



PR 2006/70 - Income tax: 2006 Cherry Project

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Product Ruling

Income tax: 2006 Cherry Project

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❶ 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 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 '2006 Cherry Project' or just simply as 'the Project'.

Relevant taxation provision(s)

2. The relevant taxation 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;
- 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);
- 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. Entities 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 entities are fully informed of any legislative changes after the Ruling is issued.

Class of entities

7. The class of entities to whom this Ruling applies are 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' and will be wholesale clients for the purpose of the *Corporations Act 2001* or will have accepted an offer which complied as a small scale offer for the purpose of the Corporations Act .

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

- intend to terminate their involvement in the Project prior to its completion;
- do not intend to derive assessable income from it;
- elect to manage their orchards or take the harvested cherries rather than have it marketed and sold by the Trustee (refer to paragraph 39); or
- enter into this Project after 15 June 2006.

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 56.

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 3 May 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 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, which 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 as constituted by documents received on 17 February 2006 and additional correspondence and documents received from the Applicant's representative dated 20 March 2006, 4 April 2006, 6 April 2006, 10 April 2006, 11 April 2006, 12 April 2006 and 19 April 2006;
- Correspondence sent to the Applicant's representative from the Tax Office dated 22 February 2006, 14 March 2006, 30 March 2006, 4 April 2006, 7 April 2006 and 19 April 2006;
- Draft Information Memorandum for the 2006 Cherry Project, and The Stone Fruit Asset Trust ('Land Owner' or 'Property Trust') dated 11 April 2006;
- Draft **Constitution** of the 2006 Cherry Project ('Project Constitution') dated 10 April 2006;
- Signed Constitution of The Stone Fruit Asset Trust ('Trust Constitution') dated 3 October 2005;
- Draft **Licence and Management Agreement** between Mutual Capital Limited ('Trustee') and the Grower dated 19 April 2006;
- Draft Operations Agreement for 'the Project' between the Trustee and PR Management (Aust) Pty Ltd ('PRM') dated 10 April 2006;
- Draft Trustee Services Agreement between the Trustee and PRM dated 14 February 2006;

- Draft Deed of Retirement and Agreement to Act between the Trustee and the current trustee of the Property Trust dated 14 February 2006;
- Draft Marketing Agreement between PR Management (Aust) Pty Ltd and Panda Ranch Trading Pty Ltd dated 14 February 2006; and
- Draft lease terms between the owners of the property at Gretna, Tasmania and the Trustee dated 10 April 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. 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 below.

19. In accordance with the above documents, an Investor who participates in the scheme must be a wholesale client or accept a personal offer. This Ruling does not apply unless the Investor will be a wholesale client for the purposes of in section 761G of the Corporations Act or will accept a personal offer within the meaning of section 1012E of the Corporations Act. The meaning of wholesale client and personal offer are explained in the Information Memorandum for this Project.

Overview

20. The salient features of the 2006 Cherry Project are as follows.

Location	Gretna Tasmania
Type of business to be carried on by each Grower	Commercial growing and cultivation of cherry trees for the purpose of harvesting cherries for sale
Nature of Growers' participation in the Project	Stapled Interest – interest as a Grower plus Units in the Property Trust that owns the Project Land
Number of hectares offered for cultivation	80 hectares
Size of each Stone Fruit Lot	1 hectare
Minimum allocation	2 Stapled Interests
Number of trees per hectare	700

Term of the Project	15 years
Initial cost per Stone Fruit Lot	\$16,859
Initial cost per parcel of Units in the Property Trust	\$24,798
Ongoing costs	Annual licence fees, annual management fees and charges plus harvesting, packing and marketing costs (including commissions and statutory levies (refer to paragraphs 44 to 48))

21. Offers for Stapled Interests in the Project will be made under an Information Memorandum. Stapled Interests will not be allotted or issued under the Information Memorandum between 16 June 2006 and 30 June 2006 (inclusive). The Project will not proceed unless the minimum subscription of 80 Stapled Interests is achieved.

22. The Project involves establishing, planting, cultivating and maintaining cherry trees and harvesting cherries for sale. An entity that participates in the Project will do so by acquiring a Stapled Interest which will consist of two components:

- a 'Grower's Interest' in the Project consisting of a 1 hectare Grower's Stone Fruit Lot; and
- a 'Landowner's Interest' consisting of 30,871 units in the Property Trust at \$1.00 per unit (payable as \$24,798 on application under the Information Memorandum and \$6,073 in Year 2).

