



PR 2006/106 - Income tax: Mediterranean Olives Project 2006 (Growers not in Joint Venture)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *7 June 2006*



Product Ruling

Income tax: Mediterranean Olives Project 2006 (Growers not in Joint Venture)

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ⓘ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

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 scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document.

If the scheme 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 scheme 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 scheme has been implemented as described below and to ensure that the participants in the scheme 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 entity(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 Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Ruling this scheme is referred to as the Mediterranean Olives Project 2006 or simply as 'the Project'.

Relevant provision(s)

2. The relevant provision(s) 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 25-20 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;
- Subdivision 61-J of the ITAA 1997;
- Division 328 of the ITAA 1997;
- Division 328 of the *Income Tax (Transitional Provisions) Act 1997*;
- section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- sections 82KZME and 82KZMF of the ITAA 1936; and
- Part IVA of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Goods and Services Tax

3. All fees and expenditure referred to in this Ruling include the 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 laws 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 entities

7. The class of entities to which this Ruling applies consists of the entities more specifically identified in the Ruling part of this Product Ruling who enter into the scheme specified below on or after the date this Ruling is made. They will have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the scheme. In this Ruling, these entities are referred to as 'Growers'.

8. The class of entities to whom this Ruling applies does not include:

- entities who intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- entities who participate in the Project through offers made other than through the Product Disclosure Statement;
- entities who are accepted to participate in the Project after 15 June 2006;
- entities who enter into finance arrangements with Mediterranean Olives Financial Pty Ltd or United Pacific Finance Pty Ltd other than those described at paragraphs 45 to 52 of this Ruling; and
- 'Joint Venture Growers'. Entities who participate as 'Joint Venture Growers' should refer to Product Ruling PR 2006/105.

Qualifications

9. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 17 to 52 of this Ruling.

10. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

12. This Ruling applies prospectively from 7 June 2006, 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

13. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

16. This Product Ruling is withdrawn and ceases to have effect after 30 June 2008. The Ruling continues to apply, in respect of the relevant provisions ruled upon, to all entities within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, who entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entities' involvement in the scheme.

Scheme

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

- Application for a Product Ruling dated 1 March 2006 as constituted by documents provided on 31 March 2006 and additional correspondence from the applicant including letters dated 26 and 27 April 2006, 5, 22, 23, 24 and 29 May 2006;
- **Combined Financial Services Guide and Product Disclosure Statement** for the Mediterranean Olives Project 2006 issued by Mediterranean Olives Estate Limited (MOEL or the Responsible Entity), dated 18 April 2006;
- Draft **Supplementary Product Disclosure Statement**, undated, received on 24 May 2006;
- **Constitution** of the Mediterranean Olives Project dated 20 April 2005;
- Draft Deed of Variation of the **Constitution** of the Mediterranean Olives Project, undated, received on 2 March 2006;
- Draft Compliance Plan for the Mediterranean Olives Project, undated, received on 2 March 2006;
- Draft **Grove Lease 2006** between MOEL and the Grower, undated, received on 2 March 2006;
- Draft **Irrigation Lease and Licence Agreement 2006** between MOEL and the Grower, undated, received on 29 May 2006;

- Draft **Management Agreement 2006** between MOEL (Project Manager) and the Grower, undated, received on 24 May 2006;
- Draft **Loan Agreement 2006** between Mediterranean Olives Financial Pty Ltd (MOFPL) and the Grower, undated, received on 2 March 2006;
- Draft Finance Application and **Loan Agreement** which may be entered into by a Grower (the Borrower) and, if required, the Grower's Guarantor and United Pacific Finance Pty Ltd (UPF), undated, received on 2 March 2006;
- Draft Lease between the 'Land Owner' and MOEL, undated, received on 2 March 2006;
- Draft Principal Sub-Contractor Agreement 2006, undated, received on 2 March 2006;
- Draft Project Coordinator Agreement 2006, undated, received on 2 March 2006;
- Draft Principal Consultant Agreement 2006, undated, received on 2 March 2006;
- Draft Olive Oil Purchase Agreement 2006, undated, received on 2 March 2006;
- Draft Olive Oil Processing Agreement 2006, undated, received on 2 March 2006;
- Scheme Property Custody Agreement between MOEL and the Custodian, dated 9 March 2005; and
- Draft Agreement between MOEL and the Custodian, undated, received on 2 March 2006.

