



PR 2006/50 - Income tax: Brooklyn Park Olive Groves Project Stage 4 Extension

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 This document has changed over time. This is a consolidated version of the ruling which was published on *12 April 2006*



Product Ruling

Income tax: Brooklyn Park Olive Groves Project Stage 4 Extension

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ⓘ This Ruling 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 taxation provisions 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 Brooklyn Park Olive Groves Project Stage 4 Extension or simply as 'the Project'.

Relevant taxation provisions

2. The taxation provisions 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;
 - 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;
 - Part 3-1 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),
 - section 82KZL of the 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 advisors

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 is the entities more specifically identified in the Ruling part of this Product Ruling and 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;
- who do not enter into a Management Agreement with the Manager but elect to maintain their Allotments themselves or through an approved contactor; or
- who, under Clause 6 of the Management Agreement, elect to harvest their own Allotments or have the Manager harvest their Allotments separately or elect to retain the Olives from their allotment for marketing and selling by the Grower themselves.

Qualifications

9. The class of entities defined in this Ruling may rely on its contents provided the scheme that is actually carried out in accordance with the scheme described in paragraphs 15 to 60.

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 12 April 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.

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)). If a private ruling is inconsistent with a later Product Ruling, the earlier 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.

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

14. This Product Ruling is withdrawn and ceases to have effect after 30 June 2009. The Ruling continues to apply, in respect of the tax law(s) 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 entity's involvement in the arrangement.

Scheme

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

- Application for a Product Ruling dated 30 December 2005 as constituted by documents provided on 5 January 2006, 31 January 2006, 16 February 2006, 24 March 2006 and 27 March 2006 and correspondence and documents previously provided dated 25 January 2005, 28 February 2005, 4 March and 6 April 2005 and 7 December 2005;
- **Prospectus and Product Disclosure Statement for Brooklyn Park Olive Groves Stage 4 dated 22 April 2005;**
- **Draft Supplementary Prospectus and Product Disclosure Statement for Brooklyn Park Olive Groves Stage 4 Extension received on 16 February 2006;**
- Constitution of Brooklyn Park Olive Groves Limited;
- **Brooklyn Park Olive Groves Scheme Constitution dated 7 June 1999 and deed polls of Brooklyn Park Olive Groves dated 8 February 2001, 8 May 2003 and 2 February 2005;**
- Registered Compliance Plan for the Brooklyn Park Olive Groves Managed Investment Scheme;
- **Draft Management Agreement (Stage 4 Extension) between Australian Green and Gold Limited (as the Manager), Brooklyn Park Olive Groves Limited and the Grower, received on 31 January 2006;**
- **Draft Licence to Occupy Agreement (Stage 4 Extension) between Brooklyn Park Olive Groves Limited and the Grower, received on 31 January 2006;**

- Draft Loan Agreements between Brooklyn Park Olive Groves Limited (the borrower) and Australian Green and Gold Limited (the lender) received on 7 December 2005;
- Draft Lease Agreement between Brooklyn Park Olive Groves Limited and Huntley Custodians Limited received on 7 December 2005;
- Draft Sublease Agreement between Huntley Custodians Limited and Brooklyn Park Olive Groves Limited received on 7 December 2007;
- Draft Water and Services Agreement Stage 4 Extension received on 7 December 2005; and
- Olive Procurement Agreement between Australian Green and Gold Limited and Inglewood Olive Processors Limited, dated 7 June 1999.

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

16. The documents highlighted are those that Growers may enter into. 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. The effect of these agreements is summarised as follows.

17. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of these agreements is summarised as follows.

Overview

18. The main features of the Brooklyn Park Olive Groves Stage 4 Extension are as follows:

Location	The Darling Downs Region of Queensland
Type of business to be carried on by each participant	Commercial growing and cultivation of olives for the purpose of harvesting and selling the olives
Number of hectares offered for cultivation	100 hectares
Size of each interest	0.2 hectares
Number of olive trees per hectare	Depending on the variety planted between 250 and 400
Number of olive trees per Allotment	Depending on variety planted between 50 and 80

Term of the Project	Approximately 15 years
Initial cost	\$16,950 for the first three years comprising \$15,950 in the Project and \$1,000 for shares in Brooklyn Park Olive Groves Limited
Initial cost per hectare	\$84,750
Ongoing costs	Management fees as a set percentage of gross harvest proceeds and annual Licence Fees increased by CPI.

