PR 2001/84 - Income tax: Boort Olives Project No. 2

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Product Ruling
Income tax: Boort Olives Project No. 2

Contents Para

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 these products as investments. Further, we give no assurance that the products are 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 products. 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 Boort Olives Project No. 2, 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);
- section 35-55 (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 82KZM (ITAA 1936);
- sections 82KZMB - 82KZMD (ITAA 1936);
- section 82KZME (ITAA 1936);
- section 82KZMF (ITAA 1936);
- section 97 (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, each of these persons, referred to as 'Growers', will have accepted an offer made under subsections 708(1)-(11) of the Corporations Law.

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 this Ruling is materially different from the arrangement that is actually carried out:

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- the Ruling will be withdrawn or modified.

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Date of effect

12. This Ruling applies prospectively from 13 June 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 upon the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, the product ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

14. This Product Ruling is withdrawn and ceases to have effect on 30 June 2004. 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 the 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

15. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents or parts of documents lodged with the Tax Office:

- Application for a Product Ruling dated 29 March 2001;
- Information Memorandum dated December 2000 and issued by Boort Olives Pty Ltd ("the Manager");
- **Draft Management Agreement** to be entered into by each Grower and the Manager;
- **Draft Grove Licence Agreement** to be entered into by each Grower, the Manager and Leccino Holdings Pty Ltd as trustee for the Boort Olive Project No.2 Unit Trust ("Land Owner");
- **Draft Deed of Trust of Boort Olive Project No.2 Unit Trust**;
- Supply and Purchase Agreement between the Manager and the Purchaser, executed on 14 November 2000; and
- Correspondence and attachments from the Tax Adviser dated 13 February 2001, 7 March 2001, 19 March 2001, 22 March 2001, 23 March 2001, 28 March 2001, 3 April 2001, 5 April 2001 26 April 2001 and 4 May 2001.

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

16. In accordance with the above documents, a Grower who participates in the arrangement must have accepted an offer that was made under section 708 of the Corporations Law**. This Ruling does not apply unless the Grower:**

- has accepted a 'personal offer' under subsections 708(1)-(7) of the Corporations Law; or
- is a 'sophisticated investor' for the purposes of subsections 708(8)-(9) of the Corporations Law; or
- has accepted an offer made by a licenced dealer where the offer meets the requirements of subsection 708(10) of the Corporations Law; or
- is a 'professional investor' for the purposes of paragraphs (a), (b) or (h) of subsection 708(11) of the Corporations Law.

17. Each of these categories is explained in paragraphs 48 to 55 in the Explanations area of this Product Ruling.

18. The documents highlighted are those Growers enter into or become a party to. For the purposes of describing the arrangement to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, to which the Grower, or an associate of the Grower, will be a party to. The effect of these agreements may be summarised as follows.

Overview of the Project

19. This arrangement is called the Boort Olives Project No. 2. The salient features of the Project are shown in the table below.

Location	The Project location is 6 km south west of Boort on the Wychitella Boort Road. Boort is 80 km north west of Bendigo in Central Victoria.
Type of business each participant is carrying on	Commercial growing and cultivation of olive trees for eventual harvesting and selling of olives.
Number of hectares under cultivation	20 hectares fully subscribed by 13 June 2001 **This Product Ruling will only apply if all the Groves have been subscribed for by 13 June 2001.**
Size of minimum Grower's Allotment	One (1) hectare
Number of trees per hectare	At least 330
The term of the Project	15 years
Initial cost of a hectare allotment (see paragraph 33)	$35,476 + $6,000 to acquire units in the Unit Trust.

The Project Land

20. Each Grower, or its nominee, as a condition provided in the Management Agreement, undertakes to acquire six thousand (6,000) one dollar ($1.00) units in the Boort Olive Project No. 2 Unit Trust.

21. A Grower will participate in the Project by entering into a Grove Licence Agreement and Management Agreement. The salient provisions of these agreements are described below.