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

18. The documents highlighted are those that Growers may enter into or become a party to. A Loan Agreement will be executed where a Grower successfully applies for finance either from MOFPL or UPF. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are a part of the scheme. In this Ruling the term 'associate' has the meaning given by section 318 of the ITAA 1936.

19. All Australian Securities and Investment Commission requirements are, or will be, complied with for the term of the agreements.

Overview

20. The salient features of the Project are as follows:

Location	Serpentine, near Bendigo, central Victoria
Type of business to be carried on by each participant	Commercial growing and cultivation of olive trees for the purpose of producing extra virgin olive oil
Number of hectares offered for cultivation	30 hectares Oversubscriptions may be accepted
Size of each 'Grove Allotment'	One (1) hectare
Minimum subscription	None
Number of trees per hectare	250
Term of the Project	23 years
Initial cost per 'Grove Allotment'	'Application Amount' of \$16,555 which consists of \$16,500 management fee and \$55 irrigation lease fee
Other costs to Growers	Ongoing costs will be payable (refer to paragraphs 42 to 44 of this Ruling)

21. The Project is registered as a managed investment scheme under the *Corporations Act 2001*. MOEL has been issued with an Australian Financial Services Licence and will be the Responsible Entity for the Project.

22. The offer to participate in the Project must be made through an 'Application' in the form attached to the PDS. 'Applications' to participate in the Project must be accepted by the Responsible Entity and agreements executed on or before the 'Commencement Date', being the date on or before 15 June 2006.

23. There is no minimum amount that must be raised under the PDS and oversubscription may be accepted. A Custodian will be appointed under the Scheme Property Custody Agreement to protect the interests of Growers in their dealings with MOEL.

24. Under the Power of Attorney in the form attached to the PDS, 'Applicants' irrevocably appoint MOEL to enter into the Grove Lease Agreement, Irrigation Lease and Licence Agreement and Management Agreement (Project Agreements) on their behalf. They will also be bound by the Constitution on acceptance into the Project.

Constitution

25. The Constitution establishes the Project and operates as a deed binding all of the Growers and MOEL (clause 2.1). The Constitution sets out the terms and conditions under which MOEL agrees to act as Responsible Entity and thereby manage the Project. Growers are bound by the Constitution by virtue of their participation in the Project.

26. The 'Application Amount' paid by 'Applicants' to the Responsible Entity shall be deposited into a bank account designated as the 'Application Fund' account (clause 11). Upon acceptance of an 'Application' and the issue of an 'Interest' to a Grower, the Grower's 'Application Money' is released and applied in accordance with the Project Agreements (clause 14).

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

- powers of the Responsible entity (clauses 5 and 6);
- the Responsible Entity's entitlement to be paid fees out of the 'Application Fund' and the 'Proceeds Fund' and to recover from the 'Application Fund' and the 'Proceeds Fund' all costs, fees and expenses in accordance with the terms of the Project Agreements (clause 7);
- procedures relating to 'Applications' (clause 12);
- a 'Register' of Growers is to be maintained which sets out each Grower's personal details and a description of their 'Grove Allotments' (clause 13);
- the termination of Project Agreements (clause 16);
- the assignment and transmission of Grower's 'Interest' and restrictions on such assignments and transmissions (clauses 17 and 18);
- additional powers and other activities of the Responsible Entity (clauses 19 and 20);
- procedures for calling a meeting of Growers (clause 22);
- complaints handling and dispute resolution procedures (clauses 26 and 27); and
- winding up the Project (clause 31).

28. The Constitution also provides that each Grower directly owns its 'Interest' in the Project including all olives growing on the 'Trees' on the Grower's 'Grove Allotment' and all improvements made to the Grower's 'Grove Allotment' (clause 15.3).