19. The Project has been registered as a Managed Investment Scheme under the *Corporations Act* 2001. Offers for shares and interest in the Project will be made under a Prospectus and Product Disclosure Statement and Supplementary Prospectus and Supplementary Product Disclosure Statement. Applicants that are accepted to participate in the Project will carry on a business of commercially growing olives for domestic and international sale. There is no minimum subscription for the Project, however, there is a maximum subscription of 500 interests. The Project will terminate on 30 June 2020, a period of approximately 15 years.

20. The Project will be situated on land adjacent to Brooklyn Park described as 'Adjoining Property' alternatively known as 'Chums Gully' and on land known as 'Tarbrook' situated approximately 1km from Brooklyn Park. These properties are situated approximately 22km west of Inglewood in the Darling Downs region of southern Queensland. Brooklyn Park Olive Groves Limited owns the two properties which are leased to Huntleys Custodian Limited ('the Custodian'). The Custodian holds this interest as Head Lessee for the security of the Growers. The property is subleased back to Brooklyn Park Olive Groves Limited for administration of the Project.

21. Growers accepted to participate in the Project will enter a Licence to Occupy Agreement with Brooklyn Park Olive Groves Limited in its capacity as lessee of the property. A Grower acquiring a single interest in the Project will hold a licence over a separate and distinct area (called an 'Allotment') of 0.2 hectare on which the Grower can plant and maintain 50 to 80 olive trees (depending upon the variety). Each Allotment will be separately identifiable on a plan prepared by Brooklyn Park Olive Groves Limited for that purpose.

22. Growers may acquire more than one Interest in the Project. However, for each Interest acquired the Grower must first apply for and be allotted a parcel of 1,000 \$1 A class shares in Brooklyn Park Olive Groves Limited, the company that owns the land upon which the Allotments will be situated.

23. Growers will also have an option to enter into a Management Agreement with Australian Green & Gold Limited ('the Manager') whereby the Manager will establish and maintain each Allotment during the term of the Project.

24. Unless a Grower elects otherwise, the Manager will harvest the olives on their behalf and use its best endeavours to sell the produce at the best available price. The Manager holds a contract with Inglewood Olive Processors to buy and market the produce.

Scheme Constitution

25. Upon entering into a Management Agreement, Growers become bound by the provisions of the Brooklyn Park Olive Groves Scheme Constitution. The Constitution primarily sets out the rights, powers, duties and obligations of the Manager. The Manager, Australian Green and Gold Limited, is the Responsible Entity for the Project and will have the primary responsibility for managing the Project, ensuring compliance with the Corporations Law, the Scheme Constitution and the Management Agreement.

26. Among other things, the Constitution sets out procedures for dealing with:

- applications for Interests (clause 3);
- the issue of Certificates relating to those Interests (clause 4);
- the Application Moneys (clauses 3 and 5);
- preparation and execution of the Scheme Agreements and the preparation of an Allotment Plan (clause 6);
- responsibilities, powers and duties of the Manager and its Employees and Officers (clauses 7 and 8);
- termination of the Scheme and procedures for calling and holding meetings of Growers (clauses 12 and clauses 17 to 22);
- the establishment and maintenance of a Growers Register and the right of Growers to inspect and copy the Register of Growers (clause 16); and
- the right of Growers to remove the Manager and the consequence of that removal (clauses 26 and 27).

Compliance Plan

27. The Compliance Plan for the Brooklyn Park Olive Groves Managed Investment Scheme describes how the Responsible Entity will ensure its compliance with the Corporations Law and the Project Scheme Constitution. The Compliance Plan is designed to protect the rights of Growers.