23. Units in the Property Trust cannot be subscribed for separately but may be held either by the Grower or an associate of the Grower.

24. An associate of PRM has contracted to purchase land for the Project, ultimately to be acquired by the Property Trust by way of nomination allowed under the contract. The land is located at Gretna, Tasmania and is known as 'Leintwardine'. Pending completion of the contract, the Property Trust will lease the land.

25. The Property Trust will own both the land on which the cherry trees will be planted and other assets including all other infrastructure used in operating the Project.

26. Applicants who are accepted into the Project will enter into a Licence and Management Agreement.

27. Each Grower will use the Grower's Stone Fruit Lot(s) for the purpose of carrying on a business of cultivating and harvesting cherries and the sale of harvested produce.

Project Constitution

28. The Project Constitution establishes the Project and sets out the rules by which the Project will be conducted. Under the Project Constitution, the Trustee is responsible for the overall operation of the Project, namely the establishment and maintenance of the Project Stone Fruit Lots, growing the trees, harvesting and selling the cherries, as well as reporting to Growers.

Licence and Management Agreement

29. Each Grower will enter into a Licence and Management Agreement with the Trustee. Under the licence, the Trustee in its capacity as trustee of the Property Trust will grant a non-exclusive licence to a Grower to use and occupy the land for the purpose of cultivating trees and harvesting cherries. The Grower also appoints the Trustee, in its capacity as trustee of the 2006 Cherry Project, to establish and manage the Grower's Stone Fruit Lot(s). This agreement will commence on the date the Trustee accepts the Grower's application under the Information Memorandum and shall continue until the earlier of harvest of all fruit from the Stone Fruit Lot(s) or the date of termination of the Grower's interest in the Project.

30. Under clause 3.1 of the Licence and Management Agreement, the Trustee grants each Grower licences:

- to use and occupy the Grower's Stone Fruit Lot for growing, maintaining and harvesting the cherry trees;
- to use the Internal Irrigation System on the Stone Fruit Lot; and
- to use in common with all other Growers the horticultural and other infrastructure on the Land required to conduct a horticultural business.

31. Under clause 6.1, the Trustee agrees to carry out initial establishment services by 30 June 2006. The Trustee agrees to perform services covering:

- general site preparation;
- land and soil preparation; and
- tree and tree guard purchases.

32. Under clause 6.2, the Trustee agrees to carry out initial Project management services by 30 June 2006. The Trustee agrees to:

- monitor and review irrigation and drainage requirements; and
- maintain in good repair and condition existing buildings, machinery, fire-breaks, wind-breaks, access roads, tracks and fences.

33. Under clauses 6.3 and 6.6, the Trustee also agrees to carry out the administrative tasks and duties of managing the Project, called Trustee Services under the agreement.

34. The Trustee will carry out further establishment duties subsequent to 30 June 2006 but before 30 June 2007, including planting the cherry trees (clause 6.4).

35. Under clause 6.5 the Trustee agrees to carry out ongoing Project management services until the end of the agreement. These include:

- keeping the Grower's Stone Fruit Lot free from any competitive weeds or other vegetation and eradicate any insects, pests or diseases which may affect the growth or yield of the Trees;
- monitoring and reviewing the irrigation, drainage and water management plan and ensuring that adequate water is supplied to the Grower's Stone Fruit Lot and the Stone Fruit Lot has adequate drainage;
- providing suitable irrigation, fertilisation and nutrients to the Trees to promote fruit production and maximise yields;
- pruning the Trees at least once each calendar year;
- maintaining and keeping in good repair and condition existing buildings, machinery, fire breaks, wind breaks, access roads, tracks and fences which are required for managing and protecting the Grower's Stone Fruit Lot; and
- testing the maturity of a sample of cherries at the appropriate time to determine whether the cherries are ready for harvesting.

36. Under clauses 6.7 to 6.9, the Trustee agrees to carry out harvesting, processing (sizing, grading and packing) and marketing services. The Trustee agrees to sell the cherries attributable to the Grower's Stone Fruit Lot using reasonable endeavours to obtain the maximum price available and to account to the Grower for the net proceeds of such sale.

