plant costing less than \$1,000. Once the choice is made to allocate 'low cost plant' to the pool, all 'low cost plant' acquired in that income year and subsequent income years must be included in the pool (subsection 42-460(1)).

128. A 'low value pool' is depreciated using a diminishing value rate of 37.5%. However, low cost plant is depreciated at 18.75% in the year it is allocated to the pool, irrespective of the date it is allocated. The value of plant included in or disposed of from such a pool will be added to or subtracted from the value of the pool.

129. Under the Licence and Management Agreement, for each Grove interest acquired in the Project a Grower incurs expenditure of \$49.50 for guards. A Grower, who is accepted into the Project on or before 30 June 2001, will first be entitled to claim a deduction for depreciation in the year ended 30 June 2001. A Grower who is accepted into the Project between 1 July 2001 and 7 December 2001 will first be entitled to claim a deduction for depreciation in the year ended 30 June 2002. Therefore, a Grower who is not a 'small business taxpayer' will have the option of including guards in a 'low value pool'.

130. Where a Grower acquires more than one interest in the Project the cost of the guards could exceed \$1,000 and, therefore, the guards may not qualify as 'low cost plant. However, provided the Grower uses the diminishing value method to depreciate the guards, the plant can be allocated to a 'low value pool' after it has been depreciated below \$1,000 (paragraph 42-455(3)(b)).

#### **Subdivision 387-B – Irrigation expenditure**

131. Growers entering into the Project will incur in respect of each Grove interest an expense of \$1,650 applicable to the conserving or conveying of water for the Growers Grove. Section 387-125 allows a taxpayer, who is carrying on a business of primary production on land in Australia, to claim a deduction for capital expenditure on conserving or conveying water. The deduction is allowed over a three-year period and applies to plant or a structural improvement primarily or principally used for the purpose of conserving or conveying water for use in a primary production business. Irrigation systems of the kind proposed would be covered by this Subdivision.

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

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

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

**Subdivision 387-C – Vines and horticultural provisions**

134. Growers entering into the Project will incur in respect of each Grove interest an expense of \$445.50 applicable to the purchase of olive trees and \$148.50 applicable to their initial planting. 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).

135. 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 olive trees in this Project, with an effective life of 30 years or more, that rate is 7%.

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

136. 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.

137. 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.

138. 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.

139. 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.

140. 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).

141. 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 is accepted into the Project during either the year ended 30 June 2001 or the year ended 30 June 2002 and who acquires the minimum investment of one interest in the Project is unlikely to pass one of the objective tests until the income year ended 30 June 2007. Growers who acquire more than one interest in the Project may however, pass one of the tests in an earlier income year.

142. 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.

143. 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 is accepted into the Project during either the year ended 30 June 2001 or the year ended 30 June 2002 and who acquires an interest(s) in the Project, the Commissioner will decide that it would be unreasonable not to exercise the second arm of the discretion in paragraph 35-55(1)(b) until the year ended 30 June 2006.

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

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

145. 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 77), in the manner described in the Arrangement (see paragraphs 15 to 64), the Commissioner's discretion will not have been exercised, because one of the key conditions in paragraph 35-55(1)(b) will not have been satisfied.

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

- The report of the independent horticulturist and additional evidence provided with the application by the Responsible Entity; and
- 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 Responsible Entity.

### **Section 82KL – Recouped expenditure**

147. 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'.

148. '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.

149. 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**

150. 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).

151. The OPAL Olive 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 67 to 75 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.

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

## **Examples**

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

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

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

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

### **Example 2 – Prepaid expenditure and the apportionment of fees**

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

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

Management fee x Number of days of eligible service period in the year of income  
Total number of days of eligible service period

$$\begin{array}{r} \$5,000 \times \frac{26}{365} \end{array}$$

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

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

$$\begin{array}{r} \$5,000 \times \frac{339}{365} \end{array}$$

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

$$\begin{array}{r} \$1,200 \times \frac{26}{365} \end{array}$$

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

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

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

**Example 3 – Apportionment of fees where there is a contractual ‘eligible service period’ and the fees include expenditure that is ‘excluded expenditure’**

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

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

*Management fee*

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

*Lease fee*

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

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

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

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

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

## **Detailed contents list**

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### Related Publications/Determinants

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

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- carrying on a business
  - commencement of business
  - fee expenses
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  - management fees
  - producing assessable income
  - product rulings
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  - taxation administration
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  - ITAA 1936 82KZMD
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