



PR 2004/40 - Income tax: 2004 Swan Hill Almond Grower Project

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 This document has changed over time. This is a consolidated version of the ruling which was published on *9 June 2004*



Product Ruling

Income tax: 2004 Swan Hill Almond Grower Project

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Preamble

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

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

No guarantee of commercial success

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.

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

Participants must form their own view about the commercial and financial viability of the product. This 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 participants by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

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

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

Terms of use of this Product Ruling

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

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax 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 referred to as the 2004 Swan Hill Grower Project or simply as 'the Project'.

Tax law(s)

2. The tax laws 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);
 - Division 40 (ITAA 1997);
 - Division 70 (ITAA 1997);
 - Division 328 (ITAA 1997);
 - Section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - Section 82KZL (ITAA 1936);
 - Section 82KZME (ITAA 1936);
 - Section 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.

Changes in the Law

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

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

Note to promoters and advisers

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

Class of persons

7. The class of persons to whom this Ruling applies is the persons who are more specifically identified in the Ruling part of this Product Ruling and who enter into the arrangement specified 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. 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. A Grower who elects to take their own almond produce is also excluded from this Ruling (see paragraph 44).

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 7 April 2004, 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).

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 2006. 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 arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the person's involvement in the arrangement.

Arrangement

14. The arrangement that is the subject of this Ruling is specified below. This arrangement incorporates the following documents:

- Application for a Product Ruling for the 2004 Swan Hill Almond Grower Project as constituted by documents dated 22 December 2003 and 23 February 2004, and correspondence and emails dated 26 February 2004, 2, 9, 11, 17, 18, 22, 23, 25, 26, 27, 29 and 30 March 2004;
- Draft Product Disclosure Statements for the 2004 Swan Hill Almond Grower Project, received 30 March 2004;
- **Draft Constitution of the 2004 Swan Hill Almond Grower Project, between Almond Investors Limited ('AIL') ('the Responsible Entity') and each Grower received 25 March 2004;**
- Draft Constitution of the 2004 Swan Hill Almond Orchard Asset Trust ('the Trust'), received 24 February 2004;
- Lease Agreement between Sandhurst Trustees Limited in its capacity as custodian of the 2004 Swan Hill Almond Orchard Asset Trust ('Custodian Lessor') and in its capacity as Custodian of the 2004 Swan Hill Almond Grower Project ('Custodian Lessee') and AIL as Responsible Entity of the 2004 Swan Hill Almond Orchard Asset Trust ('Lessor') and as Responsible Entity of the 2004 Swan Hill Almond Grower Project ('Lessee'), received 24 February 2004 ('Head Lease');
- **Allotment Sublease Agreement between AIL ('Responsible Entity') of the 2004 Swan Hill Almond Grower Project, Sandhurst Trustees Limited as custodian of the 2004 Swan Hill Almond Grower Project ('Project Custodian') and each Grower, received 30 March 2004;**
- **Allotment Management Agreement between AIL ('Responsible Entity') of the 2004 Swan Hill Almond Grower Project and each Grower, received 29 March 2004;**
- Orchard Management Agreement between RMONPRO Developments Pty Ltd ('the Manager') and AIL ('Responsible Entity') of the 2004 Swan Hill Almond Grower Project received 29 March 2004;

- Draft Custody Agreement between AIL as ('Responsible Entity') for the 2004 Swan Hill Almond Grower Project and Sandhurst Trustees Limited in as custodian of the 2004 Swan Hill Almond Grower Project ('the Custodian'), received 22 December 2003;
- Draft Almond Crop Supply Agreement between Almondco Australia Limited and AIL ('Responsible Entity') of the 2004 Almond Swan Hill Almond Project, received 22 December 2003;
- Additional correspondence received 31 May and 1 June 2004; and
- Draft Supplementary Product Disclosure Statement for the 2004 Swan Hill Almond Grower Project, received 1 June 2004.

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

15. The documents highlighted are those that the Growers enter 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 that are part of the arrangement to which this Ruling applies.

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

Overview

17. This arrangement is called 2004 Swan Hill Almond Grower Project and is summarised below. The arrangement makes reference to **Growers** and Orchard Asset Owners. **This Ruling will only apply to Growers as described in the class of persons in paragraph 7 and 8, who enter into this arrangement.**

Location	Swan Hill, Victoria
Type of business each Grower is carrying on	Cultivating almond trees on their designated 0.25 hectare Allotments and harvesting the almonds for processing and sale.
Area under cultivation	Up to 200 hectares, divided into Allotments of 0.25 hectares each.
Minimum subscription	300 Grower Allotments in the Project and 300 Units in the Orchard Asset Trust.

Number of trees	An average of 320 trees per hectare or 80 trees per Allotment.
The term of the Grower Project	The Grower Project will be completed in approximately 22 years, commencing on acceptance of a participant's application.
Initial cost	\$2,750 plus the cost of units
Initial cost per hectare	\$11,000
Ongoing and other Grower costs	Growing and Management fees, rent, Processing, marketing and drying fees. Incentive fees; and Optional insurance costs.