Licence to Occupy Agreement

28. Each Grower enters into a Licence to Occupy Agreement (the 'Agreement') with Brooklyn Park Olive Groves Limited until 30 June 2020 (clause 2.2). Under the Agreement, Brooklyn Park Olive Groves Limited grants the Grower a Licence to Occupy an Allotment on the Project Land for the purposes of conducting the 'Business' (clause 6.1). 'Business' is defined as planting, growing, cultivating, harvesting and marketing olives for domestic and overseas sale.

29. Each Allotment is 0.20 hectare in size and suitable for the planting of between 50 to 80 olive trees. The number of trees on the Allotment will be determined by the olive tree variety planted on that Allotment (clause 3.2). Each Grower's Allotment will be a distinct area of the Project Land and will be identified on an Allotment Plan to be maintained by Brooklyn Park Olive Groves Limited (clause 3.3). Each tree position will be numbered and shown in relation to the boundaries of the Project Land. This will enable Growers to identify their individual Allotment and tree holding. Brooklyn Park Olive Groves Limited will advise Growers of the location of their individual Allotment(s).

30. The Agreement places certain obligations on the Grower to maintain the Allotment and use it in a certain manner (clause 4). It also permits the Grower to use dams, irrigation systems, roads and other infrastructure located on the Project Land (clause 2.3).

31. The Grower is required to pay an annual Licence Fee for each year of the Agreement. The Fee is \$22 per year for the first 3 years (clause 7). From the fourth year onwards, the annual Fee will equal the Fee of the preceding year indexed by the All Groups Consumer Price Index for Brisbane ('CPI') in accordance with the formula in clause 7.2.

32. Under the Agreement the Grower will pay all telephone, garbage, waste, electric light and power charges levied against the Land or the Allotment in respect of the Grower's use of the Allotment to conduct the Business. Brooklyn Park Olive Groves Limited will pay for all charges and assessments levied on the Allotment including water and municipal rates (clause 8).

33. The Agreement allows the Grower to delegate the conduct of all or part of the Business to the Manager or an approved contractor (clause 11). As a consequence, the Agreement allows delegates of the Grower to enter upon the Allotment for the purpose of conducting the Grower's Business (clause 9.4).

34. The Agreement may be terminated prior to 30 June 2020, where either party defaults or does not fulfil its obligations (clause 10). Growers are not entitled to assign the licence, except as set out in Brooklyn Park Olive Groves' Constitution (clause 9.1).

35. Upon termination of the Agreement, Growers are not required to remove the trees or restore the Allotment to its original condition (clause 10.4). However, the Grower must remove any item brought onto the Allotment or any improvement constructed on the allotment (clause 10.5(a)).

36. Brooklyn Park Olive Groves Limited will be legally entitled to any trees growing on the Allotment and things brought onto the Allotment by the Grower that are not removed within 14 days following termination of the Agreement (clause 10.5(b)).

Management Agreement

37. Growers may elect to use the services of the Manager, Australian Green and Gold Limited, by entering into a Management Agreement. Growers that do not execute a Management Agreement with Australian Green and Gold Limited are outside the scope of this Product Ruling and the taxation consequences of their participation in the Project are not dealt with in this Ruling. A Grower who does not enter into a Management Agreement with the Manager may request a private ruling on the taxation consequences of their participation in the Project.

38. The parties to the Management Agreement are the Grower, the Manager and Brooklyn Park Olive Groves Limited. The Management Agreement will terminate on 30 June 2020, subject to the valid terminations as set out in clause 16 of the Agreement.

39. Under the Management Agreement, the Manager undertakes to establish the 'Business' of the Grower, including the planting of Trees, as soon as is reasonably practicable. These services will begin to be performed and carried out by the Manager on behalf of the Grower immediately after the Grower enters into the relevant agreements. It is anticipated that planting will commence soon after the acceptance of the Grower into the Project. The Olive Trees are expected to be ready for the first commercial harvest in 2009.

40. The Manager must carry out its duties under the Agreement in a manner consistent with best agricultural practice. Clause 4.2 of the Management Agreement provides that the Manager will carry out the following duties:

- properly prepare the Allotment, including the performance of soil conservation, irrigation and drainage work on the Land to the benefit of the Allotment;
- cause at least 50 to 80 Trees (depending on the variety) to be planted on the Allotment; and
- identify the Grower's Trees with appropriate markings.

