



PR 2007/80 - Income tax: Macquarie Almond Investment 2007 - Late Growers (to 15 June 2008)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *12 September 2007*



Product Ruling

Income tax: Macquarie Almond Investment 2007 – Late Growers (to 15 June 2008)

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ⓘ 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 Macquarie Almond Investment 2007 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 Grower.

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 28 of this Ruling on or before 15 June 2008. 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 2008;
- participate in the scheme through offers made other than through the Product Disclosure Statement; or
- entities who finance their participation in the scheme through loans other than those with Macquarie Bank Limited or its assigns or the Preferred Financier or other than as described at paragraphs 79 to 93 of this Ruling; and
- Macquarie Alternative Assets Management Limited and its associates.

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 in paragraphs 28 to 93 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 12 September 2007, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 12 September 2007 until 15 June 2008, 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 2010. 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.

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 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.

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 at paragraphs 28 to 93 of this Ruling.

19. 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 acceptance of their application, the time at which they become bound by the Constitution of the Macquarie Almond Investment 2007.

Small business concessions

20. From the 2007-08 income year, a range of concessions previously available under the STS, will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

21. A small business entity can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Accordingly application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Ruling.

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

22. That part of the gross sales and insurance proceeds from the Project attributable to the Grower's business, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

Deductions for Management Fees, Licence Fees, interest, borrowing costs and Almond Trees**Sections 8-1, 25-25 and 40-545 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936**

23. A Grower who is accepted to participate in the Project on or before 15 June 2008 may claim tax deductions for the following fees and expenses on a per almond lot basis, as set out in the Table below:

Fee Type	Year ended 30 June 2008	Year ended 30 June 2009	Year ended 30 June 2010
Fixed Management Fee	\$7,920 See Notes (i), (ii) & (iv)	\$1,320 See Notes (i), (ii) & (iv)	\$1,540 See Notes (i), (ii) & (iv)
Deferred Management Fee	Nil	as incurred See Notes (i), (ii) & (iv)	as incurred See Notes (i), (ii) & (iv)
Variable Management Fee	Nil	as incurred See Notes (i), (ii) & (iv)	as incurred See Notes (i), (ii) & (iv)
Fixed Licence Fee	Must be calculated See Notes (i), (ii) (iii) & (iv)	\$440 See Notes (i), (ii) & (iv)	\$660 See Notes (i), (ii) & (iv)
Interest on loans with MBL or Preferred Financier	As incurred See Notes (ii) & (v)	As incurred See Notes (ii) & (v)	As incurred See Notes (ii) & (v)
Borrowing costs for loans with MBL or Preferred Financier	Must be calculated See Note (vi)	Must be calculated See Note (vi)	Must be calculated See Note (vi)
Establishment of Almond Trees			See Note (vii)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.

- (ii) The Fixed Management Fees, Deferred Management Fees, Variable Management Fees, Fixed Licence Fees and interest on loans with Macquarie Bank Limited or its assigns (MBL) and the Preferred Financier are deductible under section 8-1 in the income year that the relevant fee is incurred. For wholesale clients the amount of the deduction available for the 2008 Fixed Management Fee will be reduced by the amount of any discount received.
- (iii) For Late Growers who enter the Project after the date of this ruling and on or before 15 June 2008 the Fixed Licence Fee of \$440 incurred in the 2007-08 income year will not be deductible in full under section 8-1. The deduction will be reduced at the rate of \$36.67 per month or part month that the Grower is not in the project in the 2007-08 income year.
- (iv) 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 103 to 107 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.
- (v) The deductibility or otherwise of interest arising from agreements entered into with financiers other than MBL or the Preferred Financier, is outside the scope of this Ruling. Prepayments of interest to any lender, including MBL and the Preferred Financier, are not covered by this Product Ruling. Growers who enter into agreements with other financiers and/or prepay interest may request a private ruling on the deductibility of the interest incurred.
- (vi) The Loan Application Fee payable to either MBL 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 costs arising from loan agreements entered into with financiers other than MBL or the Preferred Financier is outside the scope of this Ruling.