18. The Responsible Entity has registered the 2004 Swan Hill Grower Project (the Project) and the 2004 Swan Hill Almond Orchard Asset Trust (the Trust) as managed investment schemes pursuant to the *Corporations Act 2001*.

19. An offer to participate in the schemes will be made through a Product Disclosure Statement ('PDS'). The maximum offer under the PDS is for 800 Grower Allotments in the Project and 800 Orchard Asset Units in the Trust. Growers must apply for a minimum of one 0.25 hectare Allotment in the Project and one Unit in the Trust. The land on which the Project will be conducted is in Swan Hill, Victoria. The real property description is as follows:

Certificate of Title Volume 10698 Folio 346; and

Volume 10122 Folio 717.

20. The Grower or a Nominee of the Grower must subscribe for the equivalent number of Units in the Trust. AIL in its capacity as the trustee of the Trust, will own the Trust Property including the Land, Trees, Irrigation System and the Water Licences which will be held in the name of the Custodian, Sandhurst Trustees as nominee. The Trust will use these Water Licences to obtain water to irrigate the Allotments of Growers participating in the Project.

21. An offer to participate in this scheme is conditional on receiving minimum subscriptions of 75 hectares, comprising of 300 Allotments for the Grower and 300 Orchard Asset Units by 15 June 2004. If minimum subscription is not reached by 15 June 2004 all application monies received from prospective Growers and Unit holders will be returned in full no later than 27 June 2004.

22. For the purposes of this Ruling a Grower who enters the Project on or before 15 June 2004 will be referred to as a '2004 Grower', and a Grower who enters the Project on or after 1 July and on or before 30 September 2004 will be referred to as a '2005 Grower'.

23. A Head Lease will be entered into between the Custodian of the Trust and AIL as Responsible Entity. The Responsible Entity will grant the Grower a Sublease of the Grower's Allotment for the term of the Sublease for the purpose of growing, maintaining and harvesting almonds for sale.

24. Growers will also enter into an Allotment Management Agreement with AIL as Responsible Entity who will perform services in relation to the management of their Allotment. Under this agreement AIL will harvest the almonds, process the almonds as required and sell the almonds on behalf of the Grower, unless the Grower has elected to market and sell their own almonds.

Constitution of the Grower Project

25. The Grower Project Constitution is the primary document governing the relationship between the Growers in the Project and AIL as the Responsible Entity. It contains extensive provisions about the legal obligations of the parties and the rights and powers of each.

26. Amongst other things, the Constitution sets out in detail the following:

- the Project Constitution operates as a deed and is binding on all Growers and the Responsible Entity (clause 2);
- the appointment of AIL as the Responsible Entity of the Grower Project (clause 3);
- the manner in which an applicant can apply for a Grower's Interest in the Project and the holding of the Contribution by the Responsible Entity on trust for the Applicant (clauses 6 and 7);
- conditions which must be satisfied before money paid by an Applicant into the Growers' Application Fund can be transferred to the Responsible Entity (clause 8);
- how to determine an Applicant's Interest in the Application Fund and restrictions to any interest in any part of the Grower's Application Fund (clause 9);

- the number of interests in the Project and the composition of Growers' Interest (clauses 10 and 11), the appointment of a Custodian to hold Project Assets on behalf of the Growers which must be held separately from the assets of the Responsible Entity and any other managed investment scheme (clause 12), and to keep and maintain an up-to-date register of Growers' details and the requirement that the Responsible Entity permitting the Grower to inspect or obtain a copy of the register (clause 13); and
- the opening of a Growers' Proceeds Account at an Australian bank (clause 24) and the payment of proceeds into the Growers' Proceeds Account, deductions that may be made from the Growers' Proceeds Account and distribution to the Growers from the Growers' Proceeds Account (clause 26).

Allotment Sublease Agreement

27. AIL as Responsible Entity and Sandhurst Trustees Ltd in its capacity as custodian of the Project, will grant to each Grower through an Allotment Sublease Agreement, rights over a specific and identifiable area of 0.25 hectares or more of land for the purposes of horticultural activities.

28. The Allotment Sublease Agreement may only commence after minimum subscription has been met and the Grower's application accepted. The Sublease will continue until the termination of the Project, being 22 years after the date the Allotment Sublease commences (clause 3.2).

29. Pursuant to clauses 2.1 and 4.1 of the Allotment Sublease Agreement, the Project Custodian on behalf of the Responsible Entity grants to the Grower and the Grower takes a Sublease of an Allotment for the term of the agreement for the purpose of growing, maintaining and harvesting the Trees and to take away the crop of almonds harvested from the Trees.

30. Under Clause 2.2 of the Allotment Sublease the Grower has the right to use the Irrigation System and the Water Licences for the term of the sublease.

31. Clause 8 stipulates the fees and charges payable by the Grower. Pursuant to clause 8.1 the Grower will pay annual rent for the Sublease of the Grower's Allotment, the Trees, the rights to use the Water Licences and Irrigation System.