41. The Manager will also provide additional services to the Grower as set out in clauses 5.2 and 5.3:

- procuring, planting and tending the Trees on the Allotment;
- minimising soil erosion and maintaining soil quality on the Allotment;
- keeping the Allotment free from vermin, vegetation, insects and diseases that might inhibit the growth of Trees;

- maintaining and cultivating the Trees, including watering, weeding and applying fertilisers, nutrients and herbicides;
- procuring all necessary plant, equipment, machinery and materials;
- maintaining windbreaks, access roads and tracks; and
- harvesting the Trees and marketing and selling the olives produced (subject to the Grower's right to make an election regarding these services).

42. The Manager guarantees survival of the Grower's Trees to the commencement of the fourth year of the term of the Agreement. Thereafter, the Manager does not guarantee survival of the Grower's Trees or that they will produce olives (clause 4.4).

43. Under the Management Agreement, Growers may elect not to use all the services provided by the Manager. Growers may elect to have the Manager harvest the Trees on their Allotment separately (clause 6.1) or they may elect to harvest the Trees on their Allotment themselves (clause 6.2). Growers may also elect to retain the olives harvested from their Allotment and market, sell or otherwise deal with as they see fit (clause 6.3). This Ruling will not apply to any Grower who makes an election under clauses 6.1, 6.2, or 6.3. A Grower who makes such an election may request a private ruling on the taxation consequences of their participation in the Project.

44. The Manager is entitled to delegate all or any of the functions to be performed by it under the Agreement (clause 20).

45. The Manager will pool the olives produced by the Grower's Trees with those of each Other Grower, and market and sell all such olives (clause 7.1). The Olive harvest proceeds arising from Olive growing on Stage 4 Extension will be pooled for sale with those from previous stages of Brooklyn Park Olive Groves Limited when Stage 4 Extension trees reach full maturity. The proceeds of the sale of all olives will be paid to the Custodian, to be divided among all Growers as specified in clauses 7.3 and 7.2.

46. Clause 7.3 provides that, where the quantity of olives from a Grower's Allotments is less than 90% of the average of olives harvested on all Grower's Allotments (that relate to Stage 4 Extension) then the Grower's sale proceeds will be reduced by an amount determined by the Manager (clause 7.3).

47. The Custodian will establish an account for each Grower, to which the Grower's share of sale proceeds will be credited (clause 7.4). The Manager will account for the gross sale proceeds received and Management Fees payable and must provide each Grower with certain financial information in respect of the Grower's olives (clause 7.6). The Manager is also required to provide the Grower with various reports, including reports on the Management Services provided and the progress and condition of the Allotment (clause 14).

48. Growers are not entitled to assign their rights or obligations under the Management Agreement, except in certain limited circumstances. Where a Grower's interest is assigned, the Grower will no longer be entitled to rely on this Ruling.

Grower Fees

49. For a Grower accepted into the Project the Table below sets out the amounts payable, per Interest, upon Application.

Amount Payable	Amount of Fee
Part Payment of Shares	\$200.00
Licence Fee	\$22.00
Management Fee (Part Management Fee for month 1)	\$1,118.50
Landcare Operations	\$2049.50
Total payable on Application	\$3,390.00

50. Other than the amount payable upon application, during the first 36 months of the Project, Management Fees for each year are payable by 30 June of that year.

51. These Management Fees accrue on a monthly basis (referred to as a 'Grower Month') and relate wholly to services provided by the Manager and completed during the month. For each Interest held in the Project Growers incur the amounts set out in the Table below. The amount payable for Management Fees on the 30 June of a particular year will vary according to the month that a Grower is accepted to participate in the Project.

Amount Payable	Grower Month	Amount of Fee
Supply & Plant Olive Trees	1	\$412.50
Irrigation establishment costs	1	\$1,464.00
Management Fee (balance of Initial Management fee – see Note below)	1	\$5,575.50
Management Fee	2 to 12	\$308.00
Management Fee	13 to 36	\$78.17

Note: Total Management Fee for Month 1 is \$6,694, being \$1,118.50 payable on application plus \$5,575.50 payable by 30 June.