Compliance Plan

29. As required by the *Corporations Act 2001*, MOEL has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that MOEL manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

Project Land

30. Thirty 'Interests' of one hectare each is being offered in the Project. The land on which the Project will be conducted is at Serpentine, near Bendigo, in central Victoria and include that part of the properties described in the PDS as follows:

Judyong property

- the land described in Certificate of Title Volume 10321, Folio 243;
- the land described in Certificate of Title Volume 10321, Folio 244; and
- the land described in Certificate of Title Volume 10365, Folio 844.

Yarrong property

- the land described in Certificate of Title Volume 3475, Folio 901; and
- the land described in Certificate of Title Volume 8040, Folio 441.

31. A 'Head Lease' will be entered into between the 'Land Owner' and MOEL under which the 'Project Land' is made available to MOEL. Pursuant to the 'Head Lease', MOEL holds an estate in leasehold in the 'Project Land', of which the 'Grove Allotment' and the 'Common Area' form part, and is authorised to grant leases of allotments of the 'Project Land' for the purposes of the Project.

Grove Lease

32. Growers participating in the arrangement will enter into a Grove Lease with MOEL. Growers are granted an interest in land in the form of a sub-lease to use their 'Grove Allotment' for the purpose of conducting their horticultural business (clause 2.1). Each 'Grove Allotment' is comprised of an allotment of one hectare portion of the 'Project Land' and the 'Trees' growing on the 'Grove Allotment'. The PDS provides that all of these 'Trees' will be planted on the 'Grove Allotment' prior to 'Commencement Date'.

33. The term of a Grower's sub-lease is until 30 June 2029 or such later date as agreed, in writing, with MOEL before 30 June 2029 (clauses 2.1 and 2.2). The Grove Lease also sets out provisions relating to early termination of this Agreement by the Grower or MOEL and the effects of such termination (clause 12).

Irrigation Lease and Licence Agreement

34. Growers participating in the arrangement will also enter into an Irrigation Lease and Licence Agreement. MOEL will lease to a Grower the 'Grove Allotment Irrigation Equipment' and will also grant a licence to the Grower over the 'Common Area Irrigation Equipment' (clause 2.1).

35. The term of this agreement is until 30 June 2029 or such later date as agreed, in writing, with MOEL before 30 June 2029 (clause 2.2). This agreement also sets out provisions relating to early termination of this Agreement by the Grower or MOEL and the effects of such termination (clause 9).

Management Agreement

36. The Management Agreement sets out the terms and conditions of MOEL's appointment by the Grower as an independent contractor to manage the 'Grove Allotment' (clause 4). This agreement will commence on the 'Commencement Date' and continue until the termination of the Project at 30 June 2029 (clause 2). Other grounds for termination by either MOEL or the Grower and the procedures to be followed following such termination are set out in the agreement (clause 17).

37. The 'Olives' from the relevant 'Grove Allotment' will be pooled with 'Olives' from other 'Grove Allotments' and Growers will be entitled to their pro rata proportion of the 'Oil' sold (clause 8.3).

38. This agreement also provides that the Grower engages MOEL to manage and cultivate the 'Grove Allotments' on behalf of the Grower in accordance with the 'Quality Horticultural Practice', harvest the 'Olives', process the 'Olives' into extra virgin oil and sell the 'Oil'. During the 'Term' of the Project MOEL is required to perform the following services:

- the 'First Period Management Services';
- the 'Further Management Services';
- the 'Harvesting Services';
- the 'Transportation Services';
- the 'Extraction Services'; and
- any other services as Quality Horticultural Practice reasonably requires (clause 5).

39. The 'First Period Management Services' (set out in detail in Item 1 of Schedule 2) will be provided by MOEL to Growers in the period from the 'Commencement Date' to 30 June 2006. Throughout the remainder of the 'Term' of the Project MOEL will provide Growers with the 'Further Management Services' (set out in detail in Item 2 of Schedule 2) and 'Harvesting Services', 'Transportation Services', and 'Extraction Services' (Items 3, 4 and 5 of Schedule 2). The Grower acknowledges that MOEL can enter into subcontracting agreements to perform these services (clause 5.6).