37. Under clause 13.1(a) the Grower may terminate and replace the Trustee as manager of the Grower's Stone Fruit Lot. Under clause 13.1(c) the termination of the Trustee as manager of the Grower's Stone Fruit Lot will not reduce or impact upon the licence rights granted to the Grower under clause 3.1 of the Licence and Management Agreement.

Pooling of cherries

38. Clause 6.10 of the Licence and Management Agreement sets out provisions relating to the pooling of cherries held by the Trustee on behalf of Growers. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers in the Project who have contributed cherries to the pool making up the proceeds are entitled to benefit from distributions from those proceeds; and
- in the event of partial or total destruction of the Grower's Stone Fruit Lot or if the level of a Grower's production is otherwise reduced or inadequate compared to other Growers, the Grower's share of the sale proceeds will be adjusted to reflect these events.

Electing Growers

39. Growers have the right under clauses 7.3 and 7.4 of the Licence and Management Agreement to manage their Stone Fruit Lot, and/or take their harvested cherries and not have it marketed and sold by the Trustee. This Product Ruling does not apply to Growers who make either election.

Insurance

40. The Trustee may insure or cause to be insured the Land Owner, the Grower, itself and such other persons it deems necessary against public risk and against risks and damage to the Trees and cherries attributable to the Grower's Stone Fruit Lot. The Trustee may charge the cost of insurance in respect of the latter to the Grower at cost and in proportion to the Grower's interest in the Project.

Grower's obligations

41. In addition to paying fees for the various services, the Grower's obligations are set out in detail in clause 7.3 under which the Grower agrees to use the Grower's Stone Fruit Lot solely for the purpose of cultivating, maintaining, tending and harvesting the trees in accordance with sound horticultural practices.

Operations Agreement

42. The Trustee will contract with PRM to establish and operate the Growers' Stone Fruit Lots via the Operations Agreement. In consideration for payment of the fees set out in this agreement, PRM will establish and operate the cherry orchard. PRM will also provide management, harvesting, packing and fruit sales services subject to the terms and conditions set out in the agreement.

Trustee Services Agreement

43. The Trustee has agreed to act as trustee of the Project and the Property Trust. The agreement sets out the Trustee's services including acting as Trustee of the Project and the Property Trust, entering the Licence and Management Agreements with Growers and generally managing the Project in a professional and competent manner for fees set out in the agreement.

Fees

44. The amounts payable per Stone Fruit Lot for the first three years of the Project are shown in the following table:

Fees	Year 1 (to 30 June 2006)	Year 2 (to 30 June 2007)	Year 3 (to 30 June 2008)
Land and infrastructure licence fees	\$317	\$2,742	\$2,810
Establishment fee	\$14,924	\$693	0
Management fee	\$947	\$16,876	\$20,057
Trustee Services fee	\$670	\$687.50	\$704
Subscription for units in Property Trust	\$24,798	\$6,073	0
Total amount payable	\$41,656.00	\$27,071.50	\$23,571.00

45. The Establishment fee payable in Year 1 consists of the following services and fees:

- Site Clean up \$110
- Fencing \$275
- Site planning \$743
- Land and soil preparation \$3,628
- Tree purchase \$9,650
- Tree guards \$518

46. The amounts payable for Year 1 must be paid on application under the Information Memorandum.

47. The ongoing Management fees and the ongoing Land and infrastructure licence fees for Years 2 and 3 will be invoiced on 1 July of each year and will be payable within 14 days of invoice for ongoing Management fee and 30 days of invoice for ongoing Land and infrastructure licence fees.

Project Fees from Year 4 onwards

48. Fees under the Licence and Management Agreement from Year 4 onwards will be the sum of:

- (i) Land and infrastructure licence fees being the previous year's fee increased by CPI each year;
- (ii) for maintaining and cultivating duties in each year, the greater of \$1,650 or 4.4% of Net Sale Proceeds of fruit, plus the direct operational costs the Trustee incurs;
- (iii) a Trustee Services fee for management and administration (being the previous year's Trustee Services fee increased by CPI each year);
- (iv) Harvesting fees of \$1,100 per tonne (increased annually by CPI);
- (v) Processing fees of \$2,200 per tonne (increased annually by CPI); and
- (vi) Marketing fees of 12.1% of Gross Sale Proceeds plus statutory levies and any sales rebates.

