



PR 2002/77 - Income tax: Victorian Olive Oil Project

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Product Ruling

Income tax: Victorian Olive Oil Project

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

Preamble

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

No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product 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 participants 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 product fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

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

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

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

Terms of Use of this Product Ruling

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

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax 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 Victorian Olive Oil Project, or simply as 'the Project'.

Tax laws

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

Goods and Services Tax

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

Changes in the Law

4. The Government is currently evaluating further changes to the tax system in response to the *Ralph Review of Business Taxation* and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers participating in the Project are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

Note to promoters and advisers

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for participants in projects such as this. In keeping with that intention, the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

Class of persons

7. The class of persons to whom this Ruling applies is those persons who were accepted into the project between 10 September 2001 and 31 May 2002 inclusive. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant Agreements until their term expires) and deriving assessable income from this involvement. In this Ruling these persons are referred to as 'Growers'.

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

Qualifications

9. The Commissioner rules on the precise arrangement identified in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner. The Ruling will be withdrawn or modified.

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Date of effect

11. This Ruling applies prospectively from 29 May 2002 for Growers who, between 10 September 2001 and 31 May 2002 inclusive, entered into the specified arrangement that is set out below. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on that private ruling if the income year to which it relates has ended or has commenced but not yet ended. However if the arrangement covered by the private ruling

has not commenced, and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2003. The Ruling continues to apply, even following its withdrawal, in respect of the tax laws ruled upon, to all persons within the specified class who entered into the specified arrangement that is set out below between 10 September 2001 and 31 May 2002 inclusive. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

Arrangement

14. The arrangement that is the subject of this Ruling is described below. The relevant documents, or parts of documents, incorporated into this description of the arrangement include:

- Application for Product Ruling dated 28 July 2000;
- Constitution of the Victorian Olive Oil Project dated 14 May 2001 and received by the ATO on 9 May 2002;
- Compliance Plan of the Victorian Olive Oil Project received by the ATO on 9 May 2002;
- Prospectus for the Victorian Olive Oil Project, dated 1 May 2001 and received by the ATO on 9 May 2002;
- Supplementary Prospectus, dated 4 September 2001 received by the ATO on 9 May 2002;
- Head Lease Agreement between Victorian Olive Oil Project Limited (VOOP), Custodial Limited and Lanyons Paddock Pty Ltd, dated 10 September 2001 and received by the ATO on 9 May 2002;
- Growers **Lease Agreement** (i.e., Grove Lease Agreement) between Custodial Limited, VOOP and the Grower, received by the ATO on 9 May 2002;
- Undated **Management and Harvesting Agreement** between Terrappee Contractors Pty Ltd and the Grower represented by the Responsible Entity, received by the ATO on 9 May 2002;

- Undated **Irrigation System Agreement** between Terrappee Contractors Pty Ltd and the Grower represented by the Responsible Entity, received by the ATO on 9 May 2002;
- Undated **Crushing and Marketing Agreement** between Victorian Olive Processors Pty Ltd and the Grower represented by the Responsible Entity, received by the ATO on 9 May 2002;
- Orchard Establishment Plan for the Victorian Olive Oil Project, received by the ATO on 25 September 2000;
- Orchard Management Plan for the Victorian Olive Oil Project, received by the ATO on 25 September 2000;
- Revised Water Strategy for the Victorian Olive Oil Project, dated 31 August 2000 and received by the ATO on 25 September 2000;
- Draft Olive Tree Supply Agreement between Lanyons Paddock and a supplier, received by the ATO on 25 September 2000;
- Custodian Agreement between VOOP and Custodial Limited, dated 23 February 2001 and received by the ATO on 9 May 2002;
- Correspondence from the Applicant's representative dated 21 September 2000, 19 April 2002;
- Correspondence from the ATO to the Applicant's representative dated 1 and 3 May 2002.

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

15. The documents highlighted in paragraph 14 in bold are those that the Growers entered into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or an associate of the Grower, will be a party to.

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

Overview

17. This arrangement is called 'The Victorian Olive Oil Project'.

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Location	14kms south west of Boort, Victoria
Type of Business each participant is carrying on	Commercial growing and cultivation of an olive grove for the purpose of producing olive oil
Maximum number of Hectares to be cultivated	400
Size of each Olive Grove	1 hectare
Number of trees per Olive Grove	No less than 250; between 250-330 depending on variety
Expected Production	First harvest expected in 2005, reaching maturity in 2009 with expected average production of 15 tonne of fruit per hectare
Term of the Project	Initial term to 30 June 2025, with option for a further 25 years
Minimum Subscription	215 hectares
Subscription amount per olive grove (1 hectare)	\$25,058 on application, comprising: Lease to 30 June 2002 \$5,698 Irrigation \$9,900 Management fees to 30 June 2004 \$9,460
Lease fee	\$2,849 each year for 2003 to 2010 then indexed by CPI
Management fee	\$5,060 each year from 1 July 2004 indexed by CPI

18. A Grower will participate in the Project by:

- entering into a 'Grove Lease Agreement' with VOOP (the Responsible Entity) in respect of a grove (1 hectare) for the period to 30 June 2025;
- entering into an 'Irrigation System Agreement' that relates to the purchase, and installation of an irrigation system on the Growers Grove;
- entering into a 'Grove Management and Harvesting Agreement' that relates to services to be performed in maintaining and harvesting the Grower's Grove from the date of entering the agreement.