Allotment Management Agreement

32. The Allotment Management Agreement sets out the terms and conditions of AIL's appointment as an independent contractor, by the Grower, to manage the Allotment on the terms set out in this Agreement (clause 2). The Project will continue until the termination of the Project being 22 years from the Commencement Date (clause 3). The services to be carried out are outlined below.

First financial year services

33. The Responsible Entity will maintain, supervise and manage on behalf of each Grower in accordance with good commercial practice all commercial horticultural activities to be carried on by each Grower on the relevant Allotment. The services to be performed are outlined in Part 1 of Schedule 3 and include:

- arrange for an independent review to ensure that the Grower's trees have had the required services provided to an appropriate standard and identified and destroyed or rejected any Trees which a reasonable horticulturalist would destroy or reject;
- undertake appropriate land care measures preventing and limiting land degradation;
- keep, as far as reasonably possible and necessary, the Grower's Allotment free from competitive weeds or other vegetation which may affect any future growth or present any immediate fire hazard;
- comply with all laws and regulations relating to the use and occupancy of the Grower's Allotment and the actions being carried out on the Grower's Allotment; and
- maintain boundary fencing and firebreaks if applicable.
- arrange appropriate insurance for the Orchard including the Grower's Allotment;
- confirm that control measures relating to pest and weed control, fertilisation as necessary for maintenance of the Allotment during the Initial Period prior to preparation for planting are adhered to;
- review and supervise the Contractor's preparation of horticultural plans, program and annual budget;
- ensure that accurate records are maintained with respect to Growers allotments; and

- report as necessary advising the current status of the orchard.

Second and subsequent financial years

34. In the second and subsequent financial years, the Responsible Entity must provide the services outlined in Part 2 of Schedule 3 of the Agreement. These services include:

- keep the Grower's Allotment free from competitive weeds or other vegetation which may affect the growth or yield of the Trees;
- maintain the Grower's Allotment in accordance with good horticultural practice;
- monitor and review the irrigation, drainage and water management plan with a view to ensuring there is adequate water supplied to the Grower's Allotment and the Grower's Allotment has adequate drainage;
- apply suitable irrigation, fertilisation and nutrients to the Trees;
- prune the Trees at least once each calendar year;
- destroy any Trees which a reasonable horticulturalist would destroy having regard to the best interests of the remaining unaffected Trees;
- eradicate, as far as reasonably possible, any insects, pests or diseases which may affect the growth or yield of the Trees;
- keep proper and accurate records of fertilisers and nutrients applied to the Growers Allotment or Trees;
- test the maturity of a sample of almonds at the appropriate time estimated by the Responsible Entity to determine whether the Trees are ready for harvesting;
- harvest the Trees on the Grower's Allotment at or around the time estimated by the Responsible Entity to maximise the return of produce from all of the Grower's Allotments established at or around the same time as the Grower's Allotment;
- transfer harvested almonds to processing facilities; and
- carry out processing duties as described in Part 3 to Schedule 3 of the agreement.

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35. Under clause 4.4 of the Agreement the Grower may engage the Responsible Entity to market and sell the almonds harvested from the Grower's Allotment. Where the Grower engages the Responsible Entity to market and sell the Almonds attributable to the Grower's Allotment, the Responsible Entity may in its discretion aggregate these almonds together with the almonds of other Growers' Allotments. This ruling does not apply to a Grower who elects to take their own almonds (see paragraph 44).

36. The proceeds from the sale of almonds will be paid to the Responsible Entity of the Grower project for crediting to the Grower's Proceeds Account on a proportional basis. Where the produce from a Grower's Allotment is partially or totally destroyed or the level of production is otherwise reduced or inadequate compared to other Grower's Allotment then the Responsible Entity must adjust the Grower's share of the sale proceeds.

37. The Grower authorises the Responsible Entity to apply from the Grower's Proceeds Account all fees payable under the Grower's Allotment Management Agreement, as well as other amounts payable by the Grower under the Project Constitution, and the Grower's Allotment Sublease Agreement. Any surplus for each Grower after all deductions are made, must be distributed to the Grower.

38. Where there is an event which only affects some Growers' Allotments, and insurance proceeds are paid to compensate for the loss incurred by those Growers, the insurance proceeds are divided between those Growers only and according to the proportion of Growers' Allotments affected.

39. The Responsible Entity must insure from its own funds, the Grower, the Custodian, itself and such other persons it deems necessary against public risk liability and against the ordinary and insurable risks associated with the use of the Grower's Allotment. The Responsible Entity may also take out insurance against ordinary and insurable risks associated with the storage and transport of Almonds attributable to the Grower's Allotment (clause 7).

40. Clause 7.2 allows for a Grower to take out additional insurance over the Grower's Allotment, the Trees or the Almonds attributable to the Grower's Allotment. Any such insurance will be at the Grower's own cost.