- (vii) The deduction for Almond Trees is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. Since the Almond Trees have an 'effective life' greater than 13 but fewer than 30 years, for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the Almond Trees enter their first commercial season (section 40-530, item 2). Macquarie Alternative Asset Management Limited (MAAML) will notify the Grower when their Almond Trees enter their first commercial season and the amount that may be claimed.

24. A Joint Venture Grower may claim deductions, on a per Almond Lot basis, for the following expenditure set out in the Table and Notes in paragraph 23 of this Ruling.

First Joint Venture Grower

- in the year ending 30 June 2008, \$7,920 for the Fixed Management Fee (Application Payment); and
- in the year ended 30 June 2008, the Fixed Licence Fee as outlined in notes (iii) and (iv) to the Table above.

A First Joint Venture Grower who borrows from MBL or the Preferred Financier to finance participation in the Project can also claim:

- a deduction for the interest incurred, under section 8-1 as outlined in Note (ii) to the Table above; and
- the borrowing costs payable to MBL or the Preferred Financier, under subsection 25-25(1), as outlined in Note (vi) to the Table above.

Second Joint Venture Grower

- 100% of each of the Fixed Management Fee and Fixed Licence Fee in the 2009 and 2010 Financial Years (inclusive).

A Second Joint Venture Grower who borrows from MBL or the Preferred Financier to finance participation in the Project can also claim:

- a deduction for the interest incurred, under section 8-1 as outlined in Note (ii) to the Table above; and
- the borrowing costs payable to the Preferred Financier, under subsection 25-25(1), as outlined in Note (vi) to the Table above.

25. Each Joint Venturer can also claim deductions for its 50% Fractional Interest in the horticultural plant write-off as explained in Note (vii) to the Table at paragraph 23 of this Ruling.

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

26. A Grower who is an individual accepted into the Project by 15 June 2008 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 2008 to 30 June 2013**. 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.

Prepayment provisions and anti-avoidance provisions***Sections 82KZME, 82KZMF and 82KL and Part IVA***

27. For a Grower who commences participation in the Project and incurs expenditure as required by the Constitution, 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 103 to 107 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

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

- Application for a Product Ruling received on 27 October 2006 as constituted by documents provided on 27 November 2006, 3 January, 11 May, 12 June and 26 June 2007 and additional correspondence, emails and telephone conversations dated 27 November, 11, 12, 14, and 21 December 2006 and 3, 9, 10, 11, 16 and 17 January; 8, 10, 11 and 15 May, 26 June, 2, 9 and 25 July, 6 and 14 August 2007;

- Product Disclosure Statement (PDS) prepared for Macquarie Alternative Assets Management Limited (MAAML) the Responsible Entity version dated 20 October 2006, received 3 January 2007, and update to PDS received 12 June 2007;
- Draft **Constitution of the Macquarie Almond Investment 2007** (the 'Almond Project Constitution'), version dated May 2007 received 12 June 2007;
- Draft Macquarie Almond Project 2007 Plan for the Macquarie Almond Investment 2007 (the 'Compliance Plan'), version dated 20 October 2006, received 27 October 2006;
- Draft Lease between Macquarie Farm Assets and Resources Management Limited (MacFARM) and MAAML as Responsible Entity for the Scheme (the 'Lease Agreement'), received 3 January 2007;
- Draft Management Agreement 2007 between Macquarie Horticultural Services Pty Limited (MHSPL) and MAAML (the 'MHSPL Management Agreement'), version dated 20 October 2006, received 27 October 2006;
- Draft Almondco Supply Agreement between Almondco Australia Limited (Almondco) and MAAML as Responsible Entity for the Scheme (the 'Almondco Supply Agreement') version dated 20 October 2006, received 27 October 2006;
- Draft **Loan and Security Agreement and Notice of Mortgage** between Macquarie Bank Limited or its assigns (MBL) and the borrowing Grower (the 'Loan Agreement'), received 17 January 2007;
- Draft **Finance Application (including Loan Terms)** between Allco Managed Investments Limited as trustee for Gateway Momentum Funding Trust No. 1 (Momentum) and the borrowing Grower version dated 20 October 2006, received 27 October 2006;
- Notice of Addition to the Custody Agreement between MAAML and Bond Street Custodians Ltd, draft dated 20 October, which amends the Custody Agreement entered into between MAAML and Bond Street Custodians Ltd (as amended) on 26 March 2003 (the 'Custodian Agreement'), received 27 October 2006;
- Interim Independent Expert's Report prepared by Scholefield Robinson Horticultural Services, dated 20 October 2006, received 27 October 2006;