22. Leccino Holdings Pty Ltd, as trustee of the Boort Olive Project No. 2 Unit Trust ('the Land Owner'), will purchase the project land from the Manager. The improvements on the land will be specified in the Contract of Sale of Land to be executed. Information provided with the application indicate that the subject property is Lot 1 in plan of subdivision PS 444149 M containing approximately 23.08 hectares and the improvements include installed stakes and certain Landcare works.

Grove Licence Agreement

23. The Land Owner will grant a licence to each Grower, by way of a Grove Licence Agreement, to use and occupy the Grove for the purposes of the cultivation and marketing of olives (cl. 2.1).

24. The Grove Licence Agreement will commence on the date the parties sign the agreement and will continue until the termination of the Grower's interest or 30 June 2015, whichever shall be the earlier (cl. 2.1(i)).

25. In consideration of the grant of a licence by the Land Owner, the Grower is liable to pay a licence fee. This fee is payable on commencement of the agreement and thereafter is prepaid annually in advance, adjusted in accordance with the CPI (cl. 2.1(ii)).

26. The Grove Licence Agreement is subject to and conditional upon the Grower and the Manager entering into a Management Agreement for the management of the cultivation and harvesting of the olives (cl. 9.2).

Management Agreement

27. The Management Agreement sets out the terms and conditions of the Manager's appointment by the Grower as an independent contractor to manage the Grower's Grove (cl. 3). The Management Agreement will commence on the date the parties sign the agreement and will continue until the termination of the Grower's interest or 30 June 2015, whichever shall be the earlier (cl. 2). Growers are able to terminate the Management Agreement in certain instances, such as default in performance of the Manager's duties and failure to rectify the default (cl. 9.1).

28. Under the Management Agreement, the Manager will carry out the following:

- acquire and plant at least 330 olive seedlings for each hectare, prepare the grove to enable planting and plant the olive trees;

- carry out the necessary irrigation work to ensure proper reticulation of water to the seedlings on the Grower's grove;
- carry out drainage works to prevent soil erosion;
- cultivate and maintain and replace any seedlings which may fail in the first five years at no cost to the Grower;
- enter into a water supply agreement for the land owner to acquire 3 megalitres of water ;
- irrigate and apply water to the grove to maintain the olive trees in a healthy condition;
- prune the olive tree as required from time to time in order to promote the growth and production of olives in accordance with good agricultural practice for growing olives ;
- take such reasonable measures as may be required to control the growth of weeds and other vegetable pests on the grove;
- take all reasonable measures in accordance with the principals of good husbandry and to the extent reasonably possible to deter and eradicate any insect, bird or animal pests which may detract from the health and vigour of the olive trees or yield of the olive fruit; and
- apply manure, fertiliser, mulch and other such material as is necessary with good agricultural practice to encourage growth and fruiting of the olive trees (cl. 4.1).

29. The Manager commits that the services that are set out in clause 4.1 of the Management Agreement shall be completed by 30 June 2001 (cl. 4.2).

30. The Manager will continue to maintain the Grove after 30 June 2001 and to arrange the harvest annually of the trees at the optimum time to maximise the harvest and to market the olives under the Olive Supply and Purchase Agreement (cl. 4.2).

31. A Grower can elect to carry out limited maintenance and harvesting works (cls. 5.1 and 5.2). **This Ruling will only apply to Growers who choose to use the full services of the Manager**.

32. Clause 6 of the Management Agreement provides for the management fees payable to the Manager in consideration of the Manager carrying out its duties. The fees for the year ending 30 June 2001 shall be payable upon signing of the Agreement. The

management fees for subsequent years shall be payable in quarterly instalments in the financial year the expenditure is incurred (cls. 6.2 and 6.3). The Manager shall also be paid a fee for harvesting of the olives calculated in accordance with the actual cost to the Manager and an incentive fee of 25% of the sum by which the annual net proceeds shall exceed the forecasts in the Schedule (cls. 6.4 and 6.5).

Project Fees

33. The fees payable for the years ending 30 June 2001 to 30 June 2004 for a one hectare olive Grove are shown in the table below.

