



PR 2006/88 - Income tax: Moora Citrus Project - 2007 Growers

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 This document has changed over time. This is a consolidated version of the ruling which was published on *18 October 2006*



Product Ruling

Income tax: Moora Citrus Project – 2007 Growers

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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.

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

No guarantee of commercial success

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

Potential participants must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products and how the product fits an existing portfolio. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document.

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

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

Terms of use of this Product Ruling

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

What this Ruling is about

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

Relevant provision(s)

2. The relevant 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;
- section 25-25 of the ITAA 1997;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Division 40 of the ITAA 1997;
- Subdivision 61-J of the ITAA 1997;
- Division 70 of the ITAA 1997;
- Division 328 of the ITAA 1997;
- Division 328 *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 taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

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

Note to promoters and advisers

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

Class of 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 (refer to paragraph 71) 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 persons are referred to as 'Growers'.

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

- are accepted to participate in the Project prior to the date of this Ruling;
- are accepted to participate in the Project before 1 July 2007 or after 15 June 2007;
- elect to market their own produce (see paragraph 55);
- have their application conditionally accepted by Primary Securities Ltd subject to finance for the payment of the application fee, where the finance has not been approved by the lender or the funds have not

been made available to Primary Securities Ltd by 15 June 2007;

- enter into finance arrangements with entities associated with the Project, other than Momentum Investment Finance Pty Limited;
- intend to terminate their involvement in the scheme prior to the completion of the Project; or
- do not intend to derive assessable income from the Project.

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 70.

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 17 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 2009. The Ruling continues to apply, in respect of the relevant provisions ruled upon, to all entities within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, who entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entities' involvement in the scheme.

Scheme

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

- Application for a Product Ruling as constituted by documents provided on 23 February 2006, 17 March 2006, 19 April 2006, 28 April 2006, 8 May 2006 and 9 May 2006 and additional correspondence including e-mails dated 17 March 2006, 19 April 2006, 1 May 2006 and 8 May 2006;
- Draft Product Disclosure Statement for the Moora Citrus Project, received 9 May 2006;
- Draft **Constitution** of the Moora Citrus Project, received 17 March 2006;
- Draft **Management Agreement** for the Moora Citrus Project between Primary Securities Ltd (as Responsible Entity) and the Grower, received 9 May 2006;

- Draft Lease to RE for the Moora Citrus Project between Midwest Holdings Group Pty Ltd (as Lessor) and Primary Securities Ltd (as Lessee), received 8 May 2006;
- Draft **Citruslot Sub-Lease** for the Moora Citrus Project between Primary Securities Ltd (as Responsible Entity and Sub-Lessor) and the Grower, received 8 May 2006;
- Draft Responsible Entity Services Agreement for the Moora Citrus Project 2006 between Agcorp Australia Pty Ltd (as Manager), Midwest Holdings Group Pty Ltd (as Land Owner) and Primary Securities Ltd, received 23 February 2006;
- Draft Custodian Agreement for the Moora Citrus Project between Primary Securities Ltd (as Responsible Entity) and the Custodian, received 23 February 2006;
- Interim Head Lease for the Moora Citrus Project between the Seller and Midwest Holdings Group Pty Ltd (Land Company), received 23 February 2006;
- Draft Rules for the Moora Citrus Project, received 23 February 2006;
- Draft Orchard Management Agreement for the Moora Citrus Project between Primary Securities Ltd (as Responsible Entity) and Agcorp Australia Pty Ltd (as Project Manager, received 8 May 2006;
- Additional correspondence, received 14 September 2006 and 5 October 2006;
- Draft Compliance Plan for the Moora Citrus Project, received 17 March 2006; and
- Draft **Loan Agreement** and loan documents including Application Forms, received 28 February 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 (in bold) 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 to which this Ruling applies.

19. 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

20. The main features of the Moora Citrus Project are as follows:

| | |
|--|--|
| Location | Moora, 200 kms North East of Perth |
| Type of business each participant is carrying on | Commercial growing and cultivation of Citrus Fruit (Navel and Valencia oranges) for the purpose of harvesting and selling the produce. |
| Number of hectares offered for cultivation | 210 |
| Size of each interest (Citruslot) | 0.075 hectares |
| Minimum allocation per Grower | 2 Citruslots |
| Minimum subscription | 263 Citruslots |
| Number of trees to be established per hectare | 800 |
| The term of the Project | Approximately 19 years |
| Initial minimum cost | \$9,000 for 2 Citruslots |
| Ongoing | <ul style="list-style-type: none"> • Rent • Ongoing Management Fees |
| Other costs | <ul style="list-style-type: none"> • Processing costs • Incentive Fee |

The Project

21. The Project will be a Managed Investment Scheme under the *Corporations Act 2001*. Primary Securities Ltd will be Responsible Entity for the Project. Primary Securities Ltd has been issued with Financial Services Licence Number 224107 by ASIC. Offers for interests in the Project will be made under a Product Disclosure Statement. Under the Product Disclosure Statement, the Responsible Entity will offer 263 interests of 0.075 hectares in size to 2006 Growers and 1093 interests to 2007 Growers.

