



PR 2008/11 - Income tax: AIL Almond Grower Project - Swan Hill: 2008 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 *19 November 2014*



Product Ruling

Income tax: AIL Almond Grower Project – Swan Hill: 2008 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.

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

No guarantee of commercial success

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

Potential participants must form their own view about the commercial and financial viability of the product. 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 'AIL Almond Grower Project – Swan Hill: 2008 Growers' 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 who have executed the relevant Project Agreements set out in paragraph 30 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;
- finance their participation in the Project with loans other than from ABL Nominees Pty Ltd (ABL Nominees) or Almond Investors Finance Pty Ltd, or other than as described at paragraphs 87 to 106 of this Ruling; or
- elect to take and sell their own produce.

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 30 to 106 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 13 February 2008, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 13 February 2008 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.

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 at paragraphs 30 to 106 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 Allotment Management Agreement and an Allotment Sub-Lease Agreement, on or before 15 June 2008.

Concessions for 'small business entities'¹

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 within this Ruling.

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

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

¹ The meaning of 'small business entity' is explained in section 328-110.

Deductions for Growing and Management Fees, Land and Assets rent, interest and borrowing costs**Sections 8-1 and 25-25 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936**

23. A Grower may claim tax deductions for the following fees and expenses on a per Allotment basis, as set out in the table below.

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
Growing and Management Fees	\$4,600 See Notes (i), (ii) and (iii)	\$1,200 See Notes (i), (ii) and (iii)	\$1,200 See Notes (i), (ii) and (iii)
Land and Assets rent	Nil	\$750 See Notes (i), (ii) and (iii)	\$750 See Notes (i), (ii) and (iii)
Interest paid to ABL Nominees or to Almond Investors Finance Pty Ltd	As incurred See Notes (i), (iii) and (iv)	As incurred See Notes (i), (iii) and (iv)	As incurred See Notes (i), (iii) and (iv)
Loan Application Fee paid to ABL Nominees or to Almond Investors Finance Pty Ltd	Must be calculated See Note (v)	Must be calculated See Note (v)	Must be calculated See Note (v)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) The Growing and Management Fees and the Land and Assets rent are deductible under section 8-1 in the income year in which 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 87 to 105 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 agreements entered into with financiers other than ABL Nominees or Almond Investors Finance Pty Ltd, is outside the scope of this Ruling. Prepayments of interest to any lender, including ABL Nominees or Almond Investors Finance Pty Ltd 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.
- (v) The Loan Application Fee payable to either ABL Nominees or to Almond Investors Finance Pty Ltd of \$300 plus 0.5% of the loan value 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 ABL Nominees or Almond Investors Finance Pty Ltd is outside the scope of this Ruling.

Deductions for capital expenditure

Division 40

24. A Grower will be entitled to tax deductions relating to the Terms Payment Agreement administration fee, irrigation and decline in value of the Almond Trees. All deductions shown in the following table are determined under Division 40.

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
Administration fee payable under a Terms Payment Agreement	\$10 See Notes (i) and (vi)	\$10 See Notes (i) and (vi)	\$10 See Notes (i) and (vi)
Irrigation Charge	\$900 See Notes (i) and (vii)	\$900 See Notes (i) and (vii)	\$900 See Notes (i) and (vii)
Establishment of the Almond Trees	See Notes (i) and (viii)	See Notes (i) and (viii)	See Notes (i) and (viii)

Notes:

- (vi) The administration fee payable to Almond Investors Limited (AIL), in respect of a Terms Payment Agreement of \$50, is not deductible in full when it is incurred. Under section 40-880 it is deductible on a straight line basis over five income years (see paragraphs 120 and 121 of this Ruling).
- (vii) An irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. A deduction for water facilities is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one third of the capital expenditure incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one third in each of the next 2 years of income (section 40-540).
- (viii) Almond Trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold a Sub-Lease over the land, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the Almond Trees is determined using the formula in section 40-545 and is based on the capital expenditure 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). The Responsible Entity of the Project will notify the Grower when their Almond Trees enter their first commercial season and the amount that may be claimed.

Units in the Asset Trust***Part 3-1 of the ITAA 1997 and Division 6 of Part III of the ITAA 1936***

25. Growers or the nominees of Growers will acquire Units in the Asset Trust. The Units are CGT Assets (section 108-5) and the amounts payable for the Units in the Asset Trust upon subscription constitute an outgoing of capital and are not allowable as a deduction.

26. The amount paid for each Unit will represent the first element of the cost base of the units (subsection 110-25(2)). Any disposal of the Units by the Unit Holder will be a CGT Event and may give rise to a capital gain or loss.

27. Income distributions by the Asset Trust are included in the assessable income of a Grower who is an Orchard Asset Owner in accordance with Division 6 of Part III of the ITAA 1936.

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

Section 35-55 – exercise of Commissioner’s discretion

28. 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 below, 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.

28A. For the financial years ending **30 June 2014 and 30 June 2015**, the Commissioner will exercise the discretion in subsection 35-55(1) once the following conditions are satisfied:

- the Grower carried on their business of almond growing during the financial year;
- the business activity that is carried on is not materially different to that in the scheme described in paragraphs 30 to 106; and
- the Grower has incurred a taxation loss for the income year from carrying on that business activity.

