



PR 2007/24 - Income tax: Great Southern 2007 Diversified Olives Income 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 *16 May 2007*



Product Ruling

Income tax: Great Southern 2007 Diversified Olives Income Project – 2007 Growers

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[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.]

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

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

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

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

No guarantee of commercial success

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

Potential participants must form their own view about the commercial and financial viability of the product. 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.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product 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 Product Ruling.

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the 'Great Southern 2007 Diversified Olives Income Project' or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Growers.

3. The class of entities who can rely on those tax benefits consists of entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and which execute relevant Project Agreements mentioned in paragraph 27 of this Ruling on or before 15 June 2007. They must 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.

4. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- are accepted into this Project before the date of this Ruling or after 15 June 2007;
- participate in the scheme through offers made other than through the Product Disclosure Statement;
- enter into finance arrangements with Great Southern Finance Pty Ltd (the Financier) that do not comply with the written assurance given to the Tax Office by the Responsible Entity, Great Southern Managers Australia Limited (GSMAL), dated 22 December 2006; or
- enter into finance arrangements with the Financier or ABL Nominees Pty Ltd (the Preferred Financier) other than those specified in paragraphs 64 to 68 of this Ruling.

Qualifications

5. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 27 to 71 of this Ruling.

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

- this Product 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 Product Ruling may be withdrawn or modified.

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Date of effect

8. This Product Ruling applies prospectively from 28 March 2007, the date this Product Ruling is made. It therefore applies to the specified class of entities that enter into the scheme from 28 March 2007 until 15 June 2007, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities up to 30 June 2009. This Product Ruling will continue to apply to those entities even after its period of application for schemes entered into during the period of application.

9. However the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;
- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

10. 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)).

11. 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.

12. 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).

Changes in the law

13. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

14. Entities who are considering participating in the scheme 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

15. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes 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 Product Ruling is issued.

Goods and Services Tax

16. All fees and expenditure referred to in this Product 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.

Ruling

Application of this Ruling

17. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters into the scheme described at paragraphs 27 to 71 of this Ruling.

18. The Grower's participation in the Project must constitute the carrying on of a business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Lease and Management Agreement (LMA).

19. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced.

The Simplified Tax System (STS)

Division 328

20. 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 was an 'STS taxpayer' prior to 1 July 2005 and 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*.

21. 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

22. 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**Sections 6-5 and 17-5**

23. 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.

Deduction for management fees, rent, insurance premiums, interest, borrowing expenses and capital expenditure**Section 8-1, section 25-25, Division 27 and Subdivision 40-F of the ITAA 1997 and section 82KZMF of the Income Tax Assessment Act 1936**

24. A Grower may claim tax deductions for the following fees and expenditure on a per Grovelot basis, as set out in the Table below.

Fee Type	Year ended 30 June 2007	Year ended 30 June 2008	Year ended 30 June 2009
Management fees	\$5,060, plus 100% of Net Proceeds of Sale See Notes (i) & (ii)	\$633, plus 90% of Net Proceeds of Sale See Notes (i) & (ii)	\$632, plus 90% of Net Proceeds of Sale See Notes (i) & (ii)
Rent	Nil	10% of Net Proceeds of Sale See Note (i)	10% of Net Proceeds of Sale See Note (i)
Insurance premiums	Nil	As incurred See Note (i)	As incurred See Note (i)
Interest on loans with the Financier or the Preferred Financier	As incurred See Note (iii)	As incurred See Note (iii)	As incurred See Note (iii)
Loan establishment fee	Must be calculated – See Note (iv)	Must be calculated – See Note (iv)	Must be calculated – See Note (iv)
Establishment of Olive Trees	Must be calculated – See Note (v)	Must be calculated – See Note (v)	Must be calculated – See Note (v)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) The amount of \$6,325 payable on application consists of a management fee for Initial Management Services of \$5,060 and management fees for Ongoing Management Services provided during the income years ending 30 June 2008 and 2009 totalling \$1,265.