- entering into a 'Crushing and Marketing Agreement' that relates to the crushing of the Grower's produce into olive oil and the marketing of that oil.

Grove Lease Agreement

19. The Grower will lease the Project land from VOOP which will give the Grower full use of one hectare of land planted with no less than 250 olive trees and sufficient water to irrigate the olive trees. The lease will refer to an identifiable area of land and the Grower must maintain their grove to a minimum standard. The Grower may delegate the orchard maintenance to a Manager approved by VOOP.

20. The 'Grove Lease Agreement' will commence after minimum subscription has been achieved and expires on 30 June 2025. The Grower has the option to renew the lease for a further 25 years. The lease fee to be paid under the agreement is \$2,849 per financial year, or part thereof, fixed for the period to 30 June 2010, then increased annually by the proportional increase in the CPI.

21. The first two years rent, \$5,698, relating to the period from application to 30 June 2002, must be paid on application and will be held by the Custodian until minimum subscription is reached.

Irrigation System Agreement

22. The Grower will enter into an agreement with Terraptee Contractors Pty Ltd to purchase and install an irrigation system. Terraptee Contractors Pty Ltd will ensure that the irrigation system is installed on the Grower's leased property prior to the olive trees being planted. All future maintenance of the irrigation system is included under the Grove Management and Harvesting Agreement.

23. The Irrigation System Agreement fee is \$9,900, to be paid on application and will be held by the Custodian until minimum subscription is achieved.

Grove Management and Harvesting Agreement

24. The Grower will enter into an agreement appointing Terraptee Contractors Pty Ltd to manage the Grower's interest in the Project. Under this agreement, Terraptee Contractors Pty Ltd specifically undertakes to maintain the Grower's olive grove, with such maintenance to include, but not be limited to, the following activities:

- undertaking of certain measures concerning land degradation;
- establishment of wind breaks;

- operation and maintenance of the irrigation system;
- supply and application of herbicides and fertilisers;
- weed and pest control;
- tying and retying of young trees;
- pruning the trees in a manner to assist with mechanical harvesting;
- harvesting the trees;
- controlling the spread of feral olives; and
- provision of fire control.

25. The Grove Management and Harvesting Agreement will commence on execution of the agreement for an initial period to 30 June 2025. The fee for this Agreement is \$9,460, payable on application, for the period from commencement to 30 June 2004, then \$5,060 per annum payable monthly in advance, increased annually by the proportional increase in the CPI.

Crushing and Marketing Agreement

26. The Grower will enter into an agreement with Victorian Olive Processors Pty Ltd to arrange processing of the Grower's harvest from the Grove with the resulting oil to be marketed for a fee equal to 15% of oil produced by weight.

27. The Crushing and Marketing Agreement will commence upon execution of the agreement, which will not occur before minimum subscription is achieved, and will cease on 30 June 2025.

Income

28. As provided for by the Project's constitution (see below) the gross proceeds from the sale of olive oil under the Crushing and Marketing Agreement will be pooled by VOOP in the Revenue Fund and shared between Growers in proportion to their interest in the fund after deduction of all selling costs.

Application

29. On application to the Project, the Grower must elect what Agreements he or she wishes to enter into. This ruling only applies to Growers who enter into all of the agreements and pay the following amounts:

Grove Lease Agreement for the period to 30 June 2001	5,698
Irrigation System Agreement	9,900
Grove Management and Harvesting Agreement for the period to 30 June 2004	<u>9,460</u>
	<u>\$25,058</u>

30. The amounts paid by the Grower will be held in trust by the Custodian to the Project until the minimum subscription of 215 allotments have been achieved. The Custodian will make payments to VOOP and Terrappee Contractors Pty Ltd as invoices are presented evidencing work completed, or in annual instalments in the case of the Grove Lease Agreement and Grove Management and Harvesting Agreement.

Management

31. VOOP is the Responsible Entity for the Project. VOOP has the legal responsibility of overseeing the Project in accordance with the Constitution, the Compliance Plan and the Lease Agreement. VOOP will also take a supervisory role in the Irrigation System Agreement, Grove Management and Harvesting Agreement and Crushing and Marketing Agreement. VOOP has applied for a Dealers Licence with the Australian Securities and Investments Commission authorising them to operate the Project.

