



PR 2005/29 - Income tax: 2005 Swan Hill Almond Grower Project - 2006 Growers

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 This document has changed over time. This is a consolidated version of the ruling which was published on *16 March 2005*



Product Ruling

Income tax: 2005 Swan Hill Almond Grower Project – 2006 Growers

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Potential participants may wish to refer to the Tax Office website at www.ato.gov.au or contact the Tax Office directly to confirm the currency of this Product Ruling or any other Product Ruling that the Tax Office has issued.

Preamble

*The number, subject heading, **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Previous Rulings**, **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 Tax Office **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.

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 and how the product fits an existing portfolio. 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 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, 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 Tax Office 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 2005 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 of the ITAA 1997;
- section 17-5 of the ITAA 1997;
- section 25-25 of the ITAA 1997;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Division 40 of the ITAA 1997;
- Part 3-1 of the ITAA 1997;
- Division 328 of the ITAA 1997;
- section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 82KZL of the ITAA 1936;
- section 82KZME of the ITAA 1936;
- section 82KZMF of the ITAA 1936;
- Division 6 of Part III of the ITAA 1936; and
- Part IVA of the 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 (that is, 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 48).

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 16 March 2005, 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 2008. 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 2005 Swan Hill Almond Grower Project as constituted by documents dated 30 September 2004, 13 and 18 October 2004, 18, 22, 23, 26 November 2004, 24 January 2005, 3, 11, 17 and 23 February 2005 and 1 March 2005 and correspondence and emails dated 18, 22, 23 and 26 November 2004, 24 January 2005, 3, 14, 18, 24 and 28 February 2005 and 1 March 2005;
- Draft **Product Disclosure Statements** for the 2005 Swan Hill Almond Grower Project, received 1 March 2005;
- Draft **Constitution** of the 2005 Swan Hill Almond Grower Project, between Almond Investors Limited ('AIL') and each Grower received 1 March 2005;
- Draft **Constitution** of the 2005 Swan Hill Almond Orchard Asset Trust ('the Trust'), received 30 November 2004;
- Lease Agreement between Sandhurst Trustees Limited in its capacity as custodian of the 2005 Swan Hill Almond Orchard Asset Trust ('Custodian Lessor') and in its capacity as Custodian of the 2005 Swan Hill Almond Grower Project ('Custodian Lessee') and AIL as Responsible Entity of the 2005 Swan Hill Almond Orchard Asset Trust ('Lessor') and as Responsible Entity of the 2005 Swan Hill Almond Grower Project ('Lessee'), received 30 November 2004 ('Head Lease');
- **Allotment Sublease Agreement** between AIL, Sandhurst Trustees Limited as custodian of the 2005 Swan Hill Almond Grower Project ('Project Custodian') and each Grower, received 1 March 2005;
- **Allotment Management Agreement** between AIL ('Responsible Entity') of the 2005 Swan Hill Almond Grower Project and each Grower, received 1 March 2005;
- Orchard Management Agreement between RMONPRO Developments Pty Ltd ('the Manager') and AIL ('Responsible Entity') of the 2005 Swan Hill Almond Grower Project received 30 November 2004;
- Draft Custody Agreement between AIL as ('Responsible Entity') for the 2005 Swan Hill Almond Grower Project and Sandhurst Trustees Limited as custodian of the 2005 Swan Hill Almond Grower Project ('the Custodian'), received 30 November 2004; and

- Draft Almond Crop Supply Agreement between Almondco Australia Limited and AIL ('Responsible Entity') of the 2005 Almond Swan Hill Almond Project, received 30 November 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 2005 Swan Hill Almond Grower Project and is summarised below.