The fee for Initial Management Services of \$5,060 is payable on application for services to be provided in the Initial Management Period and is deductible in the year in which it is incurred. However, the amount of \$1,265 prepaid in respect of the Ongoing Management Services is **NOT** deductible in the year in which it is incurred for non-'STS taxpayers'. Deductions for this amount **must** be determined using the formula in subsection 82KZMF(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) (see paragraphs 81 to 92 of this Ruling). This section operates to apportion expenditure over the 'eligible service period' or ten years, whichever is the lesser. The 'eligible service period' commences on 1 July 2007 and ends on 30 June 2009. Accordingly, an amount of \$633 is deductible in the year ended 30 June 2008 and \$632 is deductible in the year ended 30 June 2009.
- (iii) The deductibility or otherwise of interest arising from agreements entered into with financiers other than the Financier or the Preferred Financier is outside the scope of this Ruling. Prepayments of interest to any lender, including the Financier or the Preferred Financier, are also not covered by this Product Ruling. Growers who enter into agreements with other financiers and/or prepay interest may request a private binding ruling on the deductibility of the interest incurred.
- (iv) The loan establishment fee payable to either the Financier or to the Preferred Financier 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. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing expenses arising from loan agreements entered into with financiers other than the Financier or the Preferred Financier is outside the scope of this Ruling.

- (v) Olive trees are a 'horticultural plant' as defined in subsection 40-520(2). As a Grower holds the Grovelot under a lease, the condition in item 2 of subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the Olive Trees is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. As the Olive Trees have an 'effective life' of 30 years or more for the purposes of section 40-545, this results in a straight-line write-off at a rate of 7%. The deduction is allowable when the Olive Trees enter their first commercial season (section 40-530, item 2). The Responsible Entity will inform the Grower when their Olive Trees enter their first commercial season and the amount that may be claimed.

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

Section 35-55 – exercise of Commissioner's discretion

25. A Grower who is an individual accepted into the Project by 15 June 2007 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 below, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for Growers 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.

Anti-avoidance provisions

Section 82KL and Part IVA

26. For a Grower who commences participation in the Project and incurs expenditure as required by the LMA, 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.

Scheme

27. The scheme that is the subject of this Ruling is identified and described in the following documents:

- Application for a Product Ruling received on 3 October 2006 and additional correspondence from the applicant dated 10 November 2006, 17 November 2006, 22 December 2006, 28 December 2006, 4 January 2007, 22 January 2007, 14 February 2007, 19 February 2007, 22 February 2007, 9 March 2007 and 15 March 2007;
- Draft Product Disclosure Statement for the Great Southern 2007 Diversified Olives Income Project and the Great Southern 2008 Diversified Olives Income Project (PDS), undated, to be issued by GSMAL, received on 3 October 2006, 10 November 2006, 28 December 2006, 19 February 2007, 22 February 2007, 9 March 2007 and 15 March 2007;
- Draft **Constitution** of the Great Southern 2007 Diversified Olives Income Project, received on 3 October 2006, 10 November 2006, 28 December 2006 and 22 February 2007;
- Draft Compliance Plan for the Great Southern 2007 Diversified Olives Income Project, received on 3 October 2006;
- Draft **Lease and Management Agreement** between GSMAL (as both the Lessor and Responsible Entity) and each Grower, received on 3 October 2006;
- Draft **Standard Terms for Lease and Management Agreement** between GSMAL (as both the Lessor and Responsible Entity) and each Grower, received on 3 October 2006, 10 November 2006 and 22 February 2007;
- Draft Lease between GSMAL (as the Lessee) and Great Southern Olives Land (No. 1) Pty Ltd (as the Owner), received on 3 October 2006 and 10 November 2006;
- Draft Management Services Agreement between GSMAL and Great Southern Limited, received on 3 October 2006;
- Draft Marketing Services Agreement between GSMAL and Great Southern Securities Pty Limited, received on 3 October 2006; and

- Draft Application for Term Finance, which includes the **Loan Deed** between the Financier or the Preferred Financier (as the Lender) and the Grower (as the Borrower), received on 28 December 2006 and 9 March 2007.

