


PR 2007/48 - Income tax: Mediterranean Olives Project 2007 - (Growers not in Joint Venture)

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Product Ruling

Income tax: Mediterranean Olives Project 2007 – (Growers not in Joint Venture)

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	9
Ruling	18
Scheme	30
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	77
Appendix 2:	
Detailed contents list	101

! 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 Mediterranean Olives Project 2007 (Growers not in Joint Venture) 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.

3. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those 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 30 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;
- participate as Joint Venture Growers. Joint Venture Growers should refer to PR 2007/47; or
- finance their participation in the Project with loans other than from Mediterranean Olives Financial Pty Ltd (MOF) or United Pacific Finance Pty Ltd, (UPF), or other than as described at paragraphs 69 to 75 of this Ruling.

Superannuation Industry (Supervision) Act 1993

5. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this product may contravene the provisions of SISA 1993.

Qualifications

6. 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 commencing at paragraph 30 of this Ruling.

7. 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

9. This Product Ruling applies prospectively from 23 May 2007, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 23 May 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 for the income years up to 30 June 2009.

10. 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.

11. 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)).

12. 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.

13. 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

14. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments to the law may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to the extent of those amendments, this Product Ruling will be superseded.

15. 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

16. 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

17. 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

18. 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 commencing at paragraph 30 of this Ruling.

19. The Grower's participation in the Project must constitute the carrying on of 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 Management Agreement, Irrigation Lease and Licence Agreement and Grove Lease.

20. 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

21. 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*.

22. 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

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

Assessable income**Sections 6-5 and 17-5**

24. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on these proceeds (section 17-5), will be assessable income of the Grower under section 6-5 at the time that income is derived. Growers should note the retention of gross sales proceeds by Mediterranean Olives Estate Limited (MOEL) in any income year constitutes the receipt of assessable income by the Grower. This may occur if MOEL withholds any amount from the Proceeds Fund, in accordance with Clause 24.3 of the Constitution, as payment of fees unpaid by the Grower under the terms and conditions of any of the Project Agreements.

Deductions for Lease Fee, Management Fee, Interest and Loan Establishment Fee**Section 8-1, section 25-25 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936**

25. A Grower may claim tax deductions, on a per Grove Allotment 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
Lease Fee	\$55 See Notes (i), (ii) & (iii)	\$907.50 (indexed) See Notes (i), (ii) & (iii)	Amount incurred See Notes (i), (ii) & (iii)
Management Fee	\$16,005 See Notes (i), (ii) & (iii)	\$8,745 See Notes (i), (ii) & (iii)	\$7,480 (indexed) See Notes (i), (ii) & (iii)
Interest on loans with Mediterranean Olives Financial Pty Ltd (MOF) or United Pacific Finance Pty Ltd (UPF)	Nil	As incurred See Notes (i), (iii) & (iv)	As incurred See Notes (i), (iii) & (iv)
Loan Establishment Fee for loans with UPF	Must be calculated See Notes (i) & (v)	Must be calculated See Notes (i) & (v)	Must be calculated See Notes (i) & (v)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoings would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) The Lease Fee and the Management Fee as set out in the Irrigation Lease and Licence Agreement and the Management Agreement, respectively, are deductible in full under section 8-1 in the year that they are incurred.
- (iii) This Ruling does not apply to Growers who choose to prepay fees or who choose, or who are required to prepay Interest under a loan agreement (see paragraphs 89 to 93 of this Ruling). Subject to certain exclusions, amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the *Income Tax Assessment Act 1936* (ITAA 1936). Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.
- (iv) The deductibility or otherwise of Interest arising from loan agreements entered into with financiers other than MOF or UPF is outside the scope of this Ruling. Growers who borrow from lenders other than MOF or UPF may request a private ruling on the deductibility of the Interest incurred.
- (v) The Loan Establishment Fee payable to UPF 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 the Term of the Project solely for income producing purposes. Where the borrowing expenses exceed \$100 the deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than UPF is outside the scope of this Product Ruling.

Deductions for capital expenditure***Division 40***

26. Each Grower will also be entitled to tax deductions relating to the olive trees planted on the Grove Allotment. If the Grower is registered or required to be registered for GST, amounts of outgoings would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.