22. The Project involves the farming of Citrus Fruit, specifically Valencia and Navel oranges, on the land acquired for this purpose and the subsequent harvest and sale of the produce. The term of the Project is approximately 19 years.

23. Primary Securities Ltd has secured 210 hectares of land on Prices Road, Moora, Western Australia for the Project at the following location:

- Top right hand corner of Lot 3627, located on Prices Road, off Dandaragon Road, Shire of Dandaragan.

24. The current owner of the land will grant an interim Head Lease to Midwest Holdings Group Pty Ltd (the Land Company), pending the subdivision and sale of land from the owner to the Land Company. The Land Company will lease the property to the Responsible Entity for the Project.

25. By completing the Application in the Product Disclosure Statement and paying the Application Fee, an Applicant can apply for two or more Citruslots each consisting of a combination of different lots to total approximately 2 Tree rows. A Citruslot is approximately 0.075 hectares in size. At the time of Allotment 40% of each Citruslot will be planted with existing trees. The balance 60% will be planted with new trees by the end of November of the income year following the year of Allotment. The Citruslots will be planted at the rate of approximately 800 trees per hectare. Water for the irrigation of the Citruslots will be acquired from the Leederville Aquifer via a production bore.

26. A Grower participating in the Project will enter into a Citruslot Sub-Lease and a Management Agreement with the Responsible Entity.

27. Under the Citruslot Sub-Lease, the Responsible Entity will lease two or more Citruslots to the Grower for a term of approximately 19 years to enable the Grower to carry on the business of commercial production of Citrus Fruit.

28. Under the Management Agreement, the Grower appoints the Responsible Entity to conduct the Project on its behalf. The Responsible Entity will be responsible for the Initial Services, installation of the Growers' Irrigation System and Citrus Farming on the Citruslots and for Processing of the Citrus Fruit. A Grower may elect to sell their own produce or the Responsible Entity will do so on their behalf. **This Ruling does not apply to Growers who elect to sell their own produce.**

29. The Responsible Entity will appoint Agcorp Australia Pty Ltd as Project Manager to carry out the services listed in the Management Agreement in respect of each Grower's Citruslot. Agcorp Australia Pty Ltd will also agree to purchase the Citrus Fruit at the on-selling price.

30. The Product Disclosure Statement states that each Grower must subscribe for a minimum of 2 Citruslots at an initial cost of \$4,500 per Citruslot. In addition, the Product Disclosure Statement states that a minimum of 263 Citruslots must be reached before the Project can commence.

31. When a Grower makes an application for Citruslots, the Grower will execute a Power of Attorney enabling the Responsible Entity to act on their behalf as required. This enables Primary Securities Ltd to enter into the Management Agreement and Citruslot Sub-Lease on behalf of the Grower. As required under the *Corporations Act 2001*, the Responsible Entity will maintain a Register of Growers.

32. Under this offer, Growers may enter the Project in either the 2006 income year (defined as '2006 Growers') or the 2007 income year (defined as '2007 Growers'). Growers Applications accepted during the period 1 July 2007 to 15 June 2007 will commence participation as '2007 Growers'. **This Ruling only applies in respect of '2007 Growers'**. Note that Product Ruling PR 2006/87 will apply to Growers who enter into the Project before 15 June 2006.

The Constitution

33. The Constitution establishes the Project and operates as a deed binding on all of the Growers and Primary Securities Ltd as the Responsible Entity. The Constitution sets out the terms and conditions under which Primary Securities Ltd agrees to act as the Responsible Entity for the Project. Growers are bound by the Constitution by virtue of their participation in the Project.