Location	Swan Hill, Victoria
Type of business each Grower will be carrying on	Cultivating almond 'Trees' on their designated 0.25 hectare 'Allotments' and harvesting the 'Almonds' for processing and sale.
Area available for cultivation	Up to 200 hectares, divided into 'Allotments' of 0.25 hectares each.
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	\$1,630 for 'Growing and Management Fees' and \$5,400 for 'Irrigation Charge', payable on application, or not later than 15 June 2006.
Ongoing fees and other Grower costs	'Growing and Management Fees', 'Land and Asset Rent', Growing, Processing, marketing and drying fees. Incentive fees; and Optional insurance costs.

18. AIL has registered the 2005 Swan Hill Grower Project (the Project) and the 2005 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. The land on which the Project will be conducted is in Swan Hill, Victoria.

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

22. 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

23. The Project Constitution operates as a deed and is binding on all Growers and AIL. It sets out the legal obligations of the parties and the rights and powers of each.

24. In summary, the Constitution also sets out provisions relating to:

- 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' (meaning the application money set out in Schedule 3) by AIL on trust for the Applicant (clauses 6 and 7);
- preparation and execution of the Allotment Sublease Agreement and Allotment Management Agreement by AIL (clause 7.6);
- conditions which must be satisfied before money paid by an Applicant into the Growers' Application Fund can be transferred to AIL (clause 8);

- an Applicant's Interest in the Application Fund (clause 9);
- the appointment of a Custodian to hold Project Assets on behalf of the Growers which must be held separately from the assets of AIL and any other managed investment scheme (clause 12);
- maintenance of an up-to-date register of Growers' details which AIL must permit the Grower to inspect or to obtain a copy of (clause 13);
- 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); and
- termination of the Project (clause 29).

Allotment Sublease Agreement

25. 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.

26. The Allotment Sublease Agreement commences on the later of the date the Grower's Application's acceptance and the date the Head Lease commences. The Sublease will continue until the termination of the Project, being 22 years after the date the Allotment Sublease Agreement commences (clause 3.2).

27. Pursuant to clauses 2.1 and 4.1 of the Allotment Sublease Agreement, the Project Custodian on behalf of AIL 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.

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

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

Allotment Management Agreement

30. 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).

31. In accordance with good commercial practice AIL will maintain, supervise and manage on behalf of each Grower all commercial horticultural activities to be carried out on the relevant 'Allotment'. The services to be performed are outlined in Part 1 of Schedule 3.

32. In the second and subsequent financial years, AIL must provide the services outlined in Part 2 of Schedule 3 of the Agreement.

33. Under clause 4.4 of the Agreement the Grower may engage AIL to market and sell the 'Almonds' harvested from the Grower's 'Allotment'. Where the Grower engages AIL to market and sell the 'Almonds' attributable to the Grower's 'Allotment', AIL 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 48).

34. Where the produce from a Grower's 'Allotment' is partially or totally destroyed or the level of production is otherwise reduced or is inadequate compared to other Growers' 'Allotments' then AIL must adjust the Grower's share of the sale proceeds.

35. The Grower acknowledges that AIL may call for a first and paramount lien in respect of the 'Almonds' attributable to the Grower's Allotment for any outstanding fees or expenses due and payable to AIL under this agreement. Any surplus for each Grower after all deductions are made must be distributed to the Grower.

36. 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.

37. AIL 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'. AIL 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).

38. Clause 7.2 allows 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.

Pooling of amounts and distribution of proceeds

39. Both the Constitution (clause 25) and the Allotment Management Agreement (clause 7.3) set out provisions relating to the pooling of amounts from the sale of the Growers' 'Almonds' and the distribution of proceeds from that sale or from insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed proceeds from the sale of 'Almonds', insurance or other proceeds to the pool making up the 'Growers' Proceeds Account' are entitled to benefit from distributions from the 'Growers' Proceeds Account'; and
- any pools of proceeds from the sale of 'Almonds' or other proceeds must consist only of proceeds from the sale of 'Almonds' or other proceeds contributed by Growers in the 2005 Swan Hill Almond Grower Project.