Pooling of amounts and distribution of proceeds

40. Both the Constitution (clauses 15 and 24) and the Management Agreement (clause 8.3) set out provisions relating to the pooling of amounts held by MOEL on behalf of Growers. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed 'Olives', 'Oil' or insurance proceeds to the pool making up the proceeds are entitled to benefit from distributions from those proceeds; and
- any pooled 'Olives', 'Oil' or other proceeds must consist only of 'Olives', 'Oil' or other proceeds contributed by Growers participating in the Mediterranean Olives Project 2006.

Fees

41. Growers' obligations to pay fees are stipulated in the Grove Lease (clause 3), Irrigation Lease and Licence Agreement (clause 3) and Management Agreement (clause 12).

42. The fees payable per 'Grove Allotment' under the Grove Lease and the Irrigation Lease and Licence Agreement are as follows:

'Rent' payable under the Grove Lease

- for the period from 'Commencement Date' to 30 June 2006, **nil**;
- for the period 1 July 2006 to 30 June 2007, **nil**;
- for the period 1 July 2007 to 30 June 2008, **nil**;
- for the period 1 July 2008 to 30 June 2009, **\$2,420**, 'Indexed', payable on 31 October 2008; and
- for subsequent 'Financial Years' from and including the 'Financial Year' ending 30 June 2010, the 'Rent' payable in previous year, 'Indexed', payable on 31 October in each subsequent 'Financial Year'.

'Lease Fee' payable under the Irrigation Lease and Licence Agreement

- for the period from 'Commencement Date' until 30 June 2006, **\$55**, payable on application;
- for the period 1 July 2006 to 30 June 2007, **\$880**, 'Indexed', payable on 31 October 2006; and
- for subsequent 'Financial Years' from and including the 'Financial Year' ending 30 June 2008, the 'Lease Fee' payable in previous year, 'Indexed', payable on 31 October in each subsequent 'Financial Year'.

'Management Fees' payable under the Management Agreement

43. The fees payable for the 'Term' of the Management Agreement are specified in Item 4, Schedule 1. The 'Management Fees' payable per 'Grove Allotment' from 'Financial Years' ending 30 June 2006 to 30 June 2010 are as follows:

- for the period from 'Commencement Date' until 30 June 2006, **\$16,500**, payable on application;
- for the period 1 July 2006 to 30 June 2007, **\$7,700**, payable on 31 October 2006;
- for the period 1 July 2007 to 30 June 2008, **\$6,600**, payable on 31 October 2007;
- for the period 1 July 2008 to 30 June 2009, the 'Management Fee' payable in previous year, 'Indexed', payable on 31 October 2008; and
- for the period 1 July 2009 to 30 June 2010, the 'Management Fee' payable in previous year, 'Indexed', payable on 31 October 2009.

44. Within 30 days of the date of an invoice issued by MOEL Growers must pay, the 'Agricultural Insurance Premium' and such other reasonable fees for services as required by 'Quality Horticultural Practice'. Growers are also liable to pay 'Harvesting Fees', 'Transportation Fees' and 'Extraction Fees'. The amount of these fees is equal to the Grower's proportion of the expenses as the Grower's interest in the Project bears to the total number of interests issued in the Project. MOEL may also be entitled to receive an 'Incentive Fee' (clause 12.2 of the Management Agreement).

Finance

45. Growers have the option to fund their involvement in the Project with either of two finance packages offered on commercial terms. Growers may borrow from MOFPL, a lender associated with MOEL, or borrow from UPF. Alternatively, Growers may borrow from an independent lender.

46. Growers cannot rely on this Product Ruling if they enter into a finance package with MOFPL or from UPF that materially differs from those provided to the Tax Office by MOEL with the application for this Product Ruling. These financial packages are summarised below.

Finance offered by MOFPL

47. Growers can apply to borrow from MOFPL up to 80% of either the total of 'Application Amount' and fees payable on 31 October 2006 or the 'Application Amount' only. The terms of the finance offered by MOFPL include:

- a loan term ending on 15 March 2009;
- a requirement to pay equal monthly principal and interest instalments by way of direct debit; and
- a fixed interest rate of 10.5% per annum.