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

28. The documents highlighted are those that a Grower may enter into. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are a part of the scheme. The effect of these agreements is summarised as follows.

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

Overview

30. Following is a summary of the scheme:

Location	Shire of Gingin, approximately 100 kilometres north of Perth, Western Australia
Type of business to be carried on by each Grower	Commercial growing of conventional and organic olives
Term of the Project	Approximately 20 years
Number of hectares offered for cultivation	400 hectares Oversubscriptions may be accepted
Size of each interest (Grovelot)	0.1 hectares
Minimum allocation per Grower	1 Grovelot
Minimum subscription	None
Number of trees per hectare	Between 307 and 330
Initial cost per Grovelot	\$6,325 (includes an amount for prepaid management fees of \$1,265 for the years ending 30 June 2008 and 2009) plus 100% of Net Proceeds of Sale, if any

Ongoing costs per Grovelot	<ul style="list-style-type: none"> management fee and rent totalling 100% of Net Proceeds of Sale for the income years ending 30 June 2008 to 30 June 2011; and management fee and rent totalling 44% of Net Proceeds of Sale for the income years ending 30 June 2012 to 30 June 2027.
Other costs	<ul style="list-style-type: none"> insurance premiums; costs of Harvesting; and costs of oil extraction.

31. The Project will be a registered Managed Investment Scheme under the *Corporations Act 2001*. GSMAL has been issued with an Australian Financial Services Licence and will be the Responsible Entity for the Project.

32. An offer to participate in the Project will be made through the PDS. The offer under the PDS is for 400 hectares which corresponds to 4,000 Grovelots in the Project, although GSMAL has the right to accept oversubscriptions. There is no minimum amount that must be raised under the PDS.

33. To participate in the Project, Applicants must complete the Application Form attached to the PDS and lodge the completed Application Form together with the relevant Application Moneys on or before 15 June 2007. By signing the Application Form, Applicants are agreeing to appoint GSMAL as their Power of Attorney. Under the Power of Attorney, GSMAL will execute a LMA on behalf of Applicants who are accepted to participate in the Project as Growers. GSMAL will also allocate Grovelots to the Growers and place their details in a Register.

34. Applicants who are accepted to participate in the Project and who execute the LMA on or before 15 June 2007 will commence participation as a Grower. **This Ruling only applies in respect of Growers who are accepted into the Project from the date this Ruling issued to 15 June 2007.**

35. A Grower that participates in the Project will do so by acquiring an interest in the Project which will consist of a minimum of 1 Grovelot, each of 0.1 hectares in size. Each Grovelot will comprise of approximately 31 to 33 trees, of which a maximum of 30% may be mature established trees (planted prior to 2005) and a minimum of 70% may be newly established trees. Approximately 40% to 50% of the Olive Grove and each individual Grovelot will consist of newly established organic olive trees, approximately 30% to 48% will consist of newly established conventional olive trees, and approximately 12% to 30% will consist of mature established conventional olive trees.

36. Each Grovelot will therefore comprise of three separate areas of land. One of the areas will contain newly established organic olive trees, another area will contain the newly established conventional olive trees and the third area will contain mature established conventional olive trees. The percentage of each type of tree for each Grovelot will be the same as the percentage for the Project as a whole.

37. The land on which a Grower will be growing and cultivating conventional olive trees for the production of conventional olives is known as the Waterville Olive Groves, located in the Shire of Gingin, approximately 100 kilometres north of Perth, Western Australia. The land on which a Grower will be growing and cultivating organic olive trees for the production of organic olives is known as the Twin Brooks Organic Olive Grove, also located in the Shire of Gingin, approximately 100 kilometres north of Perth, Western Australia.

38. GSMAL will enter into a 'Head Lease' with Great Southern Olives Company Limited (the Owner), a wholly owned subsidiary of GSMAL, in respect of both properties and water licences owned or acquired by the Owner.