49. The invoices for ongoing Land and infrastructure licence fees, ongoing Trustee Services fees, Harvesting fees, Processing fees and Marketing fees from Year 4 onwards will be payable within 30 days of the date of invoice.

50. Invoices for ongoing Land and infrastructure licence fees and ongoing Trustee Services fees will be issued on 1 July of the year in which the fee will be incurred.

51. The ongoing Management fees payable under the Licence and Management Agreement from Year 4 onwards will be payable within 14 days of the date of the invoice.

52. Invoices for ongoing Management fees, Harvesting fees, Processing fees and Marketing fees will issue within 7 days of the commencement of that year for which the fees are payable.

53. All fees payable from Year 4 onwards are also able to be deducted from the Grower's share of the Net Sales Proceeds. At least 30 days before the end of each year the Trustee will issue to the Grower a reconciliation of the actual year's fees against the amount invoiced for that year. The Trustee will either supply to the Grower an invoice, payable within two weeks, or a credit note with payment as applicable for any difference.

Finance

54. Growers can fund their involvement in the Project themselves or borrow from an independent lender.

55. Growers cannot rely on this Product Ruling if application monies remain unpaid by 30 June 2006. Where an application is accepted 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 the Trustee on or before 15 June 2006.

56. This Ruling also 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

57. This Ruling applies only to Growers who:

- are accepted to participate in the Project on or before 15 June 2006;
- have executed a Licence and Management Agreement by that date; and
- are either a wholesale client (as defined in section 761G of the Corporations Act) or have accepted a personal offer under a small scale offering (pursuant to section 1012E of the Corporations Act).

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

59. This Ruling does not apply to Growers who make an election to manage their Stone Fruit Lot(s) and/or, collect, market and sell their own stone fruit.

Minimum subscription

60. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted, the Licence and Management Agreement has been executed and the Project has commenced. Under the terms of the Information Memorandum, a Grower's application will not be accepted and the Project will not proceed until the subscription of 80 Stapled Interests is achieved.

The Simplified Tax System (STS)

Division 328

61. 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 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*.

62. 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***

63. 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***

64. 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.

65. A Grower will be assessable on ordinary income from carrying on their business of commercial growing and cultivation of cherry trees for the purpose of harvesting cherries for sale in the income year in which that income is derived.

Deductions for Management Fees, Trustee Services Fees and Land and infrastructure licence Fees***Section 8-1***

66. A Grower may claim tax deductions under section 8-1, for the revenue expenses in the Table below on a per Stone Fruit Lot basis.

Fee Type	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Land and infrastructure licence fee	\$317 See Notes (i) & (ii)	\$2,742 See Notes (i), (ii) & (iii)	\$2,810 See Notes (i), (ii) & (iii)
Management fee	\$947 See Notes (i) & (ii)	\$16,876 See Notes (i), (ii) & (iii)	\$20,057 See Notes (i), (ii) & (iii)
Trustee Services fee	\$670 See Notes (i) & (ii)	\$687.50 See Notes (i), (ii) & (iii)	\$704 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) Where a Grower pays the Land and infrastructure licence fee, Management fee and Trustee Services fee in the relevant income years shown in the Licence and Management Agreement, those fees are deductible in full in the year that they are incurred.
- (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 100 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

67. A Grower who is not an 'STS taxpayer' will also be entitled to tax deductions relating to tree guards, fencing and the cherry trees, All deductions shown in the following Table are determined under Division 40.

Fee Type	ITAA 1997 Section	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Tree guards (\$518 per Stone Fruit Lot)	40-25	Nil See Notes (i) & (iv)	Amount must be calculated See Notes (i) & (iv)	Amount must be calculated See Notes (i) & (iv)
Fencing	40-25	Amount must be calculated See Notes (i) & (iv)	Amount must be calculated See Notes (i) & (iv)	Amount must be calculated See Notes (i) & (iv)
Establishment of cherry trees	40-515	Nil See Note (v)	Nil See Note (v)	Nil See Note (v)

Notes:

- (iv) Each of the tree guards and the fence are 'depreciating assets'. The interest in each tree guard (for all Growers) and the interest in the fence (where the Grower acquires **less** than 3 Stone Fruit Lots) are 'low cost assets' which can be allocated to a 'low value pool'. Once any 'low-cost asset' of a Grower is allocated to a 'low-value

pool', all other 'low-cost assets' the Grower starts to 'hold' in that year or a later year must be allocated to that pool. If the Grower has already allocated an asset to a 'low-value pool', the tree guard and the Grower's interest in the fence must also be allocated to that pool. Otherwise, the Grower must decide whether to create a 'low-value pool'. If the assets are allocated to a 'low-value pool', the capital expenditure on the tree guards and their interest in the fence will be deducted under the diminishing value methodology of the pool based on a rate of 18.75% in the year the tree guards and the fence are first used and a rate of 37.5% in subsequent years (section 40-440). If the assets are not allocated to a 'low-value pool', or in the case of the fence where the Grower acquires more than 3 Stone Fruit Lots, the relevant asset can be written off based on its 'effective life'. However, no deduction for the decline in value is available until the asset is installed.

The Commissioner has determined that fencing has an 'effective life' of 33 1/3 years, but there has been no determination of the 'effective life' of a tree guard by the Commissioner. Therefore, Growers must self assess an 'effective life' for the tree guards.

The fence will be installed and first used in the year ended 30 June 2006, but the tree guards will not be installed until after the cherry trees are planted. The Trustee will advise the Growers of each of those dates to enable them to calculate the deduction allowable for each asset.

- (v) Cherry 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 cherry trees is determined using the formula in section 40-545 and is based on the capital expenditure \$14,714 per Stone Fruit Lot incurred by the Grower that is attributable to their establishment. Cherry trees have an 'effective life' of 18 years for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the cherry trees enter their first commercial season (section 40-530, item 2). The Trustee will inform Growers of when the cherry trees enter their first commercial season.

Deductions for Capital Expenditure ('STS taxpayers')***Subdivision 328-D and Division 40***

68. A Grower who is an 'STS taxpayer' will also be entitled to tax deductions relating to tree guards, fencing and cherry trees. Deductions relating to the 'cost' of tree guards must be determined under Division 328. Deductions for the cherry trees must be determined under Division 40.

69. 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 ended 30 June 2007	Year ended 30 June 2008
Tree guards	328-180	Nil See Notes (i) & (vi)	\$518 per Stone Fruit Lot See Notes (i) & (vi)	Nil See Notes (i) & (vi)
Fencing	328-180 or 328-185 & 328-190	To be calculated See Notes (i) & (vi)	To be calculated See Notes (i) & (vi)	To be calculated See Notes (i) & (vi)
Establishment of Cherry Trees	40-515	Nil See Note (v)	Nil See Note (v)	Nil See Note (v)

Notes:

- (vi) Each of the tree guards and the fence are 'depreciating assets'. The interest in each tree guard (for all Growers) and the interest in the fence (where the Grower acquires **less** than 3 Stone Fruit Lots) are 'low cost assets' as defined in subsection 40-425(2). 'Low cost assets' cannot be allocated to a 'general STS pool' (section 328-180). A deduction equal to the amount of the Grower's expenditure for the tree guards and for the fencing is available in the income year in which each of the assets are 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. The Trustee will advise when this has occurred.

However, where a Grower acquires more than 3 Stone Fruit Lots, each Grower's interest in the fencing is a 'depreciating asset' which can be allocated to a 'general STS pool'. The 'cost' of the asset is the amount paid by each Grower. The tax deduction allowable is determined in the year ended 30 June 2006 by multiplying the 'cost' of the interest by half the 'general STS pool' rate, that is by 15%. Each Grower's interest in the fencing is allocated to their 'general STS pool' at the end of the year ended 30 June 2006 and that part of the 'cost' not deducted in the first year is added to the pool balance. In subsequent years, the full pool rate of 30% will apply.

Interest

70. 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 94 to 101 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.

Units in Property Trust

71. The units in The Stone Fruit Asset Trust are CGT assets (section 108-5) and the amount of \$30,871 per parcel of units payable by a Grower or the Grower's associate constitutes an outgoing of capital and is not an allowable deduction.

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

73. Distributions by The Stone Fruit Asset Trust are included in the assessable income of a Grower or an associate of the Grower who is a unit holder, in accordance with Division 6 of Part III of the ITAA 1936.

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

Section 35-55 – exercise of Commissioner’s discretion

74. 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 losses arise.

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

75. For a Grower who participates in the Project and incurs expenditure as required by the Licence and Management 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 94 to 101);
- 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

3 May 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?

76. For the amounts set out in the Tables above to constitute allowable deductions the Grower's horticultural activities as a participant in the 2006 Cherry Project must amount to the carrying on of a business of primary production.