48. The security for the loan is provided by the assignment to MOFPL of the Grower's rights and interest in the Management Agreement, the Grove Lease, the Irrigation Lease and Licence Agreement, the Olive Oil Processing Agreement and the Olive Oil Purchase Agreement and all monies payable to the Grower under those agreements and the insurances. The assignment occurs upon default by the Grower or other events set out in clause 8 of the Loan Agreement. The loan is provided by MOFPL on a full recourse basis and recovery action will be taken in respect of any default by the Grower.

Finance offered by UPF

49. Alternatively, Growers can apply to borrow from the UPF up to 100% of the 'Application Amount'. The loan will have a term of 10 years with interest only payable for the first three (3) years and becoming principal and interest over the next seven (7) years with a fixed interest rate of 10.95% per annum. Growers are also liable to pay a loan establishment fee of \$250 plus 0.5% of the 'Application Amount' (up to a maximum of \$1,250) and applicable stamp duty.

50. Security is provided by a charge over the whole right, title and interest of the benefits arising out of each of the 'Project Documents' and all monies payable to the Grower in these documents. The loan is on a full recourse basis and recovery action will be taken in respect of any default.

51. Growers cannot rely on this Product Ruling if the 'Application Amount' including the 'Application Amount' payable subject to a finance arrangement with any lender, is not paid in full by 15 June 2006 by the Grower or, by the lender, on the Grower's behalf. Where an application is accepted by MOEL subject to finance approval by any lending institution, Growers cannot rely on this Ruling if written evidence of that approval has not been given to MOEL by 15 June 2006. Where an application has been accepted on the basis of written evidence of finance approval the lending institution must provide the full amount of the loan monies to MOEL no later than 30 June 2006.

52. 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 of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 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 MOFPL, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

53. Subject to paragraph 8, this Ruling applies only to Growers who are accepted to participate in the Project and who have executed a Grove Lease Agreement, an Irrigation Lease and Licence Agreement and a Management Agreement on or before 15 June 2006.

54. 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.

55. The Grower's participation in the Project must constitute the carrying on of a business of primary production. Provided the Project is carried out as described above, the Grower's business of primary production will commence at the time of execution of their Grove Lease Agreement, Irrigation Lease and Licence Agreement and Management Agreement.

The Simplified Tax System (STS)***Division 328***

56. To be an 'STS taxpayer' a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328 of the ITAA 1997). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different under the STS where a Grower who was an 'STS taxpayer' prior to 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method') – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

57. For such Growers, a reference in this Ruling to an amount being deductible when 'incurred' will mean that amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

25% entrepreneurs tax offset***Subdivision 61-J***

58. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides for a tax offset of up to 25% of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

Tax outcomes for Growers

59. The following paragraphs outline the tax outcomes for all Growers who are **not** 'Joint Venture Growers'.

Assessable income***Section 6-5***

60. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on these proceeds (section 17-5), will be assessable income of the Grower under section 6-5 at the time that income is derived.

Deduction for lease document expenses***Section 25-20***

61. A Grower may claim a tax deduction under section 25-20 for the expense incurred in relation to registering or stamping the Grove Lease over property used solely for the purposes of producing assessable income.

Deductions for the loan establishment fee payable to UPF**Section 25-25**

62. Borrowing expenses are deductible under subsection 25-25(1) where the borrowed moneys are used or will be used during that income year for income producing purposes. It is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. Where the borrowing expenses exceed \$100 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 UPF is outside the scope of this Ruling.

Deductions for irrigation 'Lease Fees', 'Management Fees' and interest**Section 8-1**

63. A Grower may claim tax deductions, on a per hectare basis, for the following expenditure.

Fee Type	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Lease Fees	\$55 See Notes (i), (ii) & (iv)	\$880 (indexed) See Notes (i), (ii) & (iv)	Amount incurred See Notes (i), (ii) & (iv)
Management fees	\$16,500 See Notes (i), (ii) & (iv)	\$7,700 See Notes (i), (ii) & (iv)	\$6,600 See Notes (i), (ii) & (iv)
Interest payable to MOFPL or UPF	As incurred See Notes (iii) & (iv)	As incurred See Notes (iii) & (iv)	As incurred See Notes (iii) & (iv)

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.
- (ii) The 'Lease Fees' and the 'Management Fees' as set out in the Irrigation Lease and Licence Agreement and the Management Agreement, respectively, are deductible in full in the year that they are incurred.