27. An olive tree is considered to be a 'horticultural plant' as defined in subsection 40-520(2). As the Grower holds the Grove Allotment under a lease, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(b) for their decline in value. The deduction is determined using the formula in section 40-545. The establishment expenditure that can be written-off by a Grower is limited to the capital expenditure incurred that is attributable to the establishment of the Trees. As olive trees have an effective life of 30 years or more a straight-line write-off rate of 7% will be applied (section 40-545(2), item 6). The deduction is allowable when the Trees enter their first commercial season (section 40-530, item 2). MOEL will notify Growers when their Trees enter the 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

28. 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 above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for Growers for the income years ended **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.

Pre-payment provisions and anti-avoidance provisions

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

29. For a Grower who commences participation in the Project and incurs expenditure as required by the Irrigation Lease and Licence Agreement and the Management Agreement, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 89 to 93 of this Ruling);
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Scheme

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

- Application for a Product Ruling received on 9 February 2007; additional correspondence, emails, facsimiles and telephone conversations dated 19, 21 and 22 February 2007; 6, 14, 21 and 22 March 2007; 2, 4, 12, 16, 17, 24, 27 and 30 April 2007; and 1 and 10 May 2007;
- **Combined Product Disclosure Statement and Financial Services Guide** for the Mediterranean Olives Project 2007 issued by Mediterranean Olives Estate Limited (MOEL), the Responsible Entity, dated 19 March 2007;
- **Constitution** and Deed of Variation of the Constitution of the Mediterranean Olives Project dated 20 April 2005;
- Deed of Variation of the **Constitution** of the Mediterranean Olives Project dated 30 May 2006;
- Compliance Plan of the Mediterranean Olives Project, adopted by MOEL, (as Responsible Entity), dated 30 May 2006;
- Draft **Grove Lease 2007** between MOEL (as Project Manager) and the Grower, undated, received on 9 February 2007;
- Draft **Irrigation Lease and Licence Agreement 2007** between MOEL (as Project Manager) and the Grower, undated, received on 9 February 2007;
- Draft **Management Agreement 2007** between MOEL (as Project Manager) and the Grower, undated, received on 9 February 2007;
- Draft **Loan Agreement 2007** between Mediterranean Olives Financial Pty Ltd (MOF), and the Grower, undated, received on 9 February 2007;
- Draft Finance Application and **Loan Agreement** which may be entered into by a Grower (the Borrower) and, if required, the Grower's Guarantor and United Pacific Finance Pty Ltd (UPF), undated, received on 9 February 2007;
- Draft Lease between Mediterranean Olives Land Pty Ltd (MOL), the Land Owner and MOEL, (as Project Manager), undated, received on 9 February 2007;

- Draft Principal Sub-Contractor Agreement 2007, undated, received on 9 February 2007;
- Draft Project Coordinator Agreement 2007, undated, received on 9 February 2007;
- Draft Principal Consultant Agreement 2007, undated, received on 9 February 2007;
- Scheme Property Custody Agreement between MOEL (as Responsible Entity), and Sandhurst Trustees Limited (Sandhurst), the Custodian, dated 9 March 2005; and
- Agreement altering the Scheme Property Custody Agreement, between MOEL (as Responsible Entity) and Sandhurst (as Custodian), dated 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.

31. 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.

32. All Australian Securities and Investments 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

33. The main features of the Mediterranean Olives Project 2007 (Growers not in Joint Venture) are as follows:

Location	Serpentine, near Bendigo, Central Victoria
Type of business to be carried on by each entity	Commercial growing of olive trees for the purpose of producing extra virgin olive oil for sale
Number of hectares offered for cultivation	70 hectares
Size of each Grove Allotment	One (1) hectare
Minimum subscription	None
Number of trees per hectare	250
Term of the Project	23 years

Initial cost per Grove Allotment	Application Amount of \$16,060, which consists of \$16,005 Management Fee and \$55 Lease Fee
Other costs to Growers	Ongoing costs will be payable for Management Fees, Rent, Lease Fees, Agricultural Insurance; Harvesting Fees; Transportation Fees; and Extraction Fees. An Incentive Fee may also be payable, (refer to paragraphs 66 to 68 of this Ruling)

34. The Project is registered as a managed investment scheme under the *Corporations Act 2001*. MOEL has been issued with an Australian Financial Services Licence, number 246263, and will be the Responsible Entity for the Project. There is no minimum amount that must be raised under the PDS.