Fee type	30 June 2001	30 June 2002	30 June 2003	30 June 2004
Licence fee	$275	previous year's fee indexed	previous year's fee indexed	previous year's fee indexed
Management fee	$27,342	$6,380	previous year's fee indexed	previous year's fee indexed
Harvesting fee				actual cost to the Manager
Horticultural plant costs	$1,604			
Irrigation costs	$6,255			
Total	$35,476			

Finance

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

35. This Ruling does not apply if a Grower enters into a finance agreement that includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;

- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL or the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender, or any associate of the lender;
- 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 are involved, or become involved, in the provision of finance to Growers for the Project.

Ruling

Assessable Income

36. 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.

37. Growers presently entitled to income from Boort Olive Project No.2 Unit Trust, who are not under a legal disability, must include the appropriate amount in their assessable income under section 97 of the ITAA 1936.

Minimum subscription

38. A Grower will not incur the fees shown in the tables in paragraphs 39 and 41 below before the 20 hectares have been subscribed for and the Grower's application to enter into the Project is accepted (the date the investment is made). It is contemplated from the information provided by the Product Ruling Applicant that if the 20 hectares are not subscribed for by 13 June 2001, then the Contract of Sale of Real Estate between the Manager and Leccino Holdings Pty Ltd will not proceed. Tax deductions are not allowable until these requirements are met.

Section 8-1

Deductions where a Grower is <u>not</u> registered nor required to be registered for GST

39. A Grower may claim tax deductions shown in the table below for the years ending 30 June 2001 to 30 June 2004 where a Grower:

- participates in the Project by 13 June 2001 to carry on the business of growing olives;
- incurs the fees shown in paragraph 33; and
- is not registered nor required to be registered for GST.

Fee type	ITAA 1997 section	Year 1 30/6/2001	Year 2 30/06/2002	Year 3 30/06/2003	Year 4 30/06/2004
Annual Licence fee	8-1	$275 – see Note (i) below	see Notes (i) and (ii) below	see Notes (i) and (ii) below	see Notes (i) and (ii) below
Management fee	8-1	$27,342– see Note (ii) below	$6,380 – see Note (ii) below	As incurred - see Note (ii) below	As incurred - see Note (ii) below
Harvesting fee	8-1	nil	nil	nil	As incurred - see Note (ii) below

Notes:

(i) A licence fee payable which consists of an amount of less than $1,000 will be 'excluded expenditure'. Excluded expenditure is an 'exception' to the prepayment rules and is deductible in full in the year in which it is incurred (see Example 3 at paragraph 106). Deductibility of amounts of $1,000 or more, such as may occur where a Grower acquires a number of Groves in the Project, will be determined by using the formula shown in paragraph 90.

(ii) Where a Grower incurs the management fee, licence fee and harvesting fee as required by the Management Agreement, these 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 or the leasing of land) 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 **<u>MUST</u>** be determined

using the formula shown in paragraph 90 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.

Interest expense

40. The deductibility or otherwise of interest arising from agreements that Growers enter into to finance their participation in the Project is outside the scope of this Ruling. However, all Growers who enter into agreements to finance their participation in the Project should read carefully the discussion of the prepayment rules in paragraphs 94 to 96 below as those rules may be applicable if interest is prepaid.

Tax deductions for capital expenses

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

Fee type	ITAA 1997 section	Year 1 30/6/2001	Year 2 30/06/2002	Year 3 30/06/2003	Year 4 30/06/2004
Irrigation costs	387-125	$2,085 - see Note (iii) below	$2,085 - see Note (iii) below	$2,085 - see Note (iii) below	nil
Horticultural plant costs	387-165	nil - see Note (iv) below	nil - see Note (iv) below	nil - see Note (iv) below	$112

Notes:

(iii) 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.

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 section 387-125.

(iv) 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. The olive trees have an 'effective life' for the purposes of section 387-185 of 30 years. This results in a write-off rate of rate of 7% prime cost.