39. Under the LMA, GSMAL will grant each Grower a 'sub-lease' to use and occupy one or more Grovelots for the Term of the Project. A Grower will also enter into the LMA with GSMAL to engage GSMAL to cultivate the Olive Trees, maintain the Grovelots, and be responsible for harvesting, marketing and selling all of the Grower's Olive Produce.

Constitution

40. The Constitution establishes the Project and operates as a deed binding all Growers and GSMAL, as the Responsible Entity. The Constitution sets out the terms and conditions under which GSMAL agrees to act as Responsible Entity and thereby manage the Project. Growers are bound by the Constitution by virtue of their participation in the Project.

41. All Application Moneys payable by Applicants shall be delivered directly to the Responsible Entity, which will deposit those moneys in the Application Fund and hold them as the bare trustee for the Applicants (clause 5.1). Once the Responsible Entity is satisfied that all relevant documents have been executed and any required finance has been approved for an Applicant, the Application Money is released and applied against the fees payable by the Applicant (clauses 7 and 8).

42. Among other things, the Constitution also sets out provisions relating to:

- the appointment of the Responsible Entity as the Responsible Entity of the Project, the creation of the Application Fund and the Proceeds Fund, and the interests of Applicants and Growers in those Funds (clause 3);
- applications for a LMA and the absolute discretion of the Responsible Entity to refuse applications (clauses 4.2 and 4.3);
- the preparation and execution of the LMA by the Responsible Entity (clause 6);
- the Responsible Entity's powers of investment of the money standing in the Proceeds Fund (clause 11);
- the general functions, powers and duties of the Responsible Entity (clause 12);
- procedures relating to the making and responding of complaints (clause 13);
- the provision of an Olive Expert's Reports to Growers (clause 18);
- the assignment and transmission of a Grower's interests (clauses 20 and 22);
- the right of the Responsible Entity to be paid fees (clause 26);
- procedures for calling a meeting of Growers (clause 29);
- procedures relating to the collection of proceeds of sale, the Responsible Entity's entitlement to reimbursement of particular costs and expenses out of the Proceeds Fund, and the payment of Project expenses by the Responsible Entity (clause 30);
- procedures relating to distributions out of the Proceeds Fund (clause 31); and
- the termination of the Project (clause 35).

Compliance Plan

43. As required by the *Corporations Act 2001*, GSMAL has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that GSMAL, as 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.

Head Leases

44. The Waterville Olive Groves and the Twin Brooks Organic Olive Grove, together comprising the 'Project Land', is owned by the Owner. The Project Land will be leased by the Owner to GSMAL (the Lessee) under a Head Lease. The Head Leases set out the terms and conditions under which the Owner will lease the Project Land together with all improvements on the Project Land, including but not limited to the Olive Trees and the Olive Grove Infrastructure, to GSMAL to use and exploit during the Term of the Project.

45. The Owner agrees that it will, at its own cost, on or before 15 June 2007 construct and install all Olive Grove Infrastructure on the Project Land including but not limited to fences, trellising, irrigation, dams and firebreaks required for the establishment and operation of a commercial olive grove. The Owner also agrees that it will, at its own cost, procure and complete the planting of all of the Olive Trees on the Project Land by 15 June 2007 (clause 6.1). The Owner reserves the right to delegate the above activities to such persons as it may determine (clause 6.2).

46. The Olive Grove Infrastructure and the Olive Trees are and will at all times remain the property of the Owner (clause 6.3). The Olive Produce is and will at all times remain the property of the Grower in accordance with the terms of the LMA (clause 6.4).

Lease and Management Agreement

47. Each Grower will enter into a LMA with GSMAL, under which they will be granted an interest in the form of a sub-lease to use one or more Grovelots together with all improvements on the Grovelot(s), including but not limited to the Olive Trees and the Olive Grove Infrastructure, for the purpose of growing and cultivating the Olive Trees for the production of Olive Produce for commercial gain. The sub-lease will have a Term commencing on the Commencement Date and ending 20 years after the end of the Initial Management Period.