35. The offer to which this Product Ruling applies is for participation in a project consisting of up to 70 Grove Allotments situated on two properties, the Judyong property, and the Yarrong property, both at Serpentine, near Bendigo, central Victoria. Each Grove Allotment will be of one hectare and will contain approximately 250 olive trees.

36. To participate in the Project applicants must complete the Application and Power of Attorney Form in the Product Disclosure Statement (PDS) on or before 15 June 2007 and pay the Application Amount to the Custodian, in accordance with clause 11.1 of the Constitution. The Application Amount will be banked into an Application Fund, in accordance with clause 11.2(a) of the Constitution. Upon acceptance of the application and the issue of an Interest in the Project to the Grower the Responsible Entity will apply the Application Money held in the Application Fund in accordance with the Project Agreements, refer clause 14.1 of the Constitution.

37. Each Grower will enter into an Irrigation Lease and Licence Agreement over the Term of the Project. This agreement grants the Grower a lease of the Grove Allotment Irrigation Equipment and a licence to the Common Irrigation Equipment.

38. Each Grower will enter into a Grove Lease with MOEL. The Grove Lease will comprise contractual rights in relation to a parcel of land of 1 hectare called a Grove Allotment, on which at least 40% of the Trees will be planted by 15 June 2007 and the balance of the Trees will be planted by 31 October 2007.

39. Each Grower will enter into a Management Agreement to contract with MOEL as Project Manager to undertake the First Period Management Services and the Further Management Services. MOEL will also provide Harvesting Services, Transportation Services, and Extraction Services.

40. MOEL will appoint a Principal Sub-contractor to perform the First Period Management Services the Further Management Services, to harvest the Olives and prepare them for transportation under the terms of the Principal Sub-contractor Agreement.
41. By agreement with the Principal Sub-contractor under the terms of the Principal Sub-contractor Agreement, and at the commencement of harvest, MOEL shall endeavour to consult with the processor of the Olives to determine appropriate times for collection of the harvested Olives.
42. By agreement with the Principal Sub-contractor under the terms of the Principal Sub-contractor Agreement MOEL is authorised to enter into olive oil agreements to process and sell the Oil on behalf of the Growers.
43. For the purposes of this Ruling, Applicants who are accepted into the Scheme during the period from 23 May 2007 to 15 June 2007 will become Growers.
44. **Note that a separate Product Ruling PR 2007/47 has issued for Joint Venture Applicants who are accepted into the Project during the period from 23 May 2007 to 15 June 2007.**

Constitution

45. The Constitution establishes the Project and operates as a deed binding all of the Growers and MOEL (clause 2.1). The Constitution sets out the terms and conditions under which MOEL agrees to act as Responsible Entity, and binds the Growers as they are participants in the Project.
46. The Application Amount paid by Applicants shall be deposited into a bank account the Responsible Entity will arrange to have opened known as the Application Fund account (clause 11). Once the Application is accepted and an Interest is issued to a Grower the Responsible Entity will apply the Application Money in accordance with the Project Agreements (clause 14).
47. The Responsible Entity will also arrange to open an account known as the Proceeds Fund account into which will be paid all money arising from the Project, apart from the Application Money (clause 11). The Application Fund and the Proceeds Fund are known collectively as the Fund (clause 1.1, Definitions).
48. The Constitution, in summary, also sets out:
- powers of the Responsible Entity (clauses 5 and 6);
 - the Responsible Entity's entitlement to be paid fees out of the Fund, and to recover from the Fund all costs, fees and expenses in accordance with the terms of the Project Agreements (clause 7);
 - Applications procedures (clause 12);

- maintenance of a Register of Growers, consisting of personal details of each Grower, and the Grove Allotments issued to them (clause 13);
- the termination of Project Agreements (clause 16);
- the assignment and transmission of a Grower's Interest and the conditions under which such assignments and transmissions may be made (clauses 17 and 18);
- additional powers and other activities of the Responsible Entity (clauses 19 and 20);
- procedures for convening meetings of Growers (clause 22);
- distribution of sales proceeds to Growers (clause 24);
- complaints handling and dispute resolution procedures (clauses 26 and 27); and
- winding up the Project (clause 31).