52. For Year 4 and subsequent years, the annual Management Fee will be calculated using the percentages (set out in the Table below) of 'Gross Sale Proceeds' of 'Olives' harvested in that Grower year:

Year	Percentage
4	88%
5	77%
6	66%
7	55%
8 – termination	44%

Examples of fees payable by 30 June in Year of Application

53. Example 1: Grower joins the Project on 15 April 2006:

Shares	\$200.00
Licence Fee	\$22.00
Landcare Operation	\$2,049.50
Irrigation Establishment	\$1,464.00
Purchase and Planting Trees	\$412.50
Management Fee (see Note below)	\$7,310.00
Total Amount Payable for Year ended 30 June 2006	\$11,458.00

Note: The Management Fee consists of the following amounts:

On application

\$1,118.50

By 30 June 2006

April (Balance of month 1 fees)

\$5,575.50

May to June (Month 2 to month 3 @ \$308)

\$616.00

Total Management Fee

\$7,310

54. Example 2: Grower joins the Project on 1st May 2006:

Shares	\$200.00
Licence Fee	\$22.00
Landcare Operation	\$2,049.50
Irrigation Establishment	\$1,464.00
Purchase and Planting Trees	\$412.50
Management Fee	\$7002.00
Total Amount Payable for Year ended 30 June 2006	\$11,150.00

Note: The Management Fee consists of the following amounts:

On application

\$1,118.50

By 30 June 2006

May (Balance of month 1 fees)

\$5,575.50

June (Month 2 @ \$308)

\$308.00

Total Management Fee

\$7,002

Licence Fee

55. In addition to the Management Fee a Grower is required to pay a \$22 Licence Fee each year. From Year 4 onwards the Licence Fee will be increased annually by the amount of the CPI for the year.

Shares in Brooklyn Park Olive Groves Limited

56. For each Interest acquired in the Project a Grower must first apply for and be allotted shares in Brooklyn Park Olive Groves Limited, the landowning company. The minimum subscription for an investor is 1,000 shares of \$1 each, with further applications to be made in parcels of 1,000 shares. For each Interest a part payment of \$200 is payable on application. A further \$400 will be payable on or before 30 June in the financial year following the Application. The remaining \$400 is payable on or before 30 June in the next financial year.

Water and Services Agreement – Stage 4 Extension

57. Upon application, the Grower becomes a party to a Water and Services Agreement. The other parties to the Agreement are Australian Green & Gold Limited in its capacity as the Supplier and the Manager of the Project. The Supplier has agreed to supply water and services to Allotments utilised by Growers on 'Chums Gully' and 'Tarbrook' which will be identical to Water and Services Agreement relating to the supply of water and services to Brooklyn Park. Under this Agreement all fees are the responsibility of the Manager. No fees are payable by the Grower.

Finance

58. Growers are required to fund their involvement in the Project themselves or by borrowing from an independent lender. There is no financing facility offered by the Manager or any other party to the scheme.

59. Regardless of the source of loan funds, this Ruling will not apply to Growers if the Responsible Entity accepts their Application subject to finance approval by a lending institution and the full amount payable at the time of Application, are not paid to the Responsible Entity by 30 June in the year of Application.

60. 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, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

61. This Ruling applies only to Growers who are accepted to participate in the Project after the date of issue of this Product Ruling and on or before 31 May 2006 and who have executed a Management Agreement and a Licence to Occupy Agreement on or before that date. 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

62. For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the 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*.

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

Qualification

64. 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.

25% entrepreneurs tax offset

Subdivision 61-J

65. 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.

Assessable income

Section 6-5

66. 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.

67. The Grower recognises ordinary income from carrying on the business of horticulture at the time that income is derived.