34. Under the terms of the Constitution, all moneys received from Growers on application (the Application Fees) shall be paid to the Responsible Entity. The Responsible Entity will enter into a Custodian Agreement under which the Custodian will hold the Application Fees (as agent for the Responsible Entity) in a trust account set up for this purpose. The Responsible Entity will also:

- enter into the Management Agreement and Citruslot Sub-Lease on behalf of the growers;
- enter into any agreement for the sale of the Citrus Fruit on behalf of the Grower; and
- deposit the Receipts from the sale of Citrus Fruit into the trust account held by the Custodian and pay the Grower's Proportion of the Receipts to the Grower following deduction of costs and outstanding fees in accordance with clause 11.

Compliance Plan

35. As required by the Corporations Act, a Compliance Plan has been prepared for the Project. Its purpose is to ensure that the Responsible Entity manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

36. Pursuant to clause 12 of the Compliance Plan, the Responsible Entity will arrange for the Custodian to open a trust account to receive the Application Fees paid by the Growers. The Responsible Entity must ensure that the minimum subscription is reached before the Allotment of Citruslots (including entering into a Citruslot Sub-Lease and Management Agreement) and the release of any moneys.

Lease to RE

37. Under the Lease to RE (between Primary Securities Ltd as Responsible Entity and the Land Company), the Land Company will lease the land to Primary Securities Ltd for the duration of the Project. The Land Company is responsible for establishing the Orchard at its own cost, prior to Allotment of the Citruslots to the Growers. This includes preparing the land and installing all infrastructure such as the dam, irrigation system and windbreaks. The Land Company will also purchase Tree stocks and plant the Trees on the Citruslots (40% before Allotment and 60 % by the end of November of the income year following the year of Allotment) so there is an average of no less than 60 trees per Citruslot.

Citruslot Sub-Lease

38. Growers participating in the Project will enter into a Citruslot Sub-Lease with Primary Securities Ltd in its capacity as Responsible Entity and Head Lessor (or Sub-Lessor) of the Moora Citrus Project. Growers are granted an interest in land in the form of a Sub-Lease to use their Citruslots for carrying on the business of farming of Citrus Fruit (clause 2 of the Citruslot Sub-Lease).

39. Under the Citruslot Sub-Lease, Growers have an exclusive right and title to the Citrus Fruit on the Trees on the Citruslots (clause 2 of the Citruslot Sub-Lease).

40. The lease will commence on the date the Citruslots are allotted to Growers and will continue for a period of approximately 19 years or until the Project is terminated. Each Grower must pay rent annually to the Responsible Entity (Clause 4 and Item 5 of the Schedule to the Citruslot Sub-Lease).

41. Under clause 2.3 of the Citruslot Sub-Lease, the Grower has the right to use the Irrigation System, the Dam, the licence to draw water from the Water Source and any other infrastructure on the land for the purpose of asserting these rights.

42. Under the Citruslot Sub-Lease, among other things, the Grower:

- must not use the Citruslots for any purpose other than Citrus Farming and Harvesting of Citrus Fruit;
- must maintain the Citruslots in good condition and effect repairs when needed;
- must take out a public risk insurance policy and additional insurance as the Grower sees fit; and
- shall comply with all laws relating to the use and occupancy of the Citruslots.

43. If the Trees are destroyed or materially damaged, a mineral or petroleum lease is established over the Citruslots, or the Grower and Responsible Entity agree that it is no longer viable to carry out Citrus Farming then the parties may terminate the Citruslot Sub-Lease pursuant to clause 10.

Management Agreement

44. Growers participating in the scheme will enter into Management Agreement with Primary Securities Ltd in its capacity as Responsible Entity for the Project. The Management Agreement commences on the date of Allotment of the Citruslots to the Grower. Under the Management Agreement, each Grower appoints the Responsible Entity to perform the Initial Services and Citrus Farming listed in the Management Agreement in respect of each Grower's Citruslots. The Responsible Entity will also cause the Irrigation System to be installed to the extent required for irrigating the Grower's Citruslots. The Responsible Entity may employ an agent or contractor to carry out some or all of these services and will do so by engaging Agcorp Australia Pty Ltd (the Project Manager).

45. The Initial Services provided for under the Management Agreement must be completed during the period from the date of Allotment of the Citruslots to the Grower to 30 June 2007. These services will only be conducted after the Citruslots are leased to the Grower. The Initial Services include:

- inspection of all existing trees on the Land;
- preparation of a report to the effect that the Citruslots have been established in accordance with the terms of the Citruslot Sub-Lease;
- preparation of a soil report for the Growers;
- monitoring of the leaching of nutrients from the soil;
- preparation of the Initial Orchard Management Plan;
- preparation of a cash flow forecast for the following year;
- inspection, supervision and management activities in respect of the Initial Services that are carried out by sub-contractors; and
- all other activities included in the definition of Citrus Farming.