48. As Lessor, GSMAL agrees that it will, on or before the Commencement Date procure the construction and installation of the Olive Grove Infrastructure on the Grovelot, and ensure that all Olive Trees have been planted in the ground, and all associated irrigation and trellising has been installed for the Olive Trees on the Grovelot. GSMAL reserves the right to delegate all or any of these services to such persons as it may determine (clause 10.4).

49. The Grower will at all times have full right, title and interest in the Olive Produce and the right to have the Olive Produce sold for the benefit of the Grower (clause 11.3).

50. The Responsible Entity will use its reasonable endeavours to arrange insurance on behalf of the Growers annually so as to provide cover in respect of the interest and obligations of the Growers with one or more reputable insurers against destruction or damage to the Grovelot, the Olive Trees and the Olive Grove Infrastructure, and against destruction or damage to current and future Olive Produce (clause 12).

51. Each Grower appoints GSMAL for the Term of the Project to manage the Grower's business of the commercial cultivation of olives by performing the Initial Management Services and the Ongoing Management Services in accordance with good industry practices.

52. GSMAL will carry out the Initial Management Services during the Initial Management Period, being the period from the Commencement Date to 30 June 2007. The Initial Management Services are specified in Schedule 2 and include, but are not limited to:

- (a) all inspection, supervision and management activities from the Commencement Date in respect of the services listed in Schedule 2 that are carried out by subcontractors;
- (b) the obtaining of formal verification by 30 June 2007 from an Olive Expert that the Grovelot is of an appropriate standard and all required services have been performed and to an appropriate standard;
- (c) cultivating, tending, culling, watering, pruning, replanting, spraying and otherwise caring for the Olive Trees;
- (d) keeping in good repair and condition any access road or roads, all waterways, dams, irrigation and pumping equipment within the Olive Grove;
- (e) undertaking pest control, fungicide control and other Olive Tree disease measures;
- (f) controlling rabbits and other vermin by fumigating and poisoning;
- (g) keeping in good repair and condition all fences, trellising, irrigation and adequate fire-breaks;
- (h) using reasonable endeavours to achieve and maintain organic certification from a recognised industry body;
- (i) all marketing activities in respect of the sale or future sale of the Olive Produce as necessary from the Commencement Date;
- (j) activities in respect of arranging insurance of the Olive Produce; and
- (k) all administrative services required in respect of providing the services listed in Schedule 2.

53. GSMAL will carry out the Ongoing Management Services for a 20 year period commencing on 1 July 2007. The Ongoing Management Services are all commercial agronomy activities required to be carried on to manage and maintain the Olive Grove according to good industry practices for the cultivation of olives. These services are specified in Schedule 3 and include, but are not limited to:

- (a) cultivating, tending, culling, watering, pruning, replanting, spraying and otherwise caring for the Olive Trees;
- (b) keeping in good repair and condition any access road or roads, all waterways, dams, irrigation and pumping equipment within the Olive Grove;
- (c) undertaking pest control, fungicide control and other Olive Tree disease measures;
- (d) controlling rabbits and other vermin by fumigating and poisoning;
- (e) keeping in good repair and condition all fences, trellising, irrigation and adequate fire-breaks;
- (f) using reasonable endeavours to achieve and maintain organic certification from a recognised industry body; and
- (g) obtaining a Report from the Olive Expert annually, to be provided to Growers.

54. Among other things, the LMA also sets out details of the following:

- the rent and management fees payable by a Grower (clauses 3 and 22);
- the covenants of the Grower and the Lessor (clauses 5 and 10);
- the events which may trigger default and early termination of the sub-lease by the Grower (clause 9);
- the destruction or reduction in the viability of the Grovelot (clause 13);
- the performance by the Responsible Entity of the Grower's covenants under the sub-lease (clause 27); and
- the appointment of the Responsible Entity as the Grower's attorney (clause 28).

Harvesting and sale

55. The Responsible Entity will harvest, or arrange for the harvest of, the Olive Produce at such time or times as, in the opinion of the Responsible Entity, is appropriate having regard to all relevant factors including the requirements of any contract for the sale of the Olive Produce (clause 18 of the LMA).