49. The Constitution provides that each Grower directly owns its Interest in the Project, including all olives growing on the Trees in the Grower's Grove Allotment, all improvements made to the Grower's Grove Allotment, and a share in the proceeds resulting from the sale of the Crop (clause 15.3).

Compliance Plan

50. In accordance with the requirements of the *Corporations Act 2001*, MOEL has prepared a Compliance Plan. The Compliance Plan will ensure the Responsible Entity carries out its management responsibilities and obligations contained in the Constitution in order that the Project is properly managed to protect the interests of the Growers.

Project Land

51. Seventy Interests of one hectare each are being offered in the Project. The land on which the Project will be carried out is at Serpentine near Bendigo in Central Victoria. The land includes that part of the properties described in the PDS as follows:

Judyong Property

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

Yarrong Property

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

52. A Head Lease is entered into between the Land Owner and MOEL under which the Project Land is leased to MOEL. Pursuant to the Head Lease MOEL holds an estate in leasehold in the Project Land of which the Grove Allotment and Common Area form part. MOEL is authorised to grant leases of allotments of the Project Land to Growers in order to secure their Interest in the Project.

Grove Lease

53. Growers accepted into the Project enter into a Grove Lease with MOEL as Project Manager. Growers are granted an Interest in land, the Grove Allotment, on which they conduct the business of olive growing (clause 2.1). Each Grove Allotment consists of an allotment of a one hectare portion of the Project Land and the Trees growing on the Grove Allotment.

54. The term of the Grove Lease is from the Commencement Date until 30 June 2030 (item 4 of Schedule 1), or such later date as agreed in writing before 30 June 2030 (clause 2.2). The Grove Lease also provides for early termination of the Lease by the Grower or MOEL and the effects of termination (clause 12).

Irrigation Lease and Licence Agreement

55. Growers accepted into the Project enter into an Irrigation Lease and Licence Agreement with MOEL as Project Manager. MOEL will lease to a Grower the Grove Allotment Irrigation Equipment and will also grant a licence to the Grower over the Common Area Irrigation Equipment (clause 2.1).

56. The term of this agreement is from the Commencement Date until 30 June 2030 (item 5 of Schedule 1) or such later date as agreed in writing before 30 June 2030 (clause 2.2). This agreement provides for early termination of the agreement by either the Project Manager or a Grower, and the effects of termination (clause 9).

Management Agreement

57. Growers accepted into the Project enter into a Management Agreement with MOEL as Project Manager. The term of the agreement is from the Commencement Date of the Project until 30 June 2030, or such later date as agreed in writing before 30 June 2030 (clauses 2 and 3).

58. Grounds for termination of this agreement by either the Grower or MOEL are set out in clause 17.

59. The Oil processed from the Olives harvested from the Grove Allotment will be pooled with Oil produced by other Growers participating in the Project. Proceeds from the sale of the Oil will be shared in accordance with the pooling provisions in the Constitution.

60. Growers appoint MOEL to act as an independent contractor to manage and cultivate the Grove Allotments during the Term of the Project according to Quality Horticultural Practice (clause 4). MOEL will harvest the Olives, process the Olives into extra virgin olive oil and sell the Oil on behalf of the Growers and is required to perform the following services:

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

61. MOEL shall provide the Growers with the First Period Management Services as set out in detail at Schedule 2, item 1 of the agreement. The services are to be provided in the period from the Commencement Date to 30 June 2007.

62. Throughout the remainder of the Term of the Project, after the First Period Management Services have been provided, MOEL shall provide the Growers with the Further Management Services, Harvesting Services, Transportation Services, and Extraction Services.

63. The Growers acknowledge MOEL will enter into a Project Coordinator Agreement, a Principal Consultant Agreement, and a Principal Sub-contractor Agreement to ensure the services are provided (clause 5.7).