46. Services that will be provided throughout the Term of the Project are referred to as Citrus Farming. These include, among other things:

- cultivating, tending, culling, watering, pruning, thinning, replanting, fertilising, spraying and otherwise caring for existing trees;
- maintaining a pest management programme;

- monitoring and maintaining soil quality;
- obtaining all necessary approvals and consents in relation to the provision of the services listed in the Management Agreement; and
- arranging insurance of the Citrus Fruit pursuant to clause 7.

47. The Responsible Entity will carry out the Initial Services and Citrus Farming in accordance with good horticultural and agricultural practices generally recognised as good practice for the growth of premium quality Citrus Fruit.

48. In consideration of the Responsible Entity agreeing to carry out the Initial Services and install the Irrigation System, a Management Fee is payable on Application (consisting of an Irrigation Fee of \$1,320 and an Initial Services Fee of \$3,168). For Citrus Farming an Ongoing Management Fee is payable on or before 30 September each year beginning in the income year following Allotment of the Citruslots to the Grower.

49. The Responsible Entity will provide a report to the Grower by the first 31 December following Allotment and on 31 December of each succeeding year setting out information on matters relevant to the Grower's business including the general state of the Orchard. In addition the Responsible Entity will provide a report within 60 days after the completion of Harvesting each season setting out details of the sale of Citrus Fruit, the Gross Sale Proceeds, Processing Costs and Net Proceeds to Growers.

50. The Responsible Entity will be responsible for insuring the Orchard against public risk. The Responsible Entity is also required to insure the Citruslots against damage or theft, damage to picked Citrus Fruit resulting from cool store breakdown or other plant breakdown, loss due to fortuitous circumstances, product liability and other such risks in respect of the Citruslots and Citrus Fruit in a manner consistent with prevailing industry practice.

Orchard Management Agreement

51. The Responsible Entity may employ an agent or contractor to carry out some or all of the services (referred to above) and will do so by engaging Agcorp Australia Pty Ltd (Agcorp).

52. Under the Orchard Management Agreement between Primary Securities Ltd (as Responsible Entity) and Agcorp (as Project Manager), the Responsible Entity engages the Project Manager, as an independent contractor to carry out, direct, supervise and monitor the management of the Orchard (including Initial Services and Citrus Farming) for and on behalf of the Responsible Entity. The Project Manager must carry out these services in accordance with good horticultural and agricultural practices having regard to the various Management Plans required to be prepared under clause 6 of Orchard Management Agreement.

53. Under clause 16 of the Orchard Management Agreement, the Project Manager agrees to buy the Citrus Fruit of the Growers who do not elect to sell their own produce. The price paid to Growers will be the price paid by third parties for the Citrus Fruit.

Harvest and sale

54. The first Harvest of Citrus Fruit is expected two income years after Allotment with full production in the fifth income year after Allotment.

55. Growers may elect, by notice in writing to the Responsible Entity by the second 30 June following Allotment of the Citruslots, to sell the Citrus Fruit harvested from their Trees (clause 9 of the Management Agreement). **This Product Ruling does not apply to Growers who make such an election.**

56. If no such election is made, the Grower irrevocably authorises the Responsible Entity to sell (and to appoint the Project Manager to sell) the Citrus Fruit harvested from the Grower's Trees (clause 8 of the Management Agreement).

57. The Responsible Entity will (and will contract with the Project Manager to) use its best endeavours to negotiate the sale of fruit for the highest price practicable having regard to the circumstances at the relevant time.

58. The Responsible Entity will pool and sell all Citrus Fruit from the Orchard for which an election under clause 9 of the Management Agreement has not been made. The Management Agreement sets out the circumstances relating to the pooling of Growers' Citrus Fruit and the distribution of the proceeds of sale. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- Growers who have contributed Citrus Fruit from a Harvest to the pool making up the proceeds are entitled to benefit from distributions from those proceeds in proportion to their contributions; and
- Citrus Fruit can only be pooled with the Citrus Fruit of Growers accepted to participate in the Moora Citrus Project.

59. The Net Proceeds to Growers (Gross Sale Proceeds less Processing Costs) will be paid by the Project Manager to the Responsible Entity for deposit to the trust account in the name of the Custodian. The Net Proceeds to Growers will be distributed, in the following order of priority (clause 11 of the Constitution), to pay:

- the Grower's Proportion of the Processing Costs (to the extent not already paid);
- any outstanding Rent or Management Fees or other costs owing by the Grower to the Responsible Entity;

- the Grower's Proportion of the balance to the Grower.