Grower fees

40. 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:

- \$1,630 for 'Growing and Management Fees' in respect of services to be provided from the Commencement Date to 30 June 2006 payable on application;
- \$5,400 as an Irrigation Charge. The fee is payable on application;
- \$3,407 for 'Growing and Management Fees' in respect of the services to be provided in the period from 1 July 2006 to 30 June 2007, payable 1 November 2006;
- \$794 for 'Land and Asset Rent' for the period from 1 July 2006 to 30 June 2007, payable on 1 November 2006;
- \$3,475 for 'Growing and Management Fees' in respect of the services to be provided in the period from 1 July 2007 to 30 June 2008, payable on 1 November 2007;
- \$863 for 'Land and Asset Rent' for the period from 1 July 2007 to 30 June 2008, payable on 1 November 2007;
- the 'Growing Fee' for the services to be provided in the period from 1 July 2008 to 30 June 2009 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 AIL, pursuant to the Orchard Management Agreement for the relevant year;

- 'Management Fee' of \$390 per 'Allotment' per financial year for the services to be provided in the period from 1 July 2008 to 30 June 2011;
- a 'Management Fee' for the services to be provided in the period from 1 July 2011 to 30 June 2012 and each subsequent year until the end of the Project. This will be 5% of the 'Gross Proceeds' of the sale of the 'Almonds' attributable to the Grower's 'Allotment' in respect of that year;
- \$1,148 for 'Land and Asset Rent' for the period from 1 July 2008 to 30 June 2009. The amount for each subsequent year until the end of the Project is set out in Schedule 3 of the Allotment Sublease Agreement;
- a processing and marketing fee for each kilogram of processed 'Almonds' attributable to the Grower's 'Allotment' in respect of that Production Period; and
- a Grower will pay an incentive fee equal to 20% 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

41. Participant Growers can fund their involvement in the Project by borrowing from independent sources or from AIL Finance Ltd ('the Financier'), a lender associated with the Responsible Entity.

42. The Financier will provide 'Growers' with loans on a full recourse basis and will pursue legal action against any defaulting borrowers. Details of the loans that will be offered to 'Growers' by the Financier are set out in the 'Finance Application Form' and 'Loan Deed'. These documents are summarised as follows.

43. All loans have the following features:

- an application fee of \$275 for loans equal to or less than \$100,000 or \$275 plus 0.5% of the borrowed sum for loans greater than \$100,000;
- a maximum term of 10 years;
- repayments monthly in arrears;
- a variable interest rate, set at a published market rate; and
- a Higher Variable Rate set out in Item 6 of the Schedule to the Loan Deed, if repayments are not made on the due date.

44. There are three types of loan to be offered:

- an **Interest Only Loan**;
- a **Principal and Interest Loan**; and
- a **Hybrid Loan** consisting of an Interest Only Loan with a term up to 5 years and a Principal and Interest Loan for the balance of the 10 year term.

45. This Product Ruling does not cover financing arrangements, other than those set out in paragraphs 41 to 44. Growers who enter into finance agreements not covered by this Product Ruling may request a private ruling on the deductibility or otherwise of interest incurred under the agreement.

46. Growers cannot rely on any part of this Product Ruling if their 'Contributions' (meaning the application money set out in Schedule 3 of the Constitution) otherwise remain unpaid by 15 June 2006. A Grower cannot rely on this Ruling if AIL accepts their application subject to finance approval by any lending institution, including AIL Finance Ltd, and written evidence of that approval has not been given to AIL by 15 June 2006.

47. 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, other than AIL Finance Ltd, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

48. This Ruling applies only to Growers who:

- are accepted to participate in the Project and have executed an Allotment Management Agreement and Allotment Sublease Agreement on or after the date of this Product Ruling and on or before 15 June 2006; 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. 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.

The Simplified Tax System ('STS')

Division 328

49. For a Grower participating in the Project, the recognition of income and the timing of tax deductions 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

50. 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.

Assessable income

Section 6-5 and section 328-105

51. 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.