Grower Fees

41. Pursuant to Schedule 4 of the Allotment Management Agreement, and Schedule 3 of the Allotment Sublease Agreement a Grower will make the following payments as required per Allotment:

- \$2,750 for Growing and Management fees in respect of services to be provided from the Commencement Date to the next 30 June payable on application;
- \$2,750 for Growing and Management fees in respect of the services provided in the second financial year being the next 1 July to the next 30 June payable 1 November of the same financial year;
- \$1,320 for rent in respect to the second financial year for the period next 1 July to the next 30 June, payable on 1 November of the same financial year;
- \$3,250 for Growing and Management fees in respect of the services to be provided in the third financial year being the next 1 July to the next 30 June, payable on 1 November of the same financial year;
- \$1,327 for rent in respect to the third financial year for the period next 1 July to the next 30 June, payable on 1 November of the same financial year;
- the Growing fees in respect for the Financial Year ending three years after the first financial year and each subsequent year until the end of the Project will be determined in accordance with the management plan prepared by the Manager and agreed by the Responsible Entity, pursuant to the Orchard Management Agreement for the relevant year;
- the Management fee of \$220 per Allotment for the three years immediately succeeding the third financial year and then for each subsequent year until the end of the Project will be 5.5% of the Gross Proceeds of the sale of the Almonds attributable to the Grower's Allotment in respect of that year;
- the lease fees in respect for the Financial Year ending three years after the first financial year and each subsequent year until the end of the Project will be as set out in Schedule 3 of the Allotment Sublease;

- a processing and marketing fee for each kilogram of processed Almonds attributable to the Grower's Allotment in respect of that Production Period. A further drying fee may be required depending on the moisture content of the almond after the shelling process; and
- a Grower will pay an incentive fee equal to 22% of so much of the annual Net Proceeds payable to the Grower in a Financial Year in excess of the annual Net Proceeds estimated in the Product Disclosure Statement.

Finance

42. Growers can fund their involvement in the Project themselves or borrow from an independent lender. However, the deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or 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.

43. This Ruling does not apply if the finance arrangement entered into by the Grower 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

Application of this Ruling

44. This Ruling applies only to Growers who:
- are accepted to participate in the Project;
 - have executed an Allotment Management and Allotment Sublease Agreement on or before 15 June 2004 (2004 Growers) or between 1 July 2004 and 30 September 2004 (2005 Growers); and
 - do not elect to take their own almonds.

The Grower's participation in the Project must constitute the carrying on of a business of primary production.

Minimum subscription

45. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of Product Disclosure Statement a Grower's application will not be accepted and the Project will not commence until the minimum subscription of 300 interests is achieved.

The Simplified Tax System ('STS')

Division 328

46. For a Grower participating in the Project, the recognition of income and the timing of tax deductions, including those related to capital allowances, is different depending on whether the Grower is an 'STS taxpayer'. To be an 'STS taxpayer' a Grower:

- must be eligible to be an 'STS taxpayer'; and
- must have elected to be an 'STS taxpayer'.

Qualification

47. This Product Ruling assumes that a Grower who is an 'STS taxpayer' is so for the income year in which their participation in the Project commences. A Grower may become an 'STS taxpayer' at a later point in time. Also, a Grower who is an 'STS taxpayer' may choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer', during the term of the Project. These are contingencies relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

Tax outcomes for Growers who are not 'STS taxpayers'**Assessable Income*****Section 6-5***

48. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

49. The Grower recognises ordinary income from carrying on the business of growing almonds for processing and sale at the time that income is derived.

Trading stock***Section 70-35***

50. During the term of the Project a Grower who is not an 'STS taxpayer' may, in some years, hold almonds that will constitute trading stock on hand. Where, in an income year, the value of trading stock on hand at the *end* of an income year exceeds the value of trading stock on hand at the *start* of an income year a Grower must include the amount of that excess in assessable income.

51. Alternatively, where the value of trading stock on hand at the *start* of an income year exceeds the value of trading stock on hand at the *end* of an income year, a Grower may claim the amount of that excess as an allowable deduction.

52. During each year of the Project, AIL will provide the Grower with sufficient information to enable the Grower to determine the value of trading stock on hand at the end of the relevant income year.

Deductions for Growing fees, Management fees, Land and Asset Rent and Landcare operations***Section 8-1***

53. A Grower who is not an 'STS taxpayer' may claim tax deductions for the revenue expenses shown in the following Table.

Division 40

54. A Grower who is not an 'STS taxpayer' will also be entitled to tax deductions relating to a 'landcare operation'. The deduction shown in the following table for Landcare Operations is determined under Division 40.