60. The term 'Grower's Proportion' is defined in clause 1.1 of the Management Agreement.

61. In the event of total or partial damage to the Trees on the Citruslots, the Grower's Proportion will be correspondingly reduced (clause 13 of the Management Agreement).

Fees

62. The Grower must pay the following amounts to the Responsible Entity for each Citruslot:

- **Application Fee** of \$4,500 payable on application. This is comprised of the Initial Services Fee (\$3,168), the Irrigation Fee (\$1,320) and Rent (\$12) for the period from the Lease Commencement Date to 30 June 2007;
- **Ongoing Management Fee** of \$2,210 for the two income years following the income year in which Allotment takes place (Years 1 and 2) and \$1,202 for Year 3. For Year 4 and subsequent years the fee consists of the greater of \$1,202 Indexed (as defined in clause 1 of the Citruslot Sub-Lease) and the Grower's Proportion of the anticipated costs of Citrus Farming for the Orchard plus \$100,000. This fee is invoiced on 1 July each year and payable on or before 30 September of that year;
- Annual **Rent** invoiced on 1 July each year payable on or before 30 September of that year. Rent for the period from the Lease Commencement Date to 30 June 2007 is \$12 and is included in the Application Fee. Rent for the two income years following the income year in which Allotment takes place (Years 1 and 2) is \$290 per Citruslot and Rent for year 3 is \$298. For Year 4 and each subsequent year, the Rent is the Rent of the previous year Indexed (as defined in clause 1 of the Citruslot Sub-Lease);
- **Processing Costs** for harvesting, grading, freight and selling to be deducted from Gross Sale Proceeds;

- **Performance Incentive Fee** payable from and including the 2012 income year (year 5), equal to 25% of the extent to which average Net Proceeds to Growers for that year and the previous two income years exceeds the Net Proceeds to Growers thresholds set out in the table below:

| Income Year | Threshold |
|-------------|-----------|
| 2012 | \$866 |
| 2013 | \$1,889 |
| 2014 | \$2,559 |
| 2015 | \$2,625 |
| 2016 | \$2,690 |
| 2017 | \$2,765 |
| 2018 | \$2,832 |
| 2019 | \$2,910 |
| 2020 | \$2,990 |
| 2021 | \$3,072 |
| 2022 | \$3,156 |
| 2023 | \$3,145 |
| 2024 | \$3,134 |
| 2025 | \$3,123 |
| 2026 | \$3,112 |

Finance

63. Growers can fund their involvement in the Project themselves or borrow from an independent lender. All Growers can choose to borrow from a preferred lender Momentum Investment Finance Pty Limited who has entered into arrangements with the Responsible Entity and has agreed to consider applications for finance from prospective Growers.

64. Growers can apply to borrow the Application Fee of \$4,500 per Citruslot payable on application, the Rent of \$290 per Citruslot for the 2008 income year payable by 30 September 2007 and the Ongoing Management Fee of \$2,210 per Citruslot for the 2008 income year payable by 30 September 2007, from Momentum Investment Finance Pty Limited by completing the relevant Finance Application Form.

65. Momentum Investment Finance Pty Limited will lend on a full-recourse commercial basis under the following arrangements:

- Facility 1 – monthly instalments of principal and interest over 3 years commencing on the first business day of the month following the loan drawdown date.
- Facility 2 – monthly payments of interest only for 2 years plus monthly instalments of principal and interest for 3 years commencing on the first business day of the month following the loan drawdown date.
- Facility 3 – monthly instalments of principal and interest over 5 years commencing on the first business day of the month following the loan drawdown date.
- Facility 4 – monthly payments of interest only for 3 years plus monthly instalments of principal and interest for 7 years commencing on the first business day of the month following the loan drawdown date.

66. Facility 1 is subject to an interest rate of 10.5% per annum, Facilities 2 and 3 are subject to an interest rate of 10.75% per annum and Facility 4 is subject to an interest rate of 11% based on current interest rates. Interest will accrue on the unpaid balance of the loan on the date each scheduled payment is due and is charged monthly in arrears.

67. An Application Fee of \$250 plus 0.5% of the amount borrowed in respect of the Application Fee is payable on application. In addition an Application Fee of 0.5% of the amount borrowed in respect of the Rent and Ongoing Management Fee for the 2008 income year, is payable by 30 September 2007. These fees may be added to the loan. The maximum amount of finance that can be received by a Grower is \$250,000.