52. A Grower who is not an 'STS taxpayer' recognises ordinary income from carrying on their business of horticulture at the time that income is derived.

53. A Grower who is an 'STS taxpayer' recognises ordinary income from carrying on their business of horticulture at the time that income is received (paragraph 328-105(1)(a)).

Deductions for the 'Growing and Management Fees' and the 'Land and Asset Rent'

Section 8-1 and section 328-105

54. A Grower may claim tax deductions under section 8-1 of the ITAA 1997, for the revenue expenses set out in the Table below.

Fee Type	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
'Growing and Management Fee'	\$1,630 – See Notes (i), (ii) & (iii)	\$3,407 – See Notes (i), (ii) & (iii)	\$3,475 – See Notes (i), (ii) & (iii)
'Land and Asset Rent'	Nil	\$794 – See Notes (i), (ii) & (iii)	\$863 – See Notes (i), (ii) & (iii)
Interest on loans with AIL Finance Ltd	As incurred – See Notes (iii) & (iv)	As incurred – See Notes (iii) & (iv)	As incurred – See Notes (iii) & (iv)
Loan Application Fee for loans with AIL Finance Ltd	Must be calculated – see Note (v)	Must be calculated – see Note (v)	Must be calculated – see Note (v)

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 (for example input tax credits): Division 27. See Example 1 at paragraph 100.
- (ii) The 'Growing and Management Fees' and the 'Land and Asset Rent' shown in the Allotment Management Agreement and the Sub-lease are deductible under section 8-1 in full in the year that they are incurred (where the Grower is not an 'STS taxpayer') or, under paragraph 328-105(1)(b) in the year in which they are paid (where the Grower is an 'STS taxpayer').

- (iii) This Ruling does not apply to Growers who choose to prepay fees for 'Management Services' or 'Land and Asset Rent', or who choose, or who are required to prepay interest under a loan agreement. Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 (see paragraphs 87 to 89). Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.
- (iv) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than AIL Finance Ltd is outside the scope of this Ruling. Growers who borrow from lenders other than AIL Finance Ltd may request a private ruling on the deductibility of the interest incurred.
- (v) The loan application fee payable to AIL Finance Ltd is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than AIL Finance is outside the scope of this Ruling.

Deductions for capital expenditure (Non-'STS taxpayers')

Division 40

55. A Grower who is not an 'STS taxpayer' will also be entitled to tax deductions relating to irrigation and the almond trees. All deductions shown in the following Table are determined under Division 40.

Fee Type	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Irrigation Fee	\$1,800 – see Notes (i) & (vi)	\$1,800 – see Notes (i) & (vi)	\$1,800 – see Notes (i) & (vi)
Establishment of horticultural plant	NIL See Notes (i) & (vii)	NIL See Notes (i) & (vii)	NIL See Notes (i) & (vii)

- (vi) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. A deduction is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one-third in each of the next 2 years of income (section 40-540).
- (vii) Each 'Grower' will also be entitled to tax deductions relating to the almond 'Trees' planted on the 'Allotment'. An almond tree is considered to be a 'horticultural plant' as defined in subsection 40-520(2). A 'Grower' holds a sub-lease to cultivate almond 'Trees' on a designated area of land called an 'Allotment' for the growing of 'Almonds' for commercial gain. As a 'Grower' holds the 'Allotment' under a sub-lease, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction is determined using the formula in section 40-545. Almond 'Trees' have an 'effective life' of greater than 13 years but fewer than 30 years and, for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the 'Almond Trees' enter their first commercial season (section 40-530, item 2). AIL will notify 'Growers' when their 'Almond Trees' enter their first commercial season and the amount that may be claimed.

Deductions for capital expenditure ('STS taxpayers')***Subdivision 328-D and Subdivision 40-F***

56. A Grower who is an 'STS Taxpayer' will also be entitled to tax deductions relating to irrigation and the establishment of horticultural plant. An 'STS taxpayer' may claim deductions in relation to water facilities under Subdivision 40-F. If the 'water facility' is on a 'depreciating asset' used to carry on the business, they may choose to claim deductions under Division 328. Deductions for the Almond 'Trees' must be determined under Subdivision 40-F.