2004 Growers

Fee Type	ITAA 1997 Section	Year ended 30 June 2004	Year ended 30 June 2005	Year ended 30 June 2006
Growing and Management fee	8-1	\$2,541 – See Notes (i) & (ii)	\$2,750 – See Notes (i) & (ii)	\$3,250 – See Notes (i) & (ii)
Land and Asset Rent	8-1	Nil	\$1,320 – See Notes (i) & (ii)	\$1,327 – See Notes (i) & (ii)
Landcare operations	40-630	\$209 – See Notes (i) and (iii)		

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (e.g. input tax credits): Division 27. See Example at paragraph 113.
- (ii) The Growing and Management fee, and the Land and Asset Rent, shown in the Allotment Management Agreement and the Allotment Sublease Agreement are deductible in full in the year that they are incurred. However, if a Grower **chooses** to prepay fees for the doing of a thing (e.g. the provision of growing and management services or the sub-leasing of land) that will not be wholly done in the income year the fees are incurred, the prepayment rules of the ITAA 1936 may apply to apportion those fees. In such cases, the tax deduction for the prepaid fee must be determined using the formula shown in paragraph 95 unless the expenditure is 'excluded expenditure'. 'Excluded expenditure' is an 'exception' to the prepayment rules and is deductible in full in the year in which it is incurred. For the purpose of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000.

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- (iii) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630.

2005 Growers

Fee Type	ITAA 1997 Section	Year Ended 30 June 2004	Year ended 30 June 2005	Year ended 30 June 2006
Growing and Management fee	8-1	Nil	\$2,541 – See Notes (i) & (ii)	\$2,750 – See Notes (i) & (ii)
Land and Asset Rent	8-1	Nil	Nil	\$1,320 – See Notes (i) & (ii)
Landcare operations	40-630	Nil	\$209 – See Notes (i) & (iii)	

Tax outcomes for Growers who are 'STS taxpayers'**Assessable Income*****Section 6-5 and section 328-105***

55. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

56. The Grower recognises ordinary income from carrying on the business of growing almonds for processing and sale at the time the income is received (paragraph 328-105(1)(a)).

Treatment of trading stock***Section 328-285***

57. During the term of the Project a Grower who is an 'STS taxpayer' may, in some years, hold almonds that will constitute trading stock on hand. Where in an income year, the difference between the value of all trading stock at the start and a reasonable estimate of it at the end, is less than \$5,000, they do not have to account for that difference under the ordinary trading stock rules in Division 70 (subsection 328-285(1)).

58. Alternatively, a Grower who is an 'STS taxpayer' may instead choose to account for trading stock in an income year under the provisions of Division 70 (subsection 328-285(2)).

59. During each year of the Project AIL will provide the Grower with sufficient information to enable the Grower to determine the value of trading stock on hand at the end of the relevant income year.

Deductions for Growing fees, Management fees, Land and Asset Rent and Landcare operations

Section 8-1 and section 328-105

60. A Grower who is an 'STS taxpayer' may claim tax deductions for the revenue expenses shown in the following Table.

Subdivision 328-D and Subdivision 40-G

61. A Grower who is an 'STS taxpayer' will also be entitled to a tax deduction in relation to a 'landcare operation'. An 'STS taxpayer' may claim a deduction in relation to a 'landcare operation' under Subdivision 40-G. If the 'landcare operation' expenditure is on a depreciating asset used to carry on the business, they may choose to claim deductions under Division 328.

62. The deduction shown for landcare operations in the following Table assume, for representative purposes only, that a Grower has chosen to or can only claim deductions for expenditure on a 'landcare operation' under Subdivision 40-G and not under Division 328. If the expenditure has been incurred on 'depreciating assets' and is claimed under Division 328, the deduction is determined as discussed in Note (vii) below.

2004 Growers

Fee Type	ITAA 1997 Sections	Year ended 30 June 2004	Year ended 30 June 2005	Year ended 30 June 2006
Growing and Management fee	8-1 & 328-105	\$2,541 – See Notes (iv), (v) & (vi)	\$2,750 – See Notes (iv), (v) & (vi)	\$3,250 – See Notes (iv), (v) & (vi)
Land and Asset Rent	8-1 & 328-105	Nil	\$1,320 – See Notes (iv), (v) & (vi)	\$1,327 – See Notes (iv), (v) & (vi)
Landcare operations	40-630	\$209 – See Notes (iv) and (vii)		

Notes:

- (iv) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (e.g. input tax credits): Division 27. See Example at paragraph 113.

- (v) If, for any reason, an amount shown in the table above is not fully paid in the year in which it is incurred by a Grower who is an 'STS taxpayer' then the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower. Any amount or part of an amount shown in the table above which is not paid in the year in which it is incurred will be deductible in the year in which it is actually paid.
- (vi) Where a Grower who is an 'STS taxpayer', pays the Growing and Management fees and the Land and Asset Rent, in the relevant income years shown in the Allotment Management and the Allotment Sublease Agreement, those fees are deductible in full in the year that they are paid. However, if a Grower **chooses** to prepay fees for the doing of a thing (e.g. the provision of growing and management services or the sub-leasing of land) that will not be wholly done in the income year the fees are incurred, the prepayment rules of the ITAA may apply to apportion those fees. In such cases, the tax deduction for the prepaid fee must be determined using the formula shown in paragraph 95, unless the expenditure is 'excluded expenditure'. 'Excluded expenditure' is an 'exception' to the prepayment rules, and is deductible in full in the year in which it is incurred. For the purpose of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000.
- (vii) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630. If the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-G (although expenditure on some items of plant can only be deducted under Division 328). For the purposes of Division 328, each Grower's interest in the underlying asset is itself deemed to be a 'depreciating asset'. If the 'cost' apportionable to that deemed 'depreciating asset' is less than \$1,000, the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so, provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction allowable is determined by multiplying its 'cost' by half the relevant STS pool rate. At the end of the year, it is allocated to the relevant STS pool and in subsequent years, the full pool rate will apply. If the expenditure is not on a 'depreciating asset', the expenditure is fully deductible under Subdivision 40-G.