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

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

- participates in the Project by 13 June 2001 to carry on the business of growing olives;
- incurs the fees shown in paragraph 33; and
- is entitled to an input tax credit for the fees,

then the tax deductions shown in the Tables in paragraphs 39 and 41 (above) will exclude any amounts of input tax credit (Division 27 of the ITAA). See Example 1 at paragraph 104.

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

43. 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 2004 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.

44. 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 75 in the Explanations part of this Ruling, below).

45. 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.

46. 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 subsection 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

47. For a Grower who participates in the Project and incurs expenditure in accordance with the Grove Licence Agreement and Management Agreement, the following provisions of the ITAA 1936 have application as indicated:

(i) the expenditure by the Grower does not fall within the scope of section 82KZM (but see paragraphs 83 to 93);

(ii) the expenditure by the Grower does not fall within the scope of sections 82KZMB-82KZMD (but see paragraphs 83 to 93);

(iii) the expenditure by the Grower does not fall within the scope of sections 82KZME-82KZMF (but see paragraphs 83 to 93);

(iv) section 82KL does not apply to deny the deductions otherwise allowable; and

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

Explanations

Section 708 of the Corporations Law

48. For this Ruling to apply, an offer for an interest in the project must have been made to, and accepted by, the Grower under one of four categories in subsections 708(1)-(11) of the Corporations Law. These provisions set out situations where a prospectus or similar disclosure document is not required.

49. Under subsections 708(1)-(7) a Grower may participate in the project by accepting a 'personal offer' for an interest in the project. Offers under these provisions cannot be accepted by more than 20 investors in any 12 month period and these investors, in aggregate, must not invest more than $2 million dollars.

50. An offer will be a personal offer where it can only be accepted by the person to whom it is made, and it is made to a person who is likely to be interested in the offer because of any previous contact, professional or other connection to the person making the offer, or because they have indicated that they are interested in offers of that kind (subsection 708(2)).

51. Offers made under other exclusions in section 708 (see below) are not counted for the purposes of the 20 investors limit.

52. Alternatively, a Grower who is a 'sophisticated investor' may accept an offer for interests in the project under subsections 708(8)-(10). Under subsection 708(8), an investor in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will be a 'sophisticated investor' where:

- the minimum amount payable for the interests in the project on acceptance of the offer by the person to whom the offer is made is at least $500,000; or
- the amount payable for the interests in the project on acceptance by the person to whom the offer is made and the amounts previously paid by the person for interests in the project of the same class that are held by the person add up to at least $500,000; or
- it appears from a certificate given by a qualified accountant no more than 6 months before the offer is made that the person to whom the offer is made:
  - (i) has net assets of at least $2.5 million; or
  - (ii) has a gross income for each of the last 2 financial years of at least $250,000 a year.

53. A Grower may also participate in the project where the offer is made by a licenced dealer under subsection 708(10). Under this provision the dealer must be satisfied that the person to whom the offer is made has previous experience in investing which allows them to assess the merits of the offer, the value of the interests in the project, the risks involved in accepting the offer, their own information needs and the adequacy of the information provided.

54. The licenced dealer must provide a written statement of reasons for being so satisfied. Where a Grower is accepted into the project under this provision he or she must sign an acknowledgment that they did not receive a prospectus in relation to the offer.

55. Under subsection 708(11) an offer may be made to and accepted by a person who is considered to be a professional investor. Growers who participate in the project under this provision will be, at the time the offer is made:

- a person who is a licensed or exempt dealer and who is acting as a principal;
- a person who is a licensed or exempt investment adviser and who is acting as a principal; or
- a person who controls at least $10 million for the purposes of investment in securities.

Section 8-1

56. Consideration of whether the management fee, licence fee and harvesting fee 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?

57. A commercial olive growing business 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 olives produced from the olive 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 include the tending, maintaining and harvesting of the olive trees.

58. Generally, a Grower will be carrying on a business of olive growing where:

- the Grower has an identifiable interest in specific trees coupled with a right to harvest and sell the olives;
- the growing, tending, harvesting and marketing 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.