57. The deductions shown in the following Table assume, for representative purposes only, that a Grower has either chosen to or can only claim deductions for expenditure on water facilities under Subdivision 40-F 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 (viii).

58. Under Division 328, if the 'cost' of a 'depreciating asset' at the end of the income year is less than \$1,000 (a 'low-cost asset'), it can be claimed as an immediate deduction when first used or 'installed 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.

Fee Type	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Irrigation Fee	\$1,800 – see Notes (i) & (viii)	\$1,800 – see Notes (i) & (viii)	\$1,800 – see Notes (i) & (viii)
Establishment of horticultural plant	NIL See Notes (i) & (ix)	NIL See Notes (i) & (ix)	NIL See Notes (i) & (ix)

- (viii) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. 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-F. For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. The Irrigation Fee is \$5,400. 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 in the year ended 30 June 2006 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', or if they choose to use Subdivision 40-F, Growers must claim deductions under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one-third in each of the next 2 years of income (section 40-540).

- (ix) Each 'Grower' will also be entitled to tax deductions relating to the almond 'Trees' planted on the 'Allotment'. An almond tree is considered to be a 'horticultural plant' as defined in subsection 40-520(2). A 'Grower' holds a sub-lease to cultivate almond 'Trees' on a designated area of land called an 'Allotment' for the growing of 'Almonds' for commercial gain. As a 'Grower' holds the 'Allotment' under a sub-lease, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction is determined using the formula in section 40-545. Almond 'Trees' have an 'effective life' of greater than 13 years but fewer than 30 years and, for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the 'Almond Trees' enter their first commercial season (section 40-530, item 2). AIL will notify 'Growers' when their 'Almond Trees' enter their first commercial season and the amount that may be claimed.

Units in the 'Trust'

Part 3-1 of the ITAA 1997 and Division 6 of Part III of the ITAA 1936

59. Growers may also acquire units in the 'Trust'. The Units are CGT assets (section 108-5 of the ITAA 1997) and the amounts payable for Units in the 'Trust' upon subscription constitute an outgoing of capital and are not allowable deductions.

60. The amounts paid for each Unit will represent the first element of the cost base of the unit (subsection 110-25(2) of the ITAA 1997). Any disposal of the Units by a Grower will be a CGT event and may give rise to a capital gain or loss.

61. Income distributions by the 'Trust' are included in the assessable income of a Grower who is a Unit holder, in accordance with Division 6 of Part III of the ITAA 1936.

Deferral of losses from non-commercial business activities

Section 35-55 – Commissioner's discretion

62. 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 the income years ending **30 June 2006 to 30 June 2009**. 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 and 82KL and Part IVA

63. 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 and 82KZMF (but see paragraphs 88 to 89;
- 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?**

64. For the amounts set out in the table above to constitute allowable deductions, the Grower's almond orchard activities as a participant in the 2005 Swan Hill Almond Grower Project must amount to the carrying on of a business of primary production.

65. For schemes such as that of the 2005 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.

66. 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.

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

68. 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 AIL to come onto the land to carry out its obligations under the Allotment Management Agreement.

69. Under the Allotment Management Agreement AIL 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. AIL will subcontract the management services to the Manager, under the Orchard Management Agreement.

70. The Grower engages AIL to maintain the 'Trees' on the 'Allotment' according to the principles of sound horticulture practice which includes irrigation, fertilisation and weed control. AIL is also engaged to harvest and sell, on the Grower's behalf, the 'Almonds' grown on the Grower's 'Allotment'.

71. 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.

72. 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, that is, a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

73. 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'.

74. AIL'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).

75. The Grower's degree of control over AIL as evidenced by the Allotment Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, AIL 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 AIL in certain instances, such as cases of default or neglect.