68. The loans are secured by a registered charge over the Grower's interest in the Project. Normal debt recovery procedures, including legal action, will be taken in the case of defaulting borrowers.

69. This Ruling will not apply to Growers who enter into finance arrangements with Momentum Investment Finance Pty Limited with terms and conditions that differ in any way from those set out in paragraphs 65 to 68.

70. This Ruling also does not apply if a Grower enters into an agreement that 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' 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 terms are of a non-arm's length nature;
- repayments of the principal and 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) back to the lender or any associate;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project other than the Momentum Investment Finance Pty Limited (see paragraphs 63 to 68 for descriptions of the finance arrangements) are involved or become involved, in the provision of finance for the Project.

Ruling

Application of this Ruling

71. Subject to Paragraph 8, this Ruling applies only to Growers who:
- are accepted to participate in the Project during the period 1 July 2007 to 15 June 2007 and who have entered into a Management Agreement and a Citruslot Sub-Lease on or before 15 June 2007; and
 - do not elect to take and sell their produce.
72. The Grower's participation in the Project must constitute the carrying on of a business of primary production.
73. The Ruling does not apply to:
- Growers whose application has been conditionally accepted by the Responsible Entity subject to finance for the payment of the application fee, where the finance has not been approved by the lender and funds have not been made available to the Responsible Entity by 15 June 2007; or
 - Growers whose application has been conditionally accepted by the Responsible Entity subject to finance for the payment of the Rent and Ongoing Management Fee for the 2008 income year, where the finance has not been approved by the lender and funds have not been made available to the Responsible Entity by 30 September 2007; or
 - Growers who enter into finance arrangements with entities associated with the Responsible Entity other than the finance arrangements described at

paragraphs 63 to 68 with Momentum Investment Finance Pty Limited.

Minimum subscription

74. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of the Product Disclosure Statement, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 263 interests is achieved.

The Simplified Tax System (STS)

Division 328

75. 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). 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*.

76. 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

77. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides a 25% tax offset 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

78. 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.

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

Deductions for the Initial Services Fee, Rent, Ongoing Management Fees, Interest and Borrowing Expenses

Section 8-1 and section 25-25

80. A Grower may claim tax deductions for the revenue expenses set out in the Table below on a 'per Citruslot' basis.

| Fee Type | ITAA 1997 Section | Year ended 30 June 2007 | Year ended 30 June 2008 | Year ended 30 June 2009 |
|-------------------------------|--------------------------|---|---|---|
| Initial Services Fee | 8-1 | \$3,168 See Notes (i), (ii) and (iv) | | |
| Rent | 8-1 | \$12 See Notes (i), (ii) and (iv) | \$290 See Notes (i), (ii) and (iv) | \$290 See Notes (i), (ii) and (iv) |
| Ongoing Management Fee | 8-1 | | \$2,210 See Notes (i), (ii) and (iv) | \$2,210 See Notes (i), (ii) and (iv) |
| Interest | 8-1 | See Notes (iii) and (iv) | See Notes (iii) and (iv) | See Notes (iii) and (iv) |
| Borrowing Expenses | 25-25 | See Note (v) | See Note (v) | See Note (v) |

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example input tax credits): Division 27.
- (ii) The Initial Services Fee payable on application and the Rent and Ongoing Management Fees are deductible to the extent shown in the Table above in the year that they are incurred.
- (iii) Interest paid under a loan agreement with Momentum Investment Finance Pty Limited (as described at paragraphs 65 to 68) is deductible in the year in which it is incurred. 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 other than Momentum Investment Finance Pty Limited is outside the scope of this Ruling.

- (iv) This Ruling does not apply to Growers who choose to prepay the Rent and Ongoing Management Fees or who choose to, or are required to prepay interest under a loan agreement. Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.
- (v) The Loan Application fee (and stamp duty, if applicable) is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing money that is used or is to be used during that income year solely for income producing purposes. Borrowing expenses of \$100 or less are deductible in the year in which they are incurred. If the borrowing expenses are greater than \$100, the deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Momentum Investment Finance Pty Limited is outside the scope of this Ruling.