Pooling of Olives and distribution of proceeds

64. Clauses 15 and 24 of the Constitution and clause 8.3 of the Management Agreement set out provisions relating to the pooling of the Crop and the Oil processed available for sale and held on behalf of the Growers. This Product Ruling has effect only where the following principles apply in relation to pooling and distribution:

- only Growers who have contributed Oil to the pool giving rise to sale proceeds are entitled to benefit from distribution of those proceeds; and

- any Oil making up the pool must consist only of Oil contributed by Growers participating in the Mediterranean Olives Project 2007.

Project Fees

65. The Growers' obligations to pay fees are set out in the Grove Lease (clauses 3 and 4), the Irrigation Lease and Licence Agreement (clause 3) and the Management Agreement (clause 12).

Fees payable under the Grove Lease:

Rent per Grove Allotment

- for the period from Commencement Date to 30 June 2007, **nil**;
- for the period 1 July 2007 to 30 June 2008, **nil**;
- for the period 1 July 2008 to 30 June 2009, **nil**;
- for the period 1 July 2009 to 30 June 2010, **\$1,188**, Indexed, payable on 31 October 2009;
- for the period 1 July 2010 to 30 June 2011, **\$2,376**, Indexed, payable on 31 October 2010; and
- for subsequent Financial Years from and including the Financial Year ending 30 June 2012, the Rent payable in the previous year, Indexed, and payable on 31 October in each subsequent Financial Year.

Fees payable under the Irrigation Lease and Licence Agreement:

Lease Fee

- for the period from Commencement Date to 30 June 2007, **\$55**, payable on application;
- for the period 1 July 2007 to 30 June 2008, **\$907.50**, Indexed, payable on 31 October 2007; and
- for subsequent Financial Years from and including the Financial Year ending 30 June 2009, the Lease Fee payable in the previous year, Indexed, payable on 31 October in each subsequent Financial Year.

Fees payable under the Management Agreement:

Management Fee

- for the period from Commencement Date to 30 June 2007, **\$16,005**, payable on application;
- for the period 1 July 2007 to 30 June 2008, **\$8,745**, payable on 31 October 2007;
- for the period 1 July 2008 to 30 June 2011, **\$7,480**, Indexed, payable on 31 October in each year;

- for the period 1 July 2011 to 30 June 2016, **\$5,016**, Indexed, payable on 31 October in each year;
- for the period 1 July 2016 to 30 June 2017, **\$4,482.50**, Indexed, payable on 31 October 2016; and
- for subsequent Financial Years from and including 30 June 2018, the Management Fee payable in the previous year, Indexed, payable on 31 October in each subsequent Financial Year.

66. MOEL will arrange Agricultural Insurance on behalf of Growers. The premium payable will be at the rate of approximately 1% of the insured value. Growers will pay to MOEL the amount of the insurance premium plus an amount equivalent to 10% of the insurance premium for MOEL's service in procuring the insurance cover. The amount due to MOEL is payable in the year of entry into the Project, and payment must be made within 30 days of issue of an invoice by MOEL to Growers (Management Agreement, clause 12.2(b)).

67. Growers are also liable to pay Harvesting Fees, Transportation Fees and Extraction Fees on 30 days written notice from MOEL, or MOEL will deduct the fees from the gross sale proceeds of the Oil prior to making any distribution to the Grower. These payments will be made in the first year of harvest in the income year ending 30 June 2010.

68. MOEL may also be entitled to an Incentive Fee for achieving higher than nominated returns from the Project, which, if applicable, MOEL will deduct from the gross sale proceeds of the Oil prior to making any distribution to the Grower (Management Agreement, clause 12.2(a)).

Finance

69. A Grower who does not pay the Lease Fee and the Management Fee (the Application Amount) in full upon application from their own financial resources can fund their involvement in the Project as follows:

- by borrowing from Mediterranean Olives Financial Pty Ltd (MOF), a lender associated with MOEL;
- by borrowing from United Pacific Finance Pty Ltd (UPF – a preferred financier of the Project); or
- by borrowing from an independent lender external to the Project.