56. The Grower will be deemed to have appointed the Responsible Entity as the Grower's agent to arrange for the sale of all Olive Produce at the maximum practicable price available, and to enter into any sale agreement for the sale of the Olive Produce with a purchaser on such terms and conditions as the Responsible Entity considers appropriate (clause 19 of the LMA).

57. The Responsible Entity will ensure that the Gross Proceeds of Sale are paid into the Proceeds Fund. The Grower's Proportional Share of the Costs of Harvesting and the Costs of Oil Extraction will be paid out of the Proceeds Fund to the Responsible Entity by way of reimbursement, or directly to the relevant third party (clause 21).

58. The Responsible Entity will distribute out of the Proceeds Fund each Grower's Proportional Interest of the Proceeds Fund relating to the last Accounting Period (clause 31 of the Constitution).

Pooling of amounts and distribution of proceeds

59. The Constitution (clauses 30.1 and 31.1) sets out provisions relating to the pooling of proceeds from the sale of the Grower's Olive Produce and the distribution of the proceeds from that sale or from insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed Olive Produce or insurance proceeds to the pool making up the proceeds are entitled to benefit from distributions of those proceeds from the pool; and
- any pool of Olive Produce or other proceeds must consist only of Olive Produce or other proceeds contributed by Growers in the Project.

Fees

60. The fees payable by a Grower under the LMA **per Grovelot** are as follows:

- for Initial Management Services to be provided in the Initial Management Period (from the Commencement Date to 30 June 2007), a fee comprised of two components is payable. The first component of **\$5,060** is payable on application and the second component is a fee calculated as **100% of the Net Proceeds of Sale** for Olive Produce harvested during the Initial Management Period (if any);

- for Ongoing Management Services to be provided in the Second Period (from 1 July 2007 to 30 June 2008), a fee comprised of two components is payable. The first component of **\$632.50** is payable on application and the second component is a fee calculated as **90% of the Net Proceeds of Sale** for Olive Produce harvested during the Second Period (if any);
- for Ongoing Management Services to be provided in the Third Period (from 1 July 2008 to 30 June 2009), a fee comprised of two components is payable. The first component of **\$632.50** is payable on application and the second component is a fee calculated as **90% of the Net Proceeds of Sale** for Olive Produce harvested during the Third Period (if any);
- for Ongoing Management Services to be provided in the Fourth Period (from 1 July 2009 to 30 June 2011), a fee calculated as **90% of the Net Proceeds of Sale** for Olive Produce harvested during the Fourth Period;
- for Ongoing Management Services to be provided in the Fifth Period (from 1 July 2011 to the Termination Date), a fee calculated as **33% of the Net Proceeds of Sale** for Olive Produce harvested during the Fifth Period;
- for the financial years ending 30 June 2008 to 30 June 2011, rent calculated as **10% of the Net Proceeds of Sale** for Olive Produce harvested during each of these respective financial years; and
- for the financial years ending 30 June 2012 to the Termination Date, rent calculated as **11% of the Net Proceeds of Sale** for Olive Produce harvested during each of these respective financial years.

61. All fees calculated as a percentage of the Net Proceeds of Sale for Olive Produce harvested will be paid out of the Net Proceeds of Sale at the time the Net Proceeds of Sale are payable by the Responsible Entity to the Grower.

62. Annual insurance premiums payable by the Growers against destruction or damage to the Grovelot, the Olive Trees, the Olive Grove Infrastructure, and current and future Olive Produce will also be deducted from the Net Proceeds of Sale. Where the Net Proceeds of Sale are not sufficient to fund the premiums, the costs will be borne by the Responsible Entity.

Finance

63. Growers can fund their involvement in the Project themselves or borrow from an independent lender external to the Project, the Financier, or the Preferred Financier.

64. The Financier and the Preferred Financier will offer loan terms on a commercial basis and approve loan amounts up to 100% of the GST exclusive portion of the Application Money payable by Growers (\$5,750 per Grovelot) plus the loan establishment fee, where applicable. The Financier or the Preferred Financier will provide a Grower with the loan on a full recourse basis and will pursue normal debt recovery procedures, including legal action, against any defaulting borrowers.