Deductions for Management Fees and Licence Fees**Section 8-1**

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

Fee Type	Year ended 30 June 2006 Year 1	Year ended 30 June 2007 Year 2	Year ended 30 June 2008 Year 3
Management Fee	See Notes (i), (ii) & (iii)	See Notes (i), (ii) & (iii)	See Notes (i), (ii) & (iii)
Licence Fee	\$22 See Notes (i), (ii) & (iii)	\$22 See Notes (i), (ii) & (iii)	\$22 See Notes (i), (ii) & (iii)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) For the 2005-06 income year and later years, where a Grower pays the Management Fee and the Licence Fee in the relevant income years shown in the Management Agreement and the Licence to Occupy Agreement, those fees are deductible in full in the year that they are incurred (see paragraphs 53 to 54 for examples of how Management Fees are calculated).
- (iii) If a Grower **chooses** to prepay fees for the doing of a thing (for example, the provision of management services or the leasing of land) that will not be wholly done in the income year the fees are incurred, the prepayment rules of the ITAA 1936 may apply to apportion those fees. In such cases, the tax deduction for the prepaid fee must be determined using the formula shown in paragraph 102 unless the expenditure is 'excluded expenditure'. 'Excluded expenditure' is an 'exception' to the prepayment rules and is deductible in full in the year in which it is incurred. For the purpose of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000.

Deductions for capital expenditure (Non-‘STS taxpayers’)

Division 40

69. A Grower who is not an ‘STS taxpayer’ will also be entitled to tax deductions relating to water facilities (for example, irrigation), a ‘landcare operation’ and the establishment of the olive trees. All deductions shown in the following Table are determined under Division 40.

Fee Type	ITAA 1997 Section	Year ended 30 June 2006 Year 1	Year ended 30 June 2007 Year 2	Year ended 30 June 2008 Year 3
Irrigation expenditure	40-515	\$488 See Notes (iv) & (v)	\$488 See Notes (iv) & (v)	\$488 See Notes (iv) & (v)
Landcare operations	40-630	\$2,049.50 See Notes (iv) & (vi)		
Establishment of horticultural plants	40-515	Nil See Note (vii)	Nil See Note (vii)	Nil See Note (vii)

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) 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 of \$1,464 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).
- (iii) Any capital expenditure incurred for a ‘landcare operation’ (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630.
- (iv) Olive trees are a ‘horticultural plant’ as defined in subsection 40-520(2). As Growers hold the land under a licence, 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 for the olive trees is determined using the formula in section 40-545 and is based on the capital expenditure of \$412.50 incurred by the Grower that is attributable to their

establishment. If the olive trees have an 'effective life' of greater than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 7%. The deduction is allowable when the olive trees enter their first commercial season (section 40-530, item 2). The Manager will inform Growers of when the olive trees enter their first commercial season.

Deductions for Capital Expenditure ('STS taxpayers')

Subdivision 328-D and Subdivisions 40-F and 40-G

70. A Grower who is an 'STS taxpayer' will also be entitled to tax deductions relating to water facilities (for example, irrigation), a 'landcare operation' and establishment of olive trees. An 'STS taxpayer' may claim deductions in relation to water facilities under Subdivision 40-F and in relation to a 'landcare operation' under Subdivision 40-G. If the 'water facility' or 'landcare operation' expenditure is on a 'depreciating asset' used to carry on the business, they may choose to claim deductions under Division 328. Deductions for the olive trees must be determined under Subdivision 40-F.

71. 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 or a 'landcare operation' under Subdivisions 40-F or 40-G and not under Division 328. If the expenditure has been incurred on 'depreciating assets' and is claimed under Division 328, the deduction is determined as discussed in Notes (ii) and (iii) below.

72. 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	ITAA 1997 Section	Year ended 30 June 2006 Year 1	Year ended 30 June 2007 Year 2	Year ended 30 June 2008 Year 3
Irrigation expenditure	40-515	\$488 See Notes (i) & (ix)	\$488 See Notes (i) & (ix)	\$488 See Notes (i) & (ix)
Landcare operations	40-630	\$2049.50 See Notes (i) & (x)		
Establishment of horticultural plants	40-515	Nil See Note (xi)	Nil See Note (xi)	Nil See Note (xi)

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) 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'. 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).
- (iii) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630. If the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-G (although expenditure on some items of plant can only be deducted under Division 328). For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. If the 'cost' apportionable to that deemed 'depreciating asset' is less than \$1,000, the deemed asset is treated as a 'low-cost asset' and

that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction is determined by multiplying its 'cost' by half the relevant STS pool rate. At the end of the year, it is allocated to the relevant STS pool and in subsequent years, the full pool rate will apply. If the expenditure is not on a 'depreciating asset', the expenditure is fully deductible under Subdivision 40-G.