- Report prepared by Scholefield Robinson Horticultural Services on Orchard Water Requirements and Water Entitlements for Macquarie Almond Investments 2006 and 2007, dated 22 June 2007, received 25 July 2007; and
- Precipitation Contingency Risk Policy, dated 23 July 2007 and received 25 July 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.

29. 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.

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

Overview

31. All capitalised terms within this Ruling are capitalised terms within the scheme documentation. The main features of the Macquarie Almond Investment 2007 (the Project) are as follows:

Location	Sunraysia Region, Victoria
Type of business to be carried on by each participant	Commercial growing, cultivation and harvesting of almonds for sale.
Number of hectares offered for cultivation	Up to 950
Size of each interest	0.25 hectares
Minimum allocation	One 'Almond Lot'
Minimum subscription	None
Number of trees per hectare	Approximately 324
Term of the Project	Approximately 23 years
Initial cost per 'Almond Lot'	\$8,360
Ongoing costs	Fixed and Variable Licence Fees Fixed, Variable and Deferred Management Fees and charges

32. The Project is a registered managed investment scheme under the *Corporations Act 2001*. Macquarie Alternative Assets Management Limited (MAAML) has been issued with an Australian Financial Service Licence No 225758 and will be the Responsible Entity for the Project.
33. The Project will involve the commercial growing, cultivation and harvesting of almonds for sale.
34. The Responsible Entity has leased Land from Macquarie Farm Assets and Resources Management Limited (MacFARM) for use in the Project within the Sunraysia Region of Victoria.
35. MacFARM is the owner of the Orchard Assets and has established the Almond Orchard. Specifically MacFARM completed pre-planting capital works before 15 May 2007 and 100% of all almond trees were planted by 23 June 2007.
36. An offer to participate in the Project will be made through the PDS. Each participant will be invited to subscribe for at least one Almond Lot. The offer under the PDS is for 950 hectares, which corresponds to 3,800 Almond Lots in the Project.
37. Applications to participate in the Project must be made on the application form included in the PDS. There is no minimum amount to be raised under the PDS. The Responsible Entity, will engage Bond Street Custodians to act as custodian of the Scheme Property and to protect the interests of the Growers in their dealings with the Responsible Entity. PR 2007/4 was issued on 24 January 2007 for the Project's Early Growers, that is, Growers accepted into the project on or before 15 June 2007.
38. 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 Almond Lot each of 0.25 hectares in size. The Responsible Entity will grant Growers a Licence to use and occupy one or more identifiable Almond Lots for the Term of the Project.
39. For Applicants who are accepted as Growers in the Project, the Responsible Entity will allocate Almond Lots, place their details in a Register and enter into Agreements on the Grower's behalf in relation to the Almond Lot(s) allocated to the Grower. Each Grower will use their Almond Lot for the purpose of carrying on a business of cultivating and harvesting almonds and the sale of harvested produce.
40. As an alternative to participation by a Grower as a single entity, the terms of the Constitution provide that two entities may enter into a Joint Venture as one Grower.
41. Pursuant to the Constitution, Growers will appoint the Responsible Entity to cultivate and maintain the Trees and be responsible for harvesting, procuring the processing and sale of the Growers Produce.

42. The Responsible Entity has subcontracted Macquarie Horticultural Services Pty Limited (MHSPL) to act as Orchard Manager for the Project. The Orchard Manager will provide full farm management services, including ongoing maintenance and management of the Orchard and harvesting of the Almond Lots.