76. 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

77. 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.

78. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). 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 and Management Fees' and 'Land and Asset Rent'

Section 8-1

79. 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.

80. 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. 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 Fees' and 'Land and Asset Rent'. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Interest deductibility

Section 8-1

(i) 'Growers' who use AIL Finance Ltd as the finance provider

81. Some 'Growers' may finance their participation in the Project through a loan facility with AIL Finance Ltd. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of the 'Growing and Management Fees' under the Allotment Management Agreement and the 'Land and Asset Rent' under Allotment Sublease Agreement.

82. The interest incurred will be in respect of a loan to finance the 'Grower's' business operations – the cultivation and growing of 'Almonds' and the sub-lease of the land on which the 'Almond Trees' will have been planted – that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

(ii) 'Growers' who DO NOT use AIL Finance Ltd as the finance provider

83. The deductibility of interest incurred by 'Growers' who finance their participation in the Project through a loan facility with a bank or financier other than AIL Finance Ltd is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

Timing of deductions

84. In the absence of any application of the prepayment provisions, the timing of deductions for the 'Growing and Management Fees', 'Land and Asset Rent' and 'Interest' will depend upon whether a Grower is an 'STS taxpayer' or is not an 'STS taxpayer'.

85. 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.

86. 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

87. 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 (for example the performance of 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.

Application of the prepayment provisions to this Project

88. Under the Arrangement to which this Product Ruling applies 'Growing and Management Fees' and 'Land and Asset Rent' are incurred annually and relate only to the services provided in the year in which they are incurred. Interest payable to AIL Finance Ltd is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF have no application to this Arrangement.

89. However, sections 82KZME and 82KZMF may have relevance if a 'Grower' in this Project chooses to prepay all or some of the expenditure payable under the Allotment Management Agreement or chooses or is required to prepay interest under a loan agreement (including loan agreements with lenders other than AIL Finance Ltd). Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

90. As noted in the Ruling section above, 'Growers' who prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

Expenditure of a capital nature***Division 40 and Division 328***

91. 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 water facilities and the establishment of the horticultural plant is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328 of the ITAA 1997.

92. 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'.

93. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 55 and 58 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***

94. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2006 to 30 June 2009** 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 those income years ended 30 June 2006 up to and including 30 June 2009:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- 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.

Therefore, 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 for those income years.

95. 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

96. 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

97. 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).

98. The 2005 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 54, 55 and 58 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.

99. 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**

100. 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:

PR 2005/29

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:

$$\frac{1}{11} \times \$4,400 = \$400.$$

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:

$$\frac{1}{11} \times \$2,200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2,200 less \$200, or \$2,000.

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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Commissioner of Taxation

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- tax avoidance
- taxation administration

<p><i>Related Rulings/Determinations:</i> PR 1999/95; TR 92/1; TR 92/20; TR 97/11; TR 97/16; TR 98/22; TR 2000/8; TR 2001/14; TR 2002/6; TR 2002/11; TD 93/34; IT 360</p> <p><i>Subject References:</i> - 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</p>	<p><i>Legislative References:</i> - TAA 1953 Pt IVAAA - ITAA 1936 82KL - ITAA 1936 Pt III Div 3 Subdiv H - ITAA 1936 82KZL - ITAA 1936 82KZM - ITAA 1936 82KZMA - ITAA 1936 82KZMB - ITAA 1936 82KZMC - ITAA 1936 82KZMD - ITAA 1936 82KZME - ITAA 1936 82KZMF - ITAA 1936 Pt III Div 6 - ITAA 1936 Pt IVA - ITAA 1936 177A - ITAA 1936 177C - ITAA 1936 177D - ITAA 1936 177D(b) - ITAA 1997 6-5</p>
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- ITAA 1997 Subdiv 328-F
- ITAA 1997 Subdiv 328-G
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- Corporations Act 2001

Case References:

- FCT v. Lau (1984) 6 FCR 202;
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