- (iv) Olive trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a licence, 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 for the olive trees is determined using the formula in section 40-545 and is based on the capital expenditure of \$412.50 incurred by the Grower that is attributable to their establishment. If the olive trees have an 'effective life' of greater than 30 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 7%. The deduction is allowable when the olive trees enter their first commercial season (section 40-530, item 2). The Manager will inform Growers of when the olive trees enter their first commercial season.

Tax outcomes that apply to all Growers

Shares

73. The shares in Brooklyn Park Olive Groves Limited are CGT assets (section 108-5) and the amount paid by a Grower to acquire those assets is an outgoing of capital and not allowable as a deduction.

74. The amount paid for each share will represent the first element of the cost base of the share (subsection 110-25(2)). Any disposal of the shares by a Grower will be a CGT event and may give rise to a capital gain or loss.

Interest

75. The deductibility or otherwise of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or other financier is outside the scope of this Ruling. However all Growers who borrow funds in order to participate in the Project, should read the discussion of the prepayment rules in paragraphs 96 to 103 as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.

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

Section 35-55 – exercise of Commissioner's discretion

76. A Grower who is an individual accepted into the Project on or before 31 May 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 2009**. 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 losses arise.

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

77. For a Grower who participates in the Project and incurs expenditure as required by the Management Agreement and the Licence to Occupy 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 96 to 103);
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

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?

78. For the amounts set out in the Tables above to constitute allowable deductions the Grower's horticultural activities as a participant in the Brooklyn Park Olive Groves Project Stage 4 Extension must amount to the carrying on of a business of primary production.

79. Where there is a business, or a future business, the gross proceeds from the sale of 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.

80. For schemes such as that of the Brooklyn Park Olive Groves Project Stage 4 Extension, 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 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.

81. Generally, a Grower will be carrying on a business of horticulture, and hence primary production, if:

- the Grower has an identifiable interest (by lease or by licence) in the land on which the Grower's olive trees are established;
- the Grower has a right to harvest and sell the olives from those olive trees;
- the horticultural activities are carried out on the Grower's behalf;
- the horticultural activities of the Grower are typical of those associated with a horticulture business; and
- the weight and influence of general indicators point to the carrying on of a business.

82. In this Project, each Grower enters into a Management Agreement and a Licence to Occupy Agreement.

83. Under the Licence to Occupy Agreement each individual Grower will have rights over a specific and identifiable area of 0.2 hectares of land. The Licence to Occupy Agreement provides the Grower with an ongoing interest in the specific olive trees on the licensed area for the term of the Project. Under the licence the Grower must use the land in question for the purpose of carrying out horticulture activities, and for no other purpose. The Licence allows the Manager to come onto the land to carry out its obligations under the Management Agreement.

84. Under the Management Agreement the Project Manager is engaged by the Grower to establish and maintain an olive grove on the Grower's identifiable area of land during the term of the Project. The Project Manager has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the allotment on the Grower's behalf.

85. The Project Manager is also engaged to harvest and sell, on the Grower's behalf, the olives grown on the Grower's allotment.

86. 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.

87. 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 olives 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.

88. The pooling of olives grown on the Growers Allotment from olives grown on the Grower's Allotment with the olives of other Growers 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 Allotment.

89. The Project Manager's services are also consistent with general horticultural practices. They are of the type ordinarily found in horticulture ventures that would commonly be said to be businesses. While the size of an Allotment is relatively small, it is of a size and scale to allow it to be commercially viable.

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

91. The horticulture 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 Brooklyn Park Olive Groves Project Stage 4 Extension will constitute the carrying on of a business.

The Simplified Tax System

Division 328

92. 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.

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

Deductibility of Management Fees and Licence Fees

Section 8-1

94. Consideration of whether the initial management fees and licence 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.