43. The Responsible Entity has appointed Scholefield Robinson Horticultural Services, an independent horticulturalist to provide horticultural and technical advice to the Responsible Entity and the Orchard Manager and review the horticultural practices of the Orchard Manager.

44. The Responsible Entity has appointed Almondco Australia Limited under the Almondco Supply Agreement to act as Marketing Agent, to process, market and sell the harvested Almonds.

Constitution

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

46. In order to acquire an interest in the Project, the Grower must make an application for Almond Lots in accordance with clause 6. Among other things, the application must be completed in a form approved by the Responsible Entity and be accompanied by payment of the Application Money.

47. The issue date for an interest will be the later of when MAAML accepts the application or when the Application Payment is received. Where the Application Payment is to be funded wholly or partially by a loan from MBL or Momentum (the 'Preferred Financier') the issue date will be when MAAML actually receives the funds or receives written confirmation that the loan has been approved.

48. Under clause 6.9 MAAML accounts for the Application Payment in a special trust account and deposits the money into a bank account solely for Application Payments for the Project.

49. The Grower appoints MAAML as its agent, representative and attorney (clause 6.1 of Schedule 1 to the Constitution).

Schedule 1 to the Constitution – Licence and Management Arrangements

50. The terms of the Licence and Management Arrangements are set out in Schedule 1 of the Constitution.

51. Clause 2 specifies that MAAML will grant each Grower a non-exclusive Licence for the term of the Project. The Licence allows the Grower to occupy the Grower's Almond Lot and access and use the Irrigation Infrastructure for the sole purpose of conducting their almond growing business. Each Grower must pay annual Licence Fees as per clause 3.1.

52. Under the Licence it is acknowledged that all right, title and interest in the Produce vest with the Grower. However, the terms of the Licence do not confer ownership of the Trees to the Grower. Ownership of the Trees remains with the Landlord.

53. Under clause 6.1 Growers engage MAAML as an independent contractor to manage and conduct the Project and to perform the orchard services on their behalf in accordance with good horticultural and environmental practices during the Term of the Project.

54. In each subsequent year during the project, MAAML will provide the operational services listed in clause 7.4. At the time that the produce is ready for harvest MAAML will test the produce, harvest any trees ready for harvesting and deliver the harvested produce for processing and sale (clauses 8 and 9).

Pooling of amounts and distribution of Proceeds

55. MAAML, as agent for the Grower, will process, market and sell the Grower's Produce along with that of other Growers for as high a price as it can reasonably achieve. The Produce from each Almond Lot will be pooled with that of other Growers. Each Grower is entitled to receive a share of the sale proceeds proportional to their interest in the project (clause 9.4).

56. The Constitution (clause 16) sets out provisions relating to the pooling and distribution of the Harvest Proceeds from the sale of the Grower's Produce. Proceeds can include both sale proceeds and insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed produce are entitled to benefit from distributions of Harvest Proceeds from the pool; and
- any pooled produce must consist only of produce contributed by Growers from the same Project.

57. Where there is partial damage or destruction of a Grower's Almond Lot MAAML will assess the damage and determine whether or not the Almond Lot and its associated interest is to be terminated. Where the Almond Lot is not to be terminated MAAML may determine the percentage of the Almond Lot that is no longer commercially viable. The Grower's proportional interest in the pooled produce will be reduced accordingly (clause 9.8).

Joint Venture

58. As an alternative to participation by a single entity as a Grower, the terms of the Constitution provide that two entities may enter into a Joint Venture. The Joint Venture will be treated as a single Grower. The Constitution defines Joint Venturer as an entity notified in the Grower's Application as a Joint Venturer.

59. Joint Venturers are known as First Joint Venturer and Second Joint Venturer, and are apportioned specific responsibilities, rights and entitlements under clause 32 of the Constitution:

60. The First Joint Venturer is solely responsible for:

- 100% of the Application Payment;
- 50% of each of the Deferred Management Fee, the Variable Management Fee and the Variable Licence Fee; and
- 50% of each of the Fixed Management Fee, the Fixed Licence Fee and any other amount payable in relation to the Interest in all Financial Years commencing from and including the 2012 Financial Year.