65. Finance is available from the Financier under the following arrangements.

Option A – 12 months interest free

- equal monthly principal instalments over a period of 12 months;
- instalments paid by direct debit commencing July 2007;
- GST is payable on execution of the LMA (\$575 per Grovelot); and
- no interest is applicable.

Option B – Principal and interest finance

(as set out in the Loan Deed enclosed within the Application for Term Finance)

- equal monthly principal and interest repayments over the term of the loan, commencing July 2007;
- interest rates will be fixed for the period of the loan;
- in the event that any amount is overdue, the Financier may charge interest at the overdue rate;
- GST is payable on execution of the LMA (\$575 per Grovelot);
- a loan establishment fee, comprising an application fee of 1.1% of the loan advance and a fee to cover legal costs and expenses of \$275 may be charged; and
- as security for the due and punctual payment of all Moneys Payable, the Grower will charge, by way of a fixed charge, all of the Grower's interest in the Project to the Financier, including all of the Grower's right, title, estate and benefit in and to the LMA, the Grower's Grovelots, all Olive Produce to be grown or growing on the Grovelots and the proceeds of disposal of all Olive Produce.

66. The terms specific to the Option B finance offered by the Financier are summarised below.

- 3 year term with an interest rate of 10.50% pa;
- 4 year term with an interest rate of 10.50% pa;
- 5 year term with an interest rate of 10.50% pa;
- 7 year term with an interest rate of 11.00% pa;
- 9 year term with an interest rate of 11.50% pa; and
- 10 year term with an interest rate of 11.50% pa.

67. Finance is also available from the Preferred Financier pursuant to the Loan Deed enclosed within the Application for Term Finance. The terms and conditions of these loans are therefore as per the loans offered by the Financier under Option B, except for an interest only period for up to three years. Under these loans equal monthly interest payments will be made during the interest only period, commencing July 2007, followed by equal monthly principal and interest repayments for the remainder of the term of the loan.

68. The terms specific to the additional finance offered by the Preferred Financier are summarised below.

- 2 years interest only, then 3 years principal and interest at a rate of 10.50% pa;
- 2 years interest only, then 5 years principal and interest at a rate of 11.00% pa;
- 2 years interest only, then 7 years principal and interest at a rate of 11.50% pa;
- 3 years interest only, then 4 years principal and interest at a rate of 11.00% pa; and
- 3 years interest only, then 7 years principal and interest at a rate of 11.50% pa.

69. Only the finance arrangements set out above are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they procure a loan from the Financier with an interest only period (as offered under the Application for Term Finance), or enter into a finance arrangement with the Financier or the Preferred Financier that materially differs from that set out in the documentation provided to the Tax Office by GSMAL with the application for this Product Ruling.

70. A Grower cannot rely on this Product Ruling if the Application Moneys, including all loan moneys, are not paid in full to GSMAL on or before 15 June 2007 by the Grower or, on the Grower's behalf by a lending institution. Where an application is accepted subject to finance approval by any lending institution other than the Financier, Growers cannot rely on this Ruling if written evidence of that approval has not been given to GSMAL by the lending institution by 15 June 2007.

71. This Ruling does not apply if the finance arrangement entered into by the Grower includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than the Financier or the preferred Financier, are involved or become involved in the provision of finance to a Grower for the Project.

Commissioner of Taxation

28 March 2007

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?

72. For the amounts set out in paragraph 24 of this Ruling to constitute allowable deductions, the Grower’s horticultural activities as a participant in the Great Southern 2007 Diversified Olives Income Project must amount to the carrying on of a business of primary production.

73. Two Taxation Rulings are relevant in determining whether a Grower will be carrying on a business of primary production.

74. The general indicators used by the Courts are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

75. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Great Southern 2007 Diversified Olives Income Project. As Taxation Ruling TR 2000/8 sets out, the relevant principles have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

76. Having applied these principles to the arrangement set out above, a Grower in the Great Southern 2007 Diversified Olives Income Project is accepted to be carrying on a business of growing and harvesting Olive Produce for sale.