32. VOOP, as Responsible Entity, will:

- arrange for the Custodian to establish an Application Fund and a Revenue Fund on behalf of the Growers by lodging the first Application Moneys and the first monies received in respect of the project. The money will be held by the Custodian upon the Trust's Constitution. Growers will then have an interest in the relevant Application Fund and Revenue Fund equal to their Proportional Interest but shall not have any interest in any particular part of the fund;
- make application to the Custodian on behalf of the Grower to pay funds from the Application Fund as amounts fall due or to meet approved expenditure;
- lease to the Grower an identifiable hectare of land to be planted with no less than 250 olive trees, and sufficient water to irrigate the Grove;
- execute on behalf of the Grower the Irrigation System Agreement, Grove Management and Harvesting

Agreement and Crushing and Marketing Agreement;
and

- ensure that all services described under the Irrigation System Agreement, Grove Management and Harvesting Agreement and Crushing and Marketing Agreement are delivered, and report to the Grower on no less than a six monthly basis the performance of the contracting parties under these agreements.

Finance

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

34. 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

Section 35-55 – Deferral of losses from non-commercial business activities

Section 35-55 Commissioner's discretion

35. For a Grower who is an individual and who enters the Project during 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 2002 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.

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

- the 'exception' in subsection 35-10(4) applies (see paragraph 42 in the Explanations part of this ruling, below); or
- a Grower's business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45; or
- a Grower's business activity produces assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsection 35-10(2)).

37. Where, the 'exception' in subsection 35-10(4) applies, the Grower's business activity satisfies one of the tests, or the discretion in subsection 35-55(1) is exercised, 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.

38. 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 commercially viable. An assessment of the Project or the product from this perspective has not been made.

Explanations

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

39. Division 35 applies to losses from certain business activities for the income year ended 30 June 2001 and subsequent years. Under the rule in subsection 35-10(2) a deduction for a loss made by an individual (including an individual in a general law partnership) from certain business activities will not be taken into account in an income year unless:

- the exception in subsection 35-10(4) applies;
- one of four tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or
- if one of the tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

40. 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.

41. Losses that cannot be taken into account in a particular year of income, because of subsection 35-10(2), can be applied to the extent of future profits from the business activity, or are deferred until one of the tests is passed, the discretion is exercised, or the exception applies.

42. For the purposes of applying Division 35, 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.

43. In broad terms, the 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, or an interest in real property, (excluding any private dwelling) 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 (excluding cars, motor cycles and similar vehicles) are used on a continuing basis in carrying on the business activity in that year (section 35-45).

44. 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 allocation of one interest in the Project is unlikely to have their activity pass one of the tests until the income year ended 30 June 2009. Growers who acquire more than one interest in the Project may however, find that their activity meets one of the tests in an earlier income year.

45. 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.

46. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, the second arm of the discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where the business activity has started to be carried on and for that, or those income years;

- because of its nature, the business activity has not satisfied, or will not satisfy one of the tests set out in Division 35; and
- there is an expectation that the business activity of an individual taxpayer will either pass one of the tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

47. Information provided with this Product Ruling indicates that a Grower who acquires the minimum investment of one interest in the Project is expected to be carrying on a business activity that will pass one of the tests in the income year ended 30 June 2009, or will produce a taxation profit, for the income years ended 30 June 2007, 30 June 2008 and 30 June 2009.

48. The Commissioner will decide for such a Grower that it would be reasonable to exercise the second arm of the discretion for all income years up to, and including the income year ended 30 June 2006.

49. The applicant has stated that the business activity comprised by a Grower's involvement in this Project has started to be carried on,

and will continue to be carried on in a manner that is not materially different to that described in the arrangement that is set out in paragraphs 14 to 34 of this Product Ruling. If, however, the Project is not carried on during the income years specified above (see paragraph 35), in the manner described in the arrangement, this Ruling may be affected. Specifically, the decision in relation to paragraph 35-55(1)(b), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) not apply, may be affected, because the Ruling no longer applies (see paragraph 9). Growers may need to apply for private rulings on how paragraph 35-55(1)(b) will apply in such changed circumstances.

50. 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 expert included in the Prospectus for the Project;
- independent, objective, and generally available information relating to the Australian 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;
- other expert opinion independently obtained by the Commissioner that specifically relates to the Project.

Detailed contents list

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

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Commissioner of Taxation

29 May 2002

Previous draft:

Not previously issued in draft form

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

- carrying on a business
- commencement of business
- fee expenses
- management fees expenses
- primary production
- primary production expenses
- producing assessable income
- product rulings
- public rulings
- taxation administration

Legislative references:

- TAA 1953 Part IVAAA
- ITAA 1936 Part IVA
- ITAA 1936 82KL
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(3)
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(a)
- ITAA 1997 35-55(1)(b)

ATO references:

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