59. For this Project, Growers have under the Grove Licence Agreement rights to farm an identifiable area of land consistent with the intention to carry on a business of growing olives. Under the Management Agreement, Growers appoint the Manager to provide services such as planting, cultivating, tending, fertilising, spraying, watering, maintaining and otherwise caring for their olive trees. Growers are considered to have control of their investment.

60. The Management Agreement gives Growers an interest in the olives grown on their behalf and the right to have those olives harvested and sold for their benefit. The Project documentation contemplates that Growers will have an ongoing interest in the growing crops. The crops belong to the Growers in the sense that they have the right to use the land on which they are growing and a profit à prendre in respect of the produce, which confers an equitable interest in the crops upon the Grower.

61. Growers have the right to use their olive Grove areas for agricultural purposes and to have the Manager come onto the land to carry out its obligations under the Management Agreement. The Grower's degree of control over the Manager, as evidenced by the Management Agreement and supplemented by Corporations Law, is sufficient. Growers are able to terminate the Management Agreement in certain instances, such as default by the Manager in performance of its duties and failure to rectify the default. The agriculture activities described in the Management Agreement are carried out on the Growers' behalf.

62. The general indicators of a business, as developed 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 discussed in that Ruling. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections in the Information Memorandum 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.

63. Growers will engage the professional services of a Manager who holds itself out as having the appropriate credentials. There is a means to identify which trees Growers have an interest in. These services are based on accepted agricultural practices and are of the type ordinarily found in farming ventures that would commonly be said to be businesses.

64. Growers have a continuing interest in the trees from the time they are acquired and planted on their behalf. The agricultural 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' agricultural activities will constitute the carrying on of a business.

65. The fees associated with the agricultural activities will relate to the gaining of income from this business, and hence have a sufficient connection to the operations by which this income (from the sale of the crop produce) is to be gained from the business. They will, thus, be deductible under section 8-1, except to the extent they are capital, or of a capital nature. Capital components of the fees have been separately identified in clause 6 of the Management Agreement. No additional capital component, or 'non-income producing purpose' in incurring the fees, is identifiable from the arrangement. The tests of deductibility under section 8-1 are met. The exclusions do not apply.

Expenditure of a capital nature

66. 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. In this Project, the costs of supply and planting of the olive seedlings and irrigation are considered to be capital in nature. The fees for these expenditures are not deductible under section 8-1. However, these expenditures fall for consideration under specific write-off provisions of the ITAA 1997.

Subdivision 387-C - Horticultural plant

67. 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).

68. 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%.

Subdivision 387-B – Irrigation expenditure

69. 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.

70. 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.

71. 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.

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

72. 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.

73. 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.

74. 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.

75. 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.

76. 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).

77. A Grower who participates in the Project will be carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling indicates that a Grower who acquires the minimum investment of one interest in the Project is unlikely to pass one of the objective tests. Growers who acquire more than one interest in the Project may, however, pass one of the tests.

78. Therefore, 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.

79. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, for an individual Grower who acquires an interest(s) in the Project, the Commissioner will decide that it would be unreasonable not to exercise the second arm of the discretion in paragraph 35-55(1)(b) for the income years ending 30 June 2001 to 30 June 2004.

80. 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.

81. 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 43), in the manner described in the Arrangement (see paragraphs 15 to 35), 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.

82. 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 independent expert report provided with the Product Ruling application; and
- independent, objective, and generally available information relating to the industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application.

Prepayments provisions – sections 82KZM, 82KZMA – 82KZMD and 82KZME – 82KZMF

83. 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 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.

84. Under the Management Agreement, the management fee of $27,342 for 30 June 2001 will be incurred on the execution of that Agreement. The fee is charged for providing services to a Grower by 30 June 2001 where the Grower invests on or before 13 June 2001. In particular, the management 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 this fee has been inflated to result in reduced fees being payable for subsequent years.

85. There is also no evidence that might suggest the services covered by this fees could not be provided in 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 management fee are for the Manager doing 'things' that are not to be wholly done within the year of income of this fee being incurred. On this basis, the basic precondition for the operation of the prepayment provisions is not satisfied and this fee will be deductible in the year in which it is incurred.