The Simplified Tax System

Division 328

77. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

78. The question of whether a Grower is eligible to be an ‘STS taxpayer’ is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an ‘STS taxpayer’.

Deductibility of management fees, rent and insurance premiums**Section 8-1**

79. Subject to paragraphs 89 to 92 of this Ruling, the management fees, rent and insurance premiums are deductible under section 8-1 (see paragraphs 43 and 44 of TR 2000/8). A 'non-income producing' purpose (see paragraphs 47 and 48 of TR 2000/8) is not identifiable in the scheme and there is no capital component evident in the management fees, rent or insurance premiums (see paragraphs 49 to 51 of TR 2000/8).

80. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. To the extent that the prepayment provisions do not apply (see paragraphs 81 to 92 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred. (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7.)

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

81. 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.

82. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 (operative provisions). If 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) (see paragraph 87 of this Ruling). 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.

83. If the requirements of subsections 82KZME(2) and (3) of the ITAA 1936 are met, the formula in subsection 82KZMF(1) of the ITAA 1936 will apply to apportion expenditure that is otherwise deductible under section 8-1 of the ITAA 1997. The requirements of subsection 82KZME(2) of the ITAA 1936 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) of the ITAA 1936).

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

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

85. 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 other than the Financier. Although undertaken with an unrelated party, that financing would be an element of the arrangement. The funds borrowed and the interest deductions are directly related to the activities under the arrangement. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF of the ITAA 1936.

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

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

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

88. 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

89. Under the LMA, a Grower incurs a fee on application of \$6,325 per Grovelot. This fee is made up of:

- \$5,060 for the Initial Management Services to be provided in the Initial Management Period from the Commencement Date to 30 June 2007; and
- prepayment of \$1,265 for Ongoing Management Services to be provided in the Second Period and Third Period from 1 July 2007 to 30 June 2009.

90. The fee of \$5,060 for the Initial Management Services is for services to be provided within the year in which the fee is incurred or paid, and is therefore deductible in that year.

91. The expenditure incurred by a Grower in the Project for the Ongoing Management Services meets the requirements of subsections 82KZME(1) and (2) of the ITAA 1936 and is incurred under an 'agreement' as described in subsection 82KZME(3). Therefore, unless one of the exceptions to section 82KZME applies, the amount and timing of those deductions for those fees are determined under section 82KZMF of the ITAA 1936.

92. The prepaid Ongoing Management fees do not fall within any of the five exceptions to section 82KZME of the ITAA 1936. Therefore, the deduction for each year is determined using the formula in subsection 82KZMF(1) of the ITAA 1936. Section 82KZMF will apportion the deduction for prepaid Ongoing Management fees over the eligible service period which commences on 1 July 2007 and ends on 30 June 2009.

Interest deductibility

93. Some Growers may finance their participation in the Project through a loan facility with the Financier or the Preferred Financier. Applying the same principles as that used for the management fees, rent and insurance premiums, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

94. Other than where the prepayment provisions apply (see paragraphs 81 to 88 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

Expenditure of a capital nature

Division 40

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

Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner’s discretion

96. 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 determined that for those income years:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the olive growing industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

97. 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.

98. 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

99. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of ‘additional benefit(s)’. Insufficient ‘additional benefits’ will be provided to trigger the application of section 82KL of the ITAA 1936. It will not apply to deny the deductions otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA – general tax avoidance provisions

100. 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).

101. The Great Southern 2007 Diversified Olives Income 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 paragraph 24 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

102. 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 Olive Produce. 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 are 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 Growers will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/7; TR 97/11; TR 98/22;
TR 2000/8; TR 2002/6;
TR 2002/11

Subject references:

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

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZME(1)
- ITAA 1936 82KZME(2)
- ITAA 1936 82KZME(3)
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- ITAA 1997 35-10
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- ITAA 1997 35-55
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- ITAA 1997 40-515(1)(b)
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