- (iii) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than MOFPL or UPF is outside the scope of this Ruling. Growers who borrow from lenders other than MOFPL or UPF may request a private ruling on the deductibility of the interest incurred.
- (iv) This Ruling does not apply to Growers who choose to prepay fees or who choose, or who are required to prepay interest under a loan agreement (see paragraphs 91 to 95 of this Ruling). Subject to certain exclusions, 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. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.

Deductions for capital expenditure

Division 40

64. Each Grower will also be entitled to tax deductions relating to the olive trees planted on the 'Grove Allotment'. 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.

65. An olive tree is considered to be a 'horticultural plant' as defined in subsection 40-520(2). As a Grower holds the 'Grove Allotment' under a 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.

66. The deduction is determined using the formula in section 40-545. The establishment expenditure that can be written-off by a Grower is limited to the capital expenditure incurred that is attributable to the establishment of the 'Trees'. As the olive trees have an 'effective life' of 30 years or more, a straight-line write-off rate of 7% will be applied. The deduction is allowable when the 'Trees' enter their first commercial season (section 40-530, item 2). MOEL will notify Growers when their 'Trees' enter their first commercial season and the amount that may be claimed.

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

Section 35-55 – exercise of Commissioner’s discretion

67. A Grower who is an individual accepted into the Project by 15 June 2006 may have losses arising from their participation in the Project that would be 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 these Growers for the income years ending **30 June 2006 to 30 June 2010**. This conditional exercise of the discretion will allow those losses to be offset against the Grower’s other assessable income in the income year in which the loss arises.

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

68. For a Grower who participates in the Project and incurs expenditure as required by the Project Agreements, 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 91 to 95 of this Ruling);
- 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.

Commissioner of Taxation

7 June 2006

Appendix 1 – Explanation

❶ ***This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.***

Is the Grower carrying on a business?

69. For the amounts set out in the table above to constitute allowable deductions the Growers' activities of cultivating olive trees and harvesting the 'Olives' for eventual sale as a participant in the Mediterranean Olives Project 2006 must amount to the carrying on of a business of primary production.

70. Where there is a business, or a future business, the gross proceeds from the sale of the 'Olives' and the 'Oil' processed from the 'Olives' will constitute gross assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income.

71. For schemes such as the Mediterranean Olives Project 2006, 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 *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

72. Generally, a Grower will be carrying on a business of growing 'Olives', and hence primary production, if:

- the Grower has an identifiable interest in the land (by lease) or rights over the land (by licence) on which the Grower's olive trees are established;
- the Grower has a right to harvest the 'Olives' and sell the 'Olives' and the 'Oil' processed from the 'Olives';
- the cultivation of the olive trees and harvesting of the 'Olives' are carried out on the Growers' behalf;
- the activities of the Grower are typical of those associated with a business of cultivating olive trees and harvesting the 'Olives' for commercial gain; and
- the weight and influence of general indicators point to the carrying on of a business.

73. In this Project, each Grower enters into a Grove Lease Agreement, an Irrigation Lease and Licence Agreement and a Management Agreement (Project Agreements).

74. Under the Grove Lease, each individual Grower will have rights over a specific and identifiable area of one (1) hectare or more of land. The Grove Lease provides the Grower with an ongoing interest in the specific trees on the leased area for the term of the Project. Under the Grove Lease, the Grower must use the land in question for the purpose of carrying out activities of cultivating olive trees and harvesting the 'Olives' for the production and sale of olive oil and for no other purpose. The Grove Lease allows MOEL to come onto the land to carry out its obligations under the Management Agreement.