The Second Joint Venturer is responsible for:

- 100% of each of the Fixed Management Fee and Fixed Licence Fee in the 2009 to 2011 Financial Years (inclusive); and
- all other amounts that are not payable by the First Joint Venturer.

61. Each Joint Venturer is entitled to a Fractional Interest in the project. The Fractional Interest confers on the Joint Venturer, subject to clause 32 of the Constitution, a share of the rights, entitlements and obligations in respect of the Interest. Clause 1.1 of the Constitution defines a Fractional Interest as 50% of an Interest which is held by Joint Ventures as tenants in common.

Head Lease

62. The Project Land is situated 18 km south east of Robinvale and approximately 7 km from the Murray River in the Sunraysia region of North West Victoria. The Project Land, Almond Trees, Irrigation Infrastructure and Water Licences will be owned by MacFARM (the Landlord).

63. The Responsible Entity has leased the Land, and acquired rights to access and use the Almond Trees, Irrigation Infrastructure and Water Licences according to the terms and conditions set out in the Lease.

64. Under the Lease, the Landlord is required to:
- carry out Pre-planting Capital Works by 15 May 2007 so that the Land is in the required condition for planting; and
 - to plant all of the trees on Part A, being no less than 15% of each Almond Lot, by 23 June 2007.
65. In accordance with the lease MacFARM completed pre-planting capital works before 15 May 2007 and 100% of all almond trees were planted by 23 June 2007.
66. The Landlord is also required to ensure that all rights under the Water Licences are fully exploited to maximise the benefits to the Responsible Entity and its sub-lessees, licencees or sub-licencees, which includes the Growers.

MHSPL Management Agreement

67. Under this agreement, MAAML engages MHSPL to provide Orchard Operational Services and subcontracts MHSPL to provide certain of its management obligations, for the Term of the Project (clauses 4 and 5). These services include ongoing maintenance and management of the Orchard and harvesting the Almond Lots.

Compliance Plan

68. The Project has a Compliance Plan in accordance with the *Corporations Act 2001*. Under the Compliance Plan, a Compliance Committee monitors MAAML's conduct of the Project to ensure it meets its obligations and responsibilities contained in the Constitution and to ensure the rights of Growers are protected.

Fees

Management Fees

Fixed Management Fees

69. Growers will pay the Manager the following Fixed Management Fees (clause 11.1 of Schedule 1 of the Constitution):
- (i) on application, \$7,920 for services to be provided from date of entry into the Project up to 30 June 2008;
 - (ii) in consideration for services to be provided in the financial year ending 30 June 2009 \$1,320 payable on 31 October 2008; and
 - (iii) in consideration for the services to be provided in the financial year ending 30 June 2010 and each financial year thereafter \$1,540.

70. The Fixed Management Fee will be indexed on 31 October 2013 and each 31 October thereafter for the term of the project (clause 11.4 of Schedule 1 of the Constitution).

Variable Management Fees

71. Growers will pay the Manager the following Variable Management Fees (clause 11.2 of Schedule 1 of the Constitution):

- (i) in consideration for services to be provided in the financial year ending 30 June 2008 and each financial year thereafter 16.5% per annum of:
- any sale proceeds; and
 - insurance proceeds,
- received during the service term. The fee is payable when the proceeds are received by the Manager.

Deferred Management Fees

72. Growers will pay the Manager, in addition to the other fees payable, the following Deferred Management Fees (clause 11.3 of Schedule 1 of the Constitution):

- (i) in consideration for services to be provided in the financial years ending 30 June 2008 and 2009, 5.5% (in aggregate) of:
- any sale proceeds; and
 - insurance proceeds,
- received during the service term. The fee is payable when the proceeds are received by the Manager.