Deductions for capital expenditure

Division 40 and Division 328

81. A Grower will also be entitled to tax deductions relating to water facilities (for example, the irrigation system) and the Citrus Fruit trees. Deductions shown in the following Table are determined under Division 40. 'STS taxpayers' may choose to calculate the deduction for water facilities under Division 328 if the Irrigation System Fee is for a 'water facility' used to carry on the business (see Note (vi)).

| Fee Type | ITAA 1997 Section | Year ended 30 June 2007 | Year ended 30 June 2008 | Year ended 30 June 2009 |
|--|------------------------------|------------------------------------|------------------------------------|------------------------------------|
| Irrigation System Fee | 40-515 | \$440 See Notes (i) & (vi) | \$440 See Notes (i) & (vi) | \$440 See Notes (i) & (vi) |
| Establishment of horticultural plants | 40-515 | Nil See Notes (i) & (vii) | Nil See Notes (i) & (vii) | Nil See Notes (i) & (vii) |

Notes:

- (vi) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being a 'depreciating asset' 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 \$1,320 per Citruslot 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).

'STS taxpayers' may choose to calculate their deduction under Division 40 or under Division 328. If the Grower chooses to use Division 40, the Grower may claim the deductions under Subdivision 40-F, paragraph 40-515(1)(a) as discussed above.

For Division 328 to apply, the asset must be a 'depreciating asset' and the Grower must be 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 and ready for use' to produce assessable income. If the cost apportionable to the asset is less than \$1000, the asset is treated as a 'low cost asset' and the amount is deductible in full. If the asset is not treated as a low cost-asset, the tax deduction allowable in the 2007 income year is determined by multiplying its cost by half the relevant STS pool rate, that is by 15%. At the end of the year, it is allocated to the relevant STS pool and in subsequent years the full pool rate of 30% will apply.

- (vii) Each Grower will also be entitled to tax deductions relating to the citrus trees planted on the Grower's Citruslot. A citrus tree is a 'horticultural plant' as defined in subsection 40-520(2). A Grower holds a sub-lease to cultivate citrus trees on a designated area of land called a Citruslot for the harvesting of Citrus Fruit for commercial gain. As a Grower holds the Citruslot under a sub-lease, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction is determined using the formula in section 40-545. TR 2000/18 lists at Table A the effective lives of the varieties of citrus trees. Orange trees have an effective life of 30 years. For the purposes of section 40-545, this results in a straight-line write-off rate of 7%. The deduction is allowable when the citrus trees enter their first commercial season (section 40-530, item 2). The Responsible Entity will notify Growers when their citrus trees enter their first commercial season and the amount that may be claimed.

Trading stock

Section 70-35

82. A Grower who is not an STS taxpayer will, in some years, hold Citrus Fruit that will constitute trading stock on hand. Where, in an income year, the value of trading stock on hand at the end of an income year exceeds the value of trading stock on hand at the start of an income year a Grower must include the amount of that excess in assessable income.

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

84. The Responsible Entity will advise the Grower of the value of trading stock on hand at the end of the year.

Section 328-285

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

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

87. The Responsible Entity will advise the Grower of the value of trading stock on hand at the end of the year.

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

Section 35-55 – Commissioner's discretion

88. A Grower who is an individual accepted into the Project on or before 15 June 2007 may have losses arising from their participation in the Project deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for the income years ending **30 June 2007 to 30 June 2011**. 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.

Section 82KL and Part IVA

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

- 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 Taxation17 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?

90. For the amounts set out in the Tables above to constitute allowable deductions, the Grower's citrus orchard activities as a participant in the Moora Citrus Project must amount to the carrying on of a business of primary production.

91. Where there is a business, or a future business, the gross proceeds from the sale of the Citrus Fruit 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.

92. For schemes such as that of the Moora Citrus 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.

93. Generally, a Grower will be carrying on a business of cultivating citrus trees and harvesting the Citrus Fruit for processing and sale, and hence primary production, if:

- the Grower has an identifiable interest in the land on which the Grower's Trees are established;
- the Grower has a right to take and sell the Citrus Fruit each year 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 citrus orchard business; and
- the weight and influence of general indicators point to the carrying on of a business.

94. In this Project, each Grower enters into a Management Agreement and a Citruslot Sub-Lease.

95. Under the Citruslot Sub-Lease each individual Grower will have rights over a specific and identifiable area of 0.15 hectares or more of land. The Citruslot Sub-Lease provides the Grower with an ongoing interest in the specific Trees on the subleased area for the term of the Project. Under the Citruslot Sub-Lease the Grower must use the land in question for the purpose of carrying out horticultural activities and for no other purpose. The Citruslot Sub-Lease allows the Responsible Entity to come onto the land to carry out its obligations under the Management Agreement.