2005 Growers

Fee Type	ITAA 1997 Sections	Year ended 30 June 2004	Year ended 30 June 2005	Year ended 30 June 2006
Growing and Management fee	8-1 & 328-105	Nil	\$2,541 – See Notes (iv), (v) & (vi)	\$2,750 – See Notes (iv), (v) & (vi)
Land and Asset Rent	8-1 & 328-105	Nil	Nil	\$1,320 – See Notes (iv), (v) & (vi)
Landcare operations	40-630	Nil	\$209 – See Notes (iv) & (vii)	

Tax outcomes that apply to all Growers

63. The deductibility or otherwise 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. However all Growers who borrow funds in order to participate in the Project, should read the discussion of the prepayment rules in paragraphs 89 to 96 as those rules may be applicable if interest is prepaid. Subject to the ‘excluded expenditure’ exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower’s choice.

Deductions for capital expenditure***Division 40 - F***

64. A Grower will also be entitled to tax deductions relating to the Almond trees. The deductions shown in the following table are determined under Division 40:

Fee type	ITAA 1997 section	Year ended 30 June 2004	Year ended 30 June 2005	Year ended 30 June 2006
Establishment of horticultural plants	40-515	Nil	Nil	Nil – See Notes (viii) & (ix)

Notes:

- (viii) If the Grower is registered or required to be registered for GST, amounts of capital expenditure would need to be adjusted as relevant for GST (e.g. input tax credits): Division 27. See Example at paragraph 113;
- (ix) Almond trees are a 'horticultural plant' as defined in subsections 40-525 (2). As Growers hold the land under a Sublease, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plant' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the Almond trees is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. If the Trees have an 'effective life' of greater than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 7%. The deduction is allowable when the Almond trees enter their first commercial season (section 40-530, item 2). The Responsible Entity will inform Growers of when the Almond trees enter their first commercial season.

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

65. A Grower who is an individual accepted into the Project may have losses arising from their participation in the Project deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for 2004 Growers for the income years ending 30 June 2004 to 30 June 2008, and from 30 June 2005 to 30 June 2008 for 2005 Growers. This conditional exercise of the discretion will allow those losses to be offset against the Growers other assessable income in the income year in which the losses arise.

Sections 82KZME – 82KZMF, 82KL, and Part IVA

66. For a Grower who participates in the Project and incurs expenditure as required by the Allotment Management Agreement and the Allotment Sublease Agreement the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME-82KZMF (but see paragraphs 95 to 103);
- section 82KL does not apply to deny the deductions otherwise allowable; and

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

Explanation

Is the Grower carrying on a business?

67. For the amounts set out in the tables above to constitute allowable deductions, the Grower's almond orchard activities as a participant in the 2004 Swan Hill Almond Grower Project must amount to the carrying on of a business of primary production. These almond orchard activities will fall within the definitions of 'horticulture' and 'commercial horticulture' in section 40-535 of the ITAA 1997.

68. For schemes such as that of the 2004 Swan Hill Almond Grower Project, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As Taxation Ruling TR 2000/8 sets out, these circumstances have been established in court decisions such as *FCT v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

69. Generally, a Grower will be carrying on a business of growing almonds for processing and sale, and hence primary production, if:

- the Grower has an identifiable interest in the land on which the Grower's Trees are established;
- the Grower has a right to harvest and sell the almonds each year from those Trees;
- the almond orchard activities are carried out on the Grower's behalf;
- the almond orchard activities of the Grower are typical of those associated with an almond orchard business; and
- the weight and influence of general indicators point to the carrying on of a business.

70. In this Project, each Grower enters into an Allotment Management Agreement and an Allotment Sublease Agreement.

71. Under the Allotment Sublease Agreement each individual Grower will have rights over a specific and identifiable area of 0.25 hectares or more of land. The Allotment Sublease Agreement provides the Grower with an ongoing interest in the specific Trees on the Subleased area for the term of the Project. Under the Sublease the Grower must use the land in question for the purpose of carrying out almond orchard activities and for no other purpose. The Sublease allows the Responsible Entity to come onto the land to carry out its obligations under the Allotment Management Agreement.
72. Under the Allotment Management Agreement the Responsible Entity is engaged by the Grower to manage and maintain an Allotment on the Grower's identifiable area of land during the term of the Project. The Responsible Entity will subcontract the management services to the Manager, under the Orchard Management Agreement.
73. The Grower engages the Responsible Entity to maintain the Trees on the Allotment according to the principles of sound horticulture practice which includes irrigation, fertilisation and weed control. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the almonds grown on the Grower's Allotment.
74. 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 Project's description for all the indicators.
75. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of its almonds that will return a before-tax profit, i.e. a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.
76. The pooling of almonds grown on the Grower's Allotment with the almonds of other Growers is consistent with general horticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled almonds will reflect the proportion of the Almonds contributed from their Allotment.
77. The Responsible Entity's services on the Grower's behalf are also consistent with general horticultural practices. The assets are of the type ordinarily used in carrying on a business of horticultural. While the size of an Allotment is relatively small, it is of a size and scale to allow it to be commercially viable. (see Taxation Ruling IT 360).