86. The prepaid component of the annual licence fee being an amount of less than $1,000 in each expenditure year, constitute 'excluded expenditure' as defined in subsection 82KZL(1). Under Exception 3 (subsection 82KZME(7)) 'excluded expenditure' is not subject to section 82KZMF and is, therefore, deductible in full in the year in which it is incurred.

87. However, where a Grower acquires a number of interests in the Project and the quantum of prepaid component of the annual licence fee is $1,000 or more, then the deduction allowable for those amounts will also be subject to apportionment under section 82KZMF (see paragraph 90 below).

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

88. Although not required under either the Grove Licence Agreement or Management Agreement, a Grower participating in the Project may choose to prepay fees for a number of years. Where this occurs, contrary to the conclusions reached in paragraphs 86 to 87 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.

89. 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, where the 'eligible service period' exceeds 13 months, whether the Grower is a 'small business taxpayer'.

90. 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.

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

91. In the formula, the 'eligible service period' means, generally, the period to which the services are to be provided.

92. 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 97 to 99) 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 90 above, concerning section 82KZMF.

93. A prepaid 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.

Interest deductibility

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

95. While the terms of any finance agreement entered into between relevant Grower and such financiers are subject to

commercial negotiation, those agreements may require interest to be prepaid. Under the prepayment rules contained in sections 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.

96. 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 Grower will be required to use the formula in subsection 82KZMF(1) to determine any tax deduction that may be allowable. Where a prepayment is for a more than 13 months, any tax deduction that may be allowable 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 formula is the same, or effectively the same as that shown above in paragraph 90 above.

Small business taxpayers

97. 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.

98. '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).

99. 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

100. The operation of section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefits(s)'. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1.

Part IVA - general tax avoidance provisions

101. 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).

102. This 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 39 and 41 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.

103. 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'

104. 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 x $5,500 = $500

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

Example 2 – Prepaid expenditure and the apportionment of fees

105. 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:

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

$$\$5{,}000 \times \frac{26}{365}$$

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

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

$$\$5{,}000 \times \frac{339}{365}$$

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

$$\$1{,}200 \times \frac{26}{365}$$

= **$85** (this represents the portion of the Year 2 prepaid management fees for the 26 days 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'

106. 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

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

Commissioner of Taxation
13 June 2001

Previously released:
Not previously issued in draft form

Related Rulings/Determinations:
PR 1999/95; TR 92/1; TR 97/11; TR 97/16; TR 92/20; TR 98/22; IT 175; TD 93/34

Subject references:
- carrying on a business
- commencement of a business
- interest expenses
- harvesting expenses
- management fees
- primary production
- primary production expenses
- producing assessable income
- product rulings
- public rulings
- schemes
- tax avoidance
- tax benefits
- horticultural expenses

Legislative references:
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 Div 27
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(3)
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(a)
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Subdiv 387-B
- ITAA 1997 387-125
- ITAA 1997 Subdiv 387-C
- ITAA 1997 387-165
- ITAA 1997 387-185
- ITAA 1997 387-210
- ITAA 1997 388-55
- ITAA 1997 960-335
- ITAA 1997 960-340
- ITAA 1997 960-345
- ITAA 1997 960-350
- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZM
- ITAA 1936 82KZM(1)
- ITAA 1936 82KZMA
- ITAA 1936 82KZMA(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)
- ITAA 1936 82KZMF
- ITAA 1936 82KZMF(1)
- ITAA 1936 97
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- Corporations Law 708(1)
- Corporations Law 708(2)
- Corporations Law 708(3)
- Corporations Law 708(4)
- Corporations Law 708(5)
- Corporations Law 708(6)
- Corporations Law 708(7)
- Corporations Law 708(8)
- Corporations Law 708(9)
- Corporations Law 708(10)
- Corporations Law 708(11)
- Corporations Law 708(11)(a)
- Corporations Law 708(11)(b)
- Corporations Law 708(11)(h)

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