70. Growers cannot rely on any part of this Ruling if the Application Amount is not paid in full 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 MOF, Growers cannot rely on this Ruling if written evidence of that approval has not been given to MOEL by the lending institution on or before 15 June 2007. The lending institution must provide the full amount of the loan monies to MOEL no later than 30 June 2007.

71. A Grower may also borrow the fees due on 31 October 2007 from MOF (see Option 2 below).

72. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with MOF or UPF that materially differs from those set out in the documentation provided to the Tax Office with the application for this Product Ruling and summarised below. A Grower who enters into a finance arrangement with an independent lender external to the Project may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements that are not covered by this Product Ruling.

Loans from MOF

73. After acceptance by MOEL of the Borrower's application to participate in the Project MOF offers Principal and Interest loans on a commercial full recourse basis under the following options:

Option 1

- up to 80% of the Application Amount for the period from Commencement Date to 30 June 2007. The loan funds will be made available by MOF to MOEL by 15 June 2007; and
- Interest is at a fixed rate of 11.2% per annum on the Principal Sum outstanding. Principal and Interest payments are to be made monthly by the Grower by direct debit commencing on 15 July 2007 until 15 September 2011.

Option 2

- up to 80% of the Application Amount for the period from Commencement Date to 30 June 2007 and up to 80% of the Management Fee and Lease Fee for the period 1 July 2007 to 30 June 2008;
- the first amount (up to 80% of the Application Amount) will be made available to MOEL by 15 June 2007 and the second amount (up to 80% of the Management Fee and Lease Fee) will be made available to MOEL by 31 October 2007; and

- Interest is at a fixed rate of 11.2% per annum on the loan amount outstanding. Principal and Interest payments are to be made monthly by the Grower by direct debit as follows:
 - for the first amount, commencing on 15 July 2007 until 15 September 2011; and
 - for the second amount, commencing on 15 November 2007 until 15 September 2011.

74. MOF will take security over the Grower's Interest in accordance with the terms and conditions of the Management Agreement, the Grove Lease, the Irrigation Lease and Licence Agreement, and all oil sale agreements and in the event of default in payment of the Principal Sum, Interest at the rate of 15% per annum will be payable by the Grower from the first date of default until the unpaid amount is paid.

Loans from UPF

75. The loan offered by UPF is an Interest Only loan for the first three years followed by a Principal and Interest loan for a further seven years. Features of the loan are as follows:

- the Borrower's application to participate in the Project has been accepted by MOEL subject to the finance approval;
- the Borrower can apply to UPF for a loan of up to 100% of the Application Amount;
- the Borrower pays a Loan Establishment Fee to UPF of \$250 plus 2.5% of the Application Amount;
- UPF will take security over the Borrower's Interest in the scheme for the term of the loan;
- Interest is payable on the Principal Sum at a fixed rate of 10.25% per annum, except in the case of default on payment when the Interest rate will be increased to 13.25% per annum from the first date of default until the unpaid amount is paid;
- Borrowers will be required to make equal monthly repayments of Interest for the first three years of the loan term, followed by equal monthly repayments of Principal and Interest for the remaining term of the loan. Payments are to be made by direct debit or by credit card; and
- Borrowers who break the terms of the loan will be liable for break costs.

General qualifications to finance arrangements

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

- split loan features of a type referred to in Taxation Ruling TR 98/22;
- 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 MOF or UPF, are involved or become involved in the provision of finance to any Grower in the Project.

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?

77. For the amounts set out in paragraphs 25 to 27 of this Ruling to constitute allowable deductions the Grower's horticulture activities as a participant in the Mediterranean Olives Project 2007 (Growers not in Joint Venture) must amount to the carrying on of a business of primary production.

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

79. 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?

80. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Mediterranean Olives Project 2007 (Growers not in Joint Venture). As Taxation Ruling TR 2000/8 sets out, the relevant principles have been established in such decisions as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 929; (1984) 16 ATR 55.

81. Having applied these principles to the arrangement set out above, a Grower in the Mediterranean Olives Project 2007 (Growers not in Joint Venture) is accepted to be carrying on a business of growing, harvesting and processing Olives into extra virgin olive oil for sale.