78. The Grower's degree of control over the Responsible Entity as evidenced by the Allotment Management Agreement, and supplemented by the Corporations Act, is sufficient. During the term of the Project, the Responsible Entity will provide the Grower with regular progress reports on the Grower's Allotment and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Responsible Entity in certain instances, such as cases of default or neglect.

79. The horticultural 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. For the purposes of this Ruling, the Growers' horticultural activities in the 2004 Swan Hill Almond Grower Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

80. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

81. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductibility of Growing fees, Management fees and Land and Asset Rent

Section 8-1

82. Consideration of whether the Growing and Management fees and Land and Asset Rent 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 is contractually committed 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.

83. The Growing and Management fees and Land and Asset Rent associated with the horticultural activities will relate to the gaining of income from the Grower's business of horticulture (see above) after the relevant Agreements have been executed, and hence have a sufficient connection to the operations by which income (from the regular sale of almonds) is to be gained from this business. They will thus be deductible under the first limb of section 8-1, except from \$209 which has been identified as being for landcare operations. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. There is no capital component of the Growing and Management fee, other than that identified for landcare operations. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Possible application of prepayment provisions

84. Under the Allotment Management Agreement and the Allotment Sublease Agreement neither the Growing and Management fees nor the Land and Asset Rent are for things to be done beyond 30 June in the year in which the relevant amounts are incurred. In these circumstances, the prepayment provisions in sections 82KZME and 82KZMF have no application to these fees.

85. However, where a Grower chooses to prepay these fees for a period beyond the income year in which the expenditure is incurred, the prepayment provisions (see paragraphs 95 to 103) will apply to determine the amount and timing of the deductions regardless of whether the Grower is an 'STS taxpayer' or not. These provisions apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF. This is subject to the 'excluded expenditure' exception. For the purpose of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000.

Timing of deductions

86. In the absence of any application of the prepayment provisions, the timing of deductions for the management fees or the Rent will depend upon whether a Grower is an 'STS taxpayer' or is not an 'STS taxpayer'.

87. If the Grower is not an 'STS taxpayer', Growing and Management fees and Land and Asset Rent are deductible in the year in which they are incurred.

88. If the Grower is an 'STS taxpayer' the Growing and Management fees and Land and Asset Rent are deductible in the income year in which they are paid, or are paid for the Grower (paragraph 328-105(1)(b)). If any amount that is properly incurred in an income year remains unpaid at the end of that income year, the unpaid amount is deductible in the income year in which it is actually paid or is paid for the Grower.

Prepayment provisions*Sections 82KZL to 82KZMF*

89. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. 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 Growing and Management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

90. For this Project only section 82KZL (an interpretative provision) and sections 82KZME and 82KZMF are relevant. Where the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for prepaid expenditure under section 82KZMF using the formula in subsection 82KZMF(1). These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF.

Sections 82KZME and 82KZMF

91. Where the requirements of subsections 82KZME(2) and (3) are met, the formula in subsection 82KZMF(1) (see below) will apply to apportion expenditure that is otherwise deductible under section 8-1 of the ITAA 1997. The requirements of subsection 82KZME(2) will be met if expenditure is incurred by a taxpayer in return for the doing of a thing that is not to be wholly done within the year the expenditure is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1)).

92. The requirements of subsection 82KZME(3) will be met where the agreement (or arrangement) has the following characteristics:

- the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year; and
- the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the arrangement are managed by someone other than the taxpayer; and
- either :
 - (a) there is more than one participant in the agreement in the same capacity as the taxpayer; or
 - (b) the person who promotes, arranges or manages the agreement (or an associate of that person) promotes similar agreements for other taxpayers.

93. For the purpose of these provisions, the agreement includes all activities that relate to the agreement (subsection 82KZME(4)). This has particular relevance for a Grower in this Project who, in order to participate in the Project may borrow funds from a financier. Although undertaken with an unrelated party, that financing would be an element of the arrangement. The funds borrowed and the interest deduction are directly related to the activities under the arrangement. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF.

94. There are a number of exceptions to these rules, but for Growers participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1). However, for the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the arrangement that is less than \$1,000. Such expenditure is immediately deductible.