75. Under the Irrigation Lease and Licence Agreement, MOEL will lease to a Grower all irrigation fixtures and fittings installed by MOEL prior to the Grower being accepted into the Project and located on the Grower's 'Grove Allotment'. MOEL will also grant a licence to the Grower over all irrigation fixtures and fittings installed by MOEL prior to the Grower being accepted into the Project and located on the 'Common Area'.

76. Under the Management Agreement, MOEL is engaged by the Grower to provide management services on the Grower's identifiable area of land during the 'Term' of the Project. Under the Principal Sub-Contractor Agreement, the management services are sub-contracted to an independent third party entity.

77. MOEL is also engaged to harvest the 'Olives' and sell, on the Grower's behalf, the 'Olives' and the 'Oil' processed from the 'Olives'.

78. 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.

79. 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 the 'Oil' 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.

80. The pooling of the 'Olives' grown on the Grower's 'Grove Allotment' with the 'Olives' of other Growers in the Mediterranean Olives Project 2006 is consistent with general horticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled 'Olives' will reflect the proportion of the 'Olives' contributed from their 'Grove Allotment'.

81. MOEL's services are also consistent with general horticultural practices. They are of the type ordinarily found in olive growing ventures that would commonly be said to be businesses. While the size of an individual 'Grove Allotment' is relatively small, it is of a size and scale to allow it to be commercially viable.

82. The Grower's degree of control over MOEL as evidenced by the Constitution and Management Agreement, and supplemented by the Corporations Act 2001, is sufficient. During the term of the Project, MOEL is required to provide the Grower with regular progress reports on the Grower's 'Grove Allotment' and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with MOEL in certain instances, such as cases of default or neglect.

83. The activities of the Grower are typical of those associated with a business of cultivating olive groves and harvesting the olives for commercial gain, 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 Grower's activities of cultivating 'Trees' and harvesting the 'Olives' for eventual sale in the Mediterranean Olives Project 2006 will constitute the carrying on of a business.

The Simplified Tax System

Division 328

84. 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.

85. Changes to the STS rules apply from 1 July 2005. 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 the 'Lease Fees' and the 'Management Fees'

Section 8-1

86. Consideration of whether the 'Lease Fees', and 'Management Fees' are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer 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.

87. The 'Lease Fee' and 'Management Fee' will relate to the gaining of income from the Grower's business of growing 'Olives' (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of olives) 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 this fee. 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 MOFPL or UPF as the finance provider

88. Some Growers may finance their participation in the Project through a loan facility with MOFPL or with UPF. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of the 'Lease Fees', and 'Management Fees'.

89. The interest incurred for the year ended 30 June 2006 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations – the cultivation and growing of 'Trees' – 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 MOFPL or UPF as the finance provider

90. 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 MOFPL or UPF 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.

Prepayment provisions

Sections 82KZL to 82KZMF

91. 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

92. Under the scheme to which this Product Ruling applies, the 'Lease Fees' and the 'Management Fees' are incurred annually. The interest payable to MOFPL and to UPF is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

93. A Grower can therefore claim a deduction for each of the relevant amounts in the income year in which the amount is incurred.

94. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under any of the Project Agreements or prepays interest under a loan agreement (including loan agreements with lenders other than MOFPL and UPF). 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.

95. Growers who choose to 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***

96. 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 olive trees is of a capital nature. This expenditure falls for consideration under Division 40.

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

97. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ending **30 June 2006 to 30 June 2010** 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 2010:

- 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 olive growing industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

98. 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 ended 30 June 2006 to 30 June 2010.

99. 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

100. The operation of section 82KL of the ITAA 1936 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 of the ITAA 1997.

Part IVA – general tax avoidance provisions

101. For Part IVA of the ITAA 1936 to apply there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

102. The Mediterranean Olives Project 2006 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 61 to 66 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

103. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting of the 'Olives' and sale of the 'Olives' and the 'Oil' processed from the 'Olives'. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing 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) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

PR 2006/105; TR 97/11;
TR 98/22; TR 2000/8;
TR 2001/14; TR 2002/6;
TR 2002/11

Subject references:

- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- stamp duty
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
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- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
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NO: 2006/3906
ISSN: 1441-1172
ATOlaw topic: Income Tax ~~ Product ~~ olives