Expenditure of a capital nature

Division 40

82. 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 olive trees is of a capital nature. This expenditure falls for consideration under Division 40. The tax treatment of capital expenditure on the establishment of the olive trees has been dealt with in a representative way in paragraphs 26 and 27 of this Ruling.

The Simplified Tax System

Division 328

83. 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.

84. Changes to the STS rules apply from 1 July 2005. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). Therefore, any Grower who relies on those parts of this Ruling that refers to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductibility of the Lease Fee, the Management Fee and Interest on loans with MOF or UPF

Section 8-1

85. The Lease Fee and the Management Fee identified at paragraph 25 of this Ruling are deductible under section 8-1 (see paragraphs 43 and 44 of Taxation Ruling TR 2000/8). A 'non-income producing' purpose (see paragraphs 47 and 48 of Taxation Ruling TR 2000/8) is not identifiable in the arrangement.

86. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Subject to the application of the prepayment provisions (see paragraphs 89 to 93 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.)

87. Some Growers may finance their participation in the Project through a Loan Agreement with either MOF or UPF. Applying the same principles as those used for the Lease Fee and the Management Fee, Interest incurred under such loans has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

88. Other than where the prepayment provisions apply (see paragraphs 89 to 93 of this Ruling) a Grower can claim a deduction for such Interest in the year in which it is incurred.

Prepayment provisions

Sections 82KZME and 82KZMF

89. 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

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

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

92. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under any of the Project Agreements or prepays Interest under a loan agreement (including loan agreements with lenders other than MOF and UPF). Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

93. As noted in the Ruling section above, Growers who prepay other fees or who prepay Interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

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

94. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the years ended **30 June 2007 to 30 June 2011**, based on the evidence supplied, 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.

95. 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 in the year it is incurred.

96. 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

97. 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

98. 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).

99. The Mediterranean Olives Project 2007 (Growers not in Joint Venture) 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 25 to 27 of this Ruling 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.

100. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting of the olives for sale, to be processed into extra virgin olive oil, or the processing of the olives into extra virgin olive oil, for sale. 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, 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

101. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	1
Class of entities	2
Superannuation Industry (Supervision) Act 1993	5
Qualifications	6
Date of effect	9
Changes in the law	14
Note to promoters and advisers	16
Goods and Services Tax	17
Ruling	18
Application of this Ruling	18
The Simplified Tax System (STS)	21
<i>Division 328</i>	21
25% entrepreneurs tax offset	23
<i>Subdivision 61-J</i>	23
Assessable income	24
<i>Sections 6-5 and 17-5</i>	24
Deductions for Lease Fee, Management Fee, Interest and Loan Establishment Fee	25
<i>Section 8-1, section 25-25 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936</i>	25
Deductions for capital expenditure	26
<i>Division 40</i>	26
Division 35 – deferral of losses from non-commercial business activities	28
<i>Section 35-55 – exercise of Commissioner’s discretion</i>	28
Prepayment provisions and anti-avoidance provisions	29
<i>Sections 82KZME, 82KZMF and 82KL and Part IVA</i>	29
Scheme	30
Overview	33
Constitution	45
Compliance Plan	50
Project Land	51

Grove Lease	53
Irrigation Lease and Licence Agreement	55
Management Agreement	57
Pooling of Olives and distribution of proceeds	64
Project Fees	65
Finance	69
<i>Loans from MOF</i>	73
<i>Loans from UPF</i>	75
<i>General qualifications to finance arrangements</i>	76
Appendix 1 – Explanation	77
Is the Grower carrying on a business?	77
Expenditure of a capital nature	82
<i>Division 40</i>	82
The Simplified Tax System	83
<i>Division 328</i>	83
Deductibility of the Lease Fee, the Management Fee and Interest on loans with MOF or UPF	85
<i>Section 8-1</i>	85
Prepayment provisions	89
<i>Sections 82KZME and 82KZMF</i>	89
Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion	94
Section 82KL – recouped expenditure	97
Part IVA – general tax avoidance provisions	98
Appendix 2 – Detailed contents list	101

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 fee
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- stamp duty
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 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
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- TAA 1953
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- Commissioner of Taxation v. Lau (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55

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