95. The Management Fees and Licence Fees associated with the horticulture activities will relate to the gaining of income from the Grower's business of horticulture (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 the Management Fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Prepayment provisions

Sections 82KZL to 82KZMF

96. 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.

97. For this Project, only section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 are relevant. Where the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for prepaid expenditure under section 82KZMF using the formula in subsection 82KZMF(1). These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

Sections 82KZME and 82KZMF

98. Other than expenditure deductible under section 82KZMG of the ITAA 1936, if the requirements of subsections 82KZME(2) and (3) of the ITAA 1936 are met, the formula in subsection 82KZMF(1) of the ITAA 1936 (see below) will apply to apportion expenditure that is otherwise deductible under section 8-1 of the ITAA 1997. The requirements of subsection 82KZME(2) will be met if expenditure is incurred by a taxpayer in return for the doing of a thing that is not to be wholly done within the year the expenditure is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1)).

99. The requirements of subsection 82KZME(3) of the ITAA 1936 will be met where the agreement (or arrangement) has the following characteristics:

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

100. For the purpose of these provisions, the agreement includes all activities that relate to the agreement (subsection 82KZME(4) of the ITAA 1936). This has particular relevance for a Grower in this Project who, in order to participate in the Project may borrow funds from a financier. Although undertaken with an unrelated party, that financing would be an element of the arrangement. The funds borrowed and the resulting interest deduction are directly related to the activities under the arrangement. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF of the ITAA 1936.

101. There are a number of exceptions to these rules, but for Growers participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) of the ITAA 1936 is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1) of the ITAA 1936. However, for the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the arrangement that is less than \$1,000. Such expenditure is immediately deductible.

102. Where the requirements of section 82KZME of the ITAA 1936 are met, section 82KZMF of the ITAA 1936 applies to apportion relevant prepaid expenditure. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

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

103. In the formula 'eligible service period' (defined in subsection 82KZL(1) of the ITAA 1936) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

Application of the prepayment provisions to this Project

104. For each Allotment in this Project, an initial Management Fee (amount dependent upon the date the Grower is accepted into the Project) and an initial Licence Fee of \$22 per Allotment will be incurred on execution of the Management Agreement and Licence to Occupy Agreement. The Management Fee and the Licence Fee are charged for providing management services and licencing land to a Growers by 30 June of the year of execution of the Agreements. Under the Agreements, further annual expenditure is required each year during the term of the Project for the provision of management services and land until 30 June in those years.

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

106. There is also no evidence that might suggest the management services covered by the fee could not be provided within the relevant expenditure year. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial management fee, and the fees for subsequent years, is for the Project Manager doing 'things' that are not to be wholly done within the expenditure year. Under the Licence to Occupy Agreement, the Licence Fee are payable annually in advance for the licence of the land during the expenditure year.

107. On this basis, provided a Grower incurs expenditure as required under the Project agreements, as set out in paragraph 49 to 55, then the basic precondition in subsection 82KZME(2) of the ITAA 1936 is not satisfied and, in these circumstances, section 82KZMF of the ITAA 1936 will have no application.

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

108. Although not required under the Management Agreement or the Licence to Occupy Agreement, a Grower participating in the Project may **choose** to prepay fees for a period beyond the 'expenditure year'. Where this occurs, contrary to the conclusion reached in paragraph 107, section 82KZMF of the ITAA 1936 will apply to apportion the expenditure and allow a deduction over the period in which the prepaid benefits are provided.

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

Expenditure of a capital nature

Division 40 and Division 328

110. 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, a 'landcare operation', and the establishment of the olive trees is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328.

111. 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'.

112. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 69 and 70 in the Tables and accompanying notes.

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

Section 35-55 – exercise of Commissioner's discretion

113. 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;
- there is an objective expectation that within a period that is commercially viable for the olive industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit; and
- a Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

114. 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

115. 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

116. 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).

117. The Brooklyn Park Olive Groves Stage 4 Extension 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 68 to 72 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.

118. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the olives. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing 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.

Appendix 2 – Detailed Contents List

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/11; TR 98/22; TR 2000/8;
TR 2001/14

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
- 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 82KZL(1)
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZME(1)
- ITAA 1936 82KZME(2)
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