95. Where the requirements of section 82KZME are met, section 82KZMF applies to apportion relevant prepaid expenditure. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

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

96. In the formula 'eligible service period' (defined in subsection 82KZL(1)) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

Application of the prepayment provisions to this Project

97. In this Project, an initial Growing and Management fee of \$2,750 consisting of \$2541 for management services and \$209 for landcare operation will be incurred. The Growing and Management fee and Land and Asset Rent are charged for providing management services or licensing land to a Grower by 30 June of the year of execution of the Agreements. Under the Agreements, further annual expenditure is required each year during the term of the Project for the provision of management services and land until 30 June in those years.

98. In particular, the Growing and Management fee are expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the description of the arrangement that the initial management fee has been inflated to result in reduced fees being payable for Growing and Management fees in subsequent years.

99. There is also no evidence that might suggest the management services covered by the fee could not be provided within the relevant expenditure year. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial management fee, and the fees for subsequent years, is for the Responsible Entity doing 'things' that are not to be wholly done within the expenditure year. Under the Allotment Sublease Agreement, Land and Asset Rents are payable annually in advance for the Sublease of the land during the expenditure year.

100. On this basis, provided a Grower incurs expenditure as required under the Project agreements, as set out in paragraph 41, then the basic precondition in subsection 82KZME(2) is not satisfied and, in these circumstances, section 82KZMF will have no application.

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

101. Although not required under either the Allotment Management Agreement, the Allotment Sublease Agreement, or a Loan Agreement, a Grower participating in the Project may **choose** to prepay fees/interest for a period beyond the 'expenditure year'. Similarly, Growers who use financiers may either choose, or be required to prepay interest. Where this occurs, contrary to the conclusion reached in paragraph 100 above, section 82KZMF will apply to apportion the expenditure and allow a deduction over the period in which the prepaid benefits are provided.

102. For these Growers, the amount and timing of deductions for any relevant prepaid Growing and Management Fees, prepaid Land and Asset Rent or prepaid interest will depend upon when the respective amounts are incurred and what the 'eligible service period' is in relation to these amounts.

103. However, as noted, above, prepaid fees of less than \$1,000 incurred in an expenditure year will be 'excluded expenditure' and will be subject to apportionment under section 82KZMF.

Expenditure of a capital nature

Division 40 and Division 328

104. Any part of the expenditure of a Grower 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, expenditure attributable to the establishment of the horticultural plant and 'landcare operations' is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328 of the ITAA 1997.

105. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is an 'STS taxpayer'.

106. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 54, 62 and 64 (above) in the tables and the accompanying Notes.

Division 35 - Deferral of losses from non-commercial business activities***Section 35-55 – Exercise of Commissioner’s discretion***

107. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for **2004 Growers** for the income years **30 June 2004 to 30 June 2008** and for the **2005 Growers** for the income years **30 June 2005 to 30 June 2008** the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 *Income tax: Division 35 – non commercial business losses*. Accordingly, based on the evidence supplied, the Commissioner has determined that for the 2004 Growers those income years ended 30 June 2004 up to and including 30 June 2008 and for the 2005 Growers those income years ended 30 June 2005 up to and including 30 June 2008:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35;
- there is an objective expectation that within a period that is commercially viable for the Almond industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit; and
- a Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

108. The exercise of the Commissioner’s discretion under paragraph 35-55(1)(b) is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Section 82KL - recouped expenditure

109. 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

110. 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).

111. The 2004 Swan Hill Almond Grower 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 48 to 64 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.

112. 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 their almonds. 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 at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Example

Entitlement to GST input tax credits

113. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her viticulture business. Her manager is registered for GST and charges her a management fee payable every six months in advance. On 1 December 2003 Susan receives a valid tax invoice from her manager requesting payment of a management fee in advance, and also requesting payment for an improvement in the connection of electricity for her vineyard that she contracted him to carry out. The tax invoice includes the following details:

Management fee for period 1/1/2004 to 30/6/2004	\$4,400*
Carrying out of upgrade of power for your vineyard as quoted	<u>\$2,200*</u>
Total due and payable by 1 January 2004 (includes GST of \$600)	<u>\$6,600</u>

*Taxable supply

Susan pays the invoice by the due date and calculates her input tax credit on the management fee (to be claimed through her Business Activity Statement) as:

$$1/11 \times \$4,400 = \$400.$$

Hence her outgoing for the management fee is effectively \$4,400 *less* \$400, or \$4,000.

Similarly, Susan calculates her input tax credit on the connection of electricity as:

$$1/11 \times \$2200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2,200 *less* \$200, or \$2000.

In preparing her income tax return for the year ended 30 June 2004, Susan is aware that the management fee is deductible in the year incurred. She calculates her management fee deduction as \$4,000 (not \$4,400).

Susan is aware that the electricity upgrade is deductible 10% per year over a 10 year period. She calculates her deduction for the power upgrade as \$200 (one tenth of \$2,000 only, not one tenth of \$2,200).

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Related Rulings/Determinations:

TR 92/1; TR 92/20; TD 93/34;
TR 97/11; TR 97/16; TR 98/22;
TR 2000/8; TR 2001/14 PR 1999/95;
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Subject references:

- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fee expenses
- management fees
- non commercial losses
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- taxation administration
- tax avoidance

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