96. Under the Management Agreement the Responsible Entity is engaged by the Grower to manage and maintain Citruslots on the Grower's identifiable area of land during the term of the Project. The Responsible Entity will subcontract the management services to the Project Manager, under the Orchard Management Agreement. The Responsible Entity has provided evidence that the Project Manager holds the appropriate professional skills and credentials to provide the management services to establish and maintain the Citruslots on the Grower's behalf.

97. The Grower engages the Responsible Entity to maintain the Trees on the Grower's Citruslots according to the principles of sound horticultural practice which includes irrigation, fertilisation and weed control. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the Citrus Fruit grown on the Grower's Citruslots.

98. 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.

99. 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 their Citrus Fruit 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.

100. The pooling of Citrus Fruit grown on the Grower's Citruslots with the Citrus Fruit of other Growers is consistent with general horticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled Citrus Fruit will reflect the proportion of the Citrus Fruit contributed from their Citruslots.

101. The Responsible Entity's services on the Grower's behalf are also consistent with general horticultural practices. The assets are of the type ordinarily used in carrying on a business of cultivating citrus trees and harvesting the Citrus Fruit for processing and sale. While the size of a Citruslot is relatively small, it is of a size and scale to allow it to be commercially viable.

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

103. The horticultural activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. For the purposes of this Ruling, the Growers' horticultural activities in the Moora Citrus Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

104. 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.

105. Changes to the STS rules apply from 1 July 2005. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductibility of the Initial Services Fee, Ongoing Management Fees and Rent

Section 8-1

106. Consideration of whether the Initial Services Fee, Ongoing Management Fees and Rent are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer is contractually committed to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

107. The Initial Services Fee, Ongoing Management Fees and Rent associated with the horticultural activities will relate to the gaining of income from the Grower's business of horticulture (see above) after the relevant Agreements have been executed, and hence have a sufficient connection to the operations by which income (from the regular sale of Citrus Fruit) 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 fees is identifiable from the scheme. The fees appear to be reasonable. There is no capital component of the Initial Services Fee, Ongoing Management Fees and Rent. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Interest deductibility

Section 8-1

(i) Growers who use Momentum Investment Finance Pty Limited as the finance provider

108. Some Growers may finance their participation in the Project through a loan facility with Momentum Investment Finance Pty Limited. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of the Initial Services Fee, Ongoing Management Fees and Rent.

109. The interest incurred for the year ended 30 June 2007 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

(ii) Growers who DO NOT use Momentum Investment Finance Pty Limited as the finance provider

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

Prepayment provisions***Sections 82KZL to 82KZMF***

111. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (for example, the performance of management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

Application of the prepayment provisions to this Project

112. Under the Scheme to which this Product Ruling applies the Initial Services Fee is incurred on application and the Ongoing Management Fees and Rent are incurred annually, for services to be provided within the relevant year. Interest payable to Momentum Investment Finance Pty Limited is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this Scheme.

113. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a 'Grower' in this Project prepays all or some of the expenditure payable under the Management Agreement and/or the Citruslot Sub-Lease or prepays interest under a loan agreement (including loan agreements with lenders other than Momentum Investment Finance Pty Limited). The prepayment provisions will apply to determine the amount and timing of the deductions regardless of whether the Grower is an 'STS taxpayer' or not.

114. As noted in the Ruling section above (at paragraph 80, Note (iv)), Growers who prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in the Project.

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

115. Any part of the expenditure of a Grower that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, expenditure attributable to the irrigation system and the establishment of the citrus trees is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328.

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

117. The tax treatment of capital expenditure has been dealt with in a representative way in paragraph 81 in the Table and accompanying notes.

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

Section 35-55 – exercise of Commissioner’s discretion

118. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2007 to 30 June 2011** 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 2007 up to and including 30 June 2011:

- 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 citrus farming 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) to a later income year is able to offset that loss against their other assessable income.

119. 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

120. 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

121. 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).

122. The Moora Citrus 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 80 and 81 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.

123. 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 Citrus Fruit. 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:

PR 2006/87; TR 97/11; TR 98/22;
TR 2000/8; TR 2000/18; 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 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5

- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
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- ITAA 1997 Div 40
- ITAA 1997 Subdiv 40-F
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- ITAA 1997 40-520(2)
- ITAA 1997 40-525(2)
- ITAA 1997 40-530
- ITAA 1997 40-540
- ITAA 1997 40-545
- ITAA 1997 Subdiv 61-J
- ITAA 1997 Div 70
- ITAA 1997 70-35
- ITAA 1997 Div 328
- ITAA 1997 328-285
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