Licence Fees

Fixed Licence Fees

73. Fixed Licence Fees are payable as follows (clause 3.2 of Schedule 1 of the Constitution):

- (i) for the financial years ended 30 June 2008 and 30 June 2009, \$440 per annum, payable on application and 31 October 2008 respectively; and
- (ii) from the financial years ended 30 June 2010 and each financial year thereafter, \$660 per annum; payable on 31 October of that financial year;

74. The Fixed Licence Fees will be indexed on 31 October 2013 and each 31 October thereafter for the remaining term of the project (clause 3.4 of Schedule 1 of the Constitution).

Variable Licence Fees

75. Variable Licence Fees are payable as follows (clause 3.3 of Schedule 1 of the Constitution):

- (i) for the financial year ending 30 June 2013 and each financial year thereafter 13.2% of:
 - any sale proceeds; and
 - insurance proceeds,received during the period from 1 July 2012 to end to the service term.

Payment of fees by Joint Venturers

76. For Joint Venturers these Fees are apportioned as prescribed in clause 32.2 of the Constitution.

77. The First Joint Venturer is solely responsible for paying:

- (i) 100% of the Application Payment;
- (ii) 50% of each of the Deferred Management Fee, the Variable Management Fee and the Variable Licence Fee; and
- (iii) 50% of each of the Fixed Management Fee, Fixed Licence Fee and any other amounts payable in relation to the interest in all financial years commencing from and including the 2012 financial year.

78. The Second Joint Venturer is solely responsible for paying:

- (i) 100% of the Fixed Management Fee, and Fixed Licence Fee in the financial years ending 30 June 2009 to 30 June 2011 inclusive; and
- (ii) all other amounts that are not payable by the First Joint Venturer.

Finance

79. A Grower who does not pay the Application Payment in full upon application can borrow from MBL or Momentum (the 'Preferred Financier') for the Project, or from an independent lender external to the Project.

80. 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 MBL or with the Preferred Financier that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling. A Grower who enters into a finance arrangement with an independent lender external to the Project, other than the Preferred Financier, may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

81. Growers cannot rely on any part of this Ruling if the Application Payment is not paid in full on or before 15 June 2008 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 MBL or the Preferred Financier, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by the lending institution by 15 June 2008.

Finance offered by MBL

82. There are three finance options offered by MBL to Growers to finance their interests in the Project. Upon acceptance of the Grower's application by MBL, the Grower will be bound by the terms and conditions of the Loan Agreement.

83. Growers will grant a mortgage in favour of MBL by way of equitable mortgage over all of its present and future right, title and interest in and to its Project Interest, including the right to receive all moneys under or in respect of the Project.

Loan Options

84. 12 month interest free loan with terms and conditions as follows:

- finance for up to 100% of the cost of the Application Payment;
- application fee of 1% of the loan amount; and
- repayments in 12 equal monthly instalments.

85. 5 or 7 year loans with terms and conditions as follows:

- finance for up to 100% of the cost of the Application Payment; and up to 100% of the Fixed Management and Fixed Licence Fees payable on 31 October 2008;
- there will be two drawdowns: on application, 31 October 2008 respectively;
- repayments of equal monthly instalments of principal and interest; and
- an indicative interest rate of 8.8% per annum.

86. If two investors choose to participate in the Project as Joint Venturers by nominating a First Joint Venturer and a Second Joint Venturer in their application, each Joint Venturer may apply for a separate Investment Loan to meet their respective obligations as detailed in paragraphs 76 to 78 of this Ruling and in accordance with paragraphs 84 and 85 of this Ruling.

Finance offered by the Preferred Financer

87. Subject to the terms and conditions of the Loan Agreement with Momentum a Grower can finance:

- up to 100% of the cost of their Application Payment; and
- up to 100% of the Fixed Management and Fixed Licence Fees payable on 31 October, 2008, 2009, and 2010 respectively.

88. This corresponds to a maximum total facility of \$14,520 per interest (excluding any loan application fee that may be included in the loan).