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

78. For schemes such as that of the 2006 Cherry Project, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As 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.

79. 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 trees are established;
- the Grower has a right to harvest and sell the cherries from those 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.

80. In this Project, each Grower enters into a Licence and Management Agreement.

81. Under the Licence and Management Agreement each individual Grower will have rights over a specific and identifiable area of one hectare of land. The Licence and Management Agreement provides the Grower with an ongoing interest in the specific 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 Trustee to come onto the land to carry out its obligations under the Management Agreement.

82. Under the Licence and Management Agreement the Trustee is engaged by the Grower to establish and maintain a Stone Fruit Lots on the Grower's identifiable area of land during the term of the Project. The Trustee has provided evidence that it holds or has contracted with an entity with the appropriate professional skills and credentials to provide the management services to establish and maintain the Stone Fruit Lots on the Grower's behalf.

83. The Trustee is also engaged to harvest and sell, on the Grower's behalf, the cherries grown on the Grower's Stone Fruit Lots.

84. 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.

85. 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 cherries 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.

86. The pooling of cherries from trees grown on the Grower's Stone Fruit Lot with the cherries of other Growers is consistent with general horticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled cherries will reflect the proportion of the cherries contributed from their Stone Fruit Lots.

87. The Trustee'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 a Stone Fruit Lot is relatively small, it is of a size and scale to allow it to be commercially viable.

88. The Grower's degree of control over the Trustee as evidenced by the Licence and Management is sufficient. During the term of the Project, the Trustee will provide the Grower with regular progress reports on the Grower's Stone Fruit Lots and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Trustee in certain instances, such as cases of default or neglect.

89. 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 2006 Cherry Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

90. 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.

91. 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 Land and infrastructure licence fees, Management and Trustee Services fees

Section 8-1

92. Consideration of whether the Land and infrastructure licence fee, Management fee and Trustee Services fee 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.

93. The Land and infrastructure licence fee, Management fee and Trustee Services fee 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 cherries 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 scheme. The fee appears to be reasonable. There is no capital component of either the Management fee, Land and infrastructure licence fee or the Trustee Services 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***

94. 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.

95. 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

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

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

- the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year;
- the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the scheme 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.

98. 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 scheme. The funds borrowed and the resulting interest deduction are directly related to the activities under the scheme. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF of the ITAA 1936.

99. 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 scheme that is less than \$1,000. Such expenditure is immediately deductible.

100. 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.

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

101. 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

102. In this Project, an initial Land and infrastructure licence fee of \$317, Management fee of \$947 and a Trustee Services fee of \$670 per Stone Fruit Lot will be incurred on execution of the Licence and Management Agreement. The Land infrastructure and licence fee, Management fee and the Trustee Services fee are charged for providing management services and licensing land to a Grower by 30 June of the year of execution of the Agreements. Under the Agreement, 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.

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

104. 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 or the Trustee Services fee, and the fees for subsequent years, is for the Trustee doing 'things' that are not to be wholly done within the expenditure year. Under the Agreement, Land and infrastructure licence fees are payable annually in advance for the licence of the land during the expenditure year.

105. On this basis, provided a Grower incurs expenditure as required under the Project agreements, as set out in paragraph 44 to 48, 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

106. Although not required under the Licence and Management Agreement, a Grower participating in the Project may **choose** to prepay fees/interest for a period beyond the 'expenditure year'. Where this occurs, contrary to the conclusion reached in paragraph 105, 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.

107. For these Growers, the amount and timing of deductions for any relevant prepaid Land and infrastructure licence fees, Management Fees and Trustee Services 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***

108. Any part of the expenditure if 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 tree guards, fencing and the establishment of the trees is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328.

109. 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'.

110. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 67 and 69 in the Table(s) and accompanying notes.

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

111. 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 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;
- there is an objective expectation that within a period that is commercially viable for the horticulture 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.

112. 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

113. 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

114. 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).

115. The 2006 Cherry Project will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 66 to 69 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.

116. 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 cherries. 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:

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
- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZM
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- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZME(1)
- ITAA 1936 82KZME(2)
- ITAA 1936 82KZME(3)
- ITAA 1936 82KZME(4)
- ITAA 1936 82KZME(7)
- ITAA 1936 82KZMF
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