89. There are a two finance options offered by Momentum:

7 year loan

- 2 years interest only, then 5 years principal and interest;
- repayments of equal monthly instalments of interest for 2 years then principal and interest for the remaining 5 years;
- indicative interest rate of 11%; and
- loan application fee of \$250 plus 0.50% of the loan amount.

10 year loan

- 3 years interest only, then 7 years principal and interest;
- repayments in equal monthly instalments of interest for 3 years then principal and interest for the remaining 7 years;
- indicative interest rate of 11.25%; and
- loan application fee of \$250 plus 0.50% of the loan amount.

90. Common features contained in each of these loans are that:

- there will be four drawdowns: on application, 31 October 2008, 2009, and 2010 respectively;
- although there are multiple drawdowns the loan will be treated as a single loan. This means that the interest only period will end 2 or 3 years after the first drawdown. The total loan will need to be repaid by the end of the 7 or 10 years (as the case may be) from the first drawdown;
- Momentum will pay to the Responsible Entity the funds on the relevant drawdown dates; and

- the Grower grants a mortgage in favour of Momentum by way of equitable mortgage over all of its present and future right, title and interest in and to its Project Interest, including the right to receive all moneys under or in respect of the Project.

91. Subject to Momentum accepting the Grower's application, the Grower will be bound by the terms and conditions of the Loan Agreement.

92. If two investors choose to participate in the Project as Joint Venturers by nominating a First Joint Venturer and a Second Joint Venturer in their application, each Joint Venturer may apply for a separate Investment Loan to meet their respective fee obligations as detailed in paragraphs 76 to 78 of this Ruling and in accordance with paragraphs 87 to 91 of this Ruling.

93. This Ruling does not apply if the finance arrangement entered into by the Grower includes 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-arms 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 MBL (excluding its assigns), are involved or become involved in the provision of finance to Growers for 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?

94. For the amounts set out in paragraph 23 of this Ruling to constitute allowable deductions the Grower's almond growing activities as a participant in the Macquarie Almond Investment 2007 Project must amount to the carrying on of a business of primary production.

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

96. 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?

97. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Macquarie Almond Investment 2007 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.

98. Having applied these principles to the arrangement set out above, a Grower in the Macquarie Almond Investment 2007 Project is accepted to be carrying on a business of growing and harvesting almonds for sale.

Deductibility of the Management Fees, Licence Fees, interest, borrowing costs and Almond Trees

Section 8-1

99. The Management Fees (fixed, variable and deferred) and Licence Fees (fixed and variable) 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 arrangement and there is no capital component evident in the management fees and licence fees (see paragraphs 49 to 51 of TR 2000/8).

100. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Provided that the prepayment provisions do not apply (see paragraphs 103 to 107 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.)

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

102. Other than where the prepayment provisions apply (see paragraphs 103 to 107 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

Prepayment provisions

Sections 82KZL to 82KZMF

103. 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.

104. 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).

Application of the prepayment provisions to this Project

105. Under the scheme to which this Product Ruling applies Management Fees, Licence Fees and other fees are incurred annually and the interest payable to MBL or the Preferred Financier is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

106. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Constitution, or prepays interest under a loan agreement (including loan agreements with lenders other than MBL or the Preferred Financier). Where such a prepayment is made these prepayment provisions will also apply to small business entities because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

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

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

108. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for income years ending 30 June 2008 to 30 June 2013, the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years:

- 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 almond industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

109. 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.

110. 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

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

Part IVA – general tax avoidance provisions

112. 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).

113. The Macquarie Almond Investment 2007 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 23 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.

114. 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 almonds. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/7; TR 97/11; TR 98/22;
TR 2000/8; TR 2001/14;
TR 2002/6; PR 2007/4

Subject references:

- carrying on a business
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME

- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 25-25(1)
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 40-530
- ITAA 1997 40-545
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968
- Corporations Act 2001
- SISA 1993

Case references:

- Commissioner of Taxation v. Lau (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55

ATO references

NO: 2006/19855

ISSN: 1441-1172

ATOLaw topic: Income Tax ~~ Product ~~ crops - other