28B. If these conditions are met for the financial years ending 30 June 2014 and 30 June 2015, the Commissioner will exercise the discretion under:

- Paragraph 35-55(1)(b) for a Grower in the Project who satisfies the income requirement in subsection 35-10(2E); and
- Paragraph 35-55(1)(c) for a Grower in the Project who does not satisfy the income requirement in subsection 35-10(2E).

28C. In any year where the discretion is not exercised, losses incurred by a Grower will be subject to the loss deferral rule in section 35-10 and the Grower will not be able to offset the losses from the Project against other assessable income.

Prepayment provisions and anti-avoidance provisions

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

29. For a Grower who commences participation in the Project and incurs expenditure as required by the Allotment Management Agreement and the Allotment Sub-Lease 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 122 and 123 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 as constituted by documents and correspondence received on 31 August 2007, 23 October 2007, 5 December 2007, 6 December 2007, 7 December 2007, 18 December 2007, 21 December 2007, 9 January 2008, 11 January 2008, 14 January 2008, 29 January 2008, 31 January 2008 and 11 April 2008;
- Draft **Product Disclosure Statement** (PDS) for the AIL Almond Orchard Project, received on 11 January 2008;
- Draft **Constitution of the AIL Almond Grower Project – Swan Hill** between AIL (the Responsible Entity of the Project) and each Grower, received on 14 January 2008;
- Draft **Constitution of the AIL Almond Asset Trust – 2007** between AIL (the Responsible Entity of the Asset Trust), the Initial Unit Holder and each Orchard Asset Owner (Unit Holder), received on 9 January 2008;
- Compliance Plan for the AIL Almond Grower Project – Swan Hill, dated 10 January 2007;
- Custodian Agreement between AIL (the Responsible Entity of the Asset Trust and the Responsible Entity of the Project) and Sandhurst Trustees Limited (the Custodian of the Asset Trust and the Custodian of the Project), dated 18 January 2006 and 9 August 2006;

- Executed Lease Agreement (Interim Head Lease) between the relevant landowner and Sandhurst Trustees Limited (or duly appointed sub-custodian), dated 13 June 2007;
- Draft Lease Agreement (Interim Head Lease) between the relevant landowner and Almond Investors Land Pty Ltd, received on 31 August 2007;
- Draft Lease Agreement (Interim Sub-Lease) between Almond Investors Land Pty Ltd and Sandhurst Trustees (the Custodian of the Asset Trust) and AIL (the Responsible Entity of the Asset Trust), received on 31 August 2007;
- Draft Lease Agreement (Trust Head Lease) between Sandhurst Trustees Limited (the Custodian of the Asset Trust) (or duly appointed sub-custodian), and AIL (the Responsible Entity of the Trust), received on 31 August 2007;
- Executed Contract of Sale of Real Estate between the relevant landowner and Sandhurst Trustees Limited (the Custodian of the Asset Trust), received on 31 August 2007;
- Executed Option to Purchase between the relevant landowner and Almond Investors Land Pty Ltd, dated 5 January 2007;
- Draft Contract of Sale of Real Estate between the relevant landowner and Almond Investors Land Pty Ltd, received on 23 October 2007;
- Draft **Allotment Sub-Lease Agreement** between AIL (the Responsible Entity of the Grower Project) and Sandhurst Nominees (Victoria) Limited (the sub-custodian of the Project), and each Grower, received on 9 January 2008;
- Draft **Allotment Management Agreement** between AIL (the Responsible Entity of the Project) and each Grower, received on 14 January 2008;
- Draft Orchard Management Agreement between AIL (the Responsible Entity of the Project) and RMONPRO Developments Pty Ltd, received on 23 October 2007;
- Draft Orchard Establishment Agreement between AIL (the Responsible Entity of the Asset Trust), RMONPRO Developments Pty Ltd and the independent contractor, received on 23 October 2007;
- Almond Crop Supply Agreement between Almondco Australia Limited (Almondco) and Almond Investors Limited, dated 8 November 2002;

- **Finance Application** for the Project, received on 11 April 2008;
- Draft **Loan Agreement** between ABL Nominees and a Borrower, received on 31 August 2007;
- Draft **Loan Agreement** between Almond Investors Finance Pty Ltd and a Borrower, received on 31 August 2007;
- Draft **Terms Payment Agreement** between AIL (the Responsible Entity of the Project) and a Grower, received on 31 August 2007;
- Report dated February 2013 titled 'Orchard Inspection and General Discussion on Recent Yield Variability within Australian Almond Orchards', received 6 October 2014;
- Report dated December 2013 titled 'Independent Assessment of Almond Investors Limited Orchards at Piangil', received 6 October 2014; and
- AIL Almond Grower Project – Swan Hill (Stage 2 – 2008) After Tax Analysis for a Grower for the financial years ended 30 June 2014 through 30 June 2025, received 6 October 2014.

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. The effect of these agreements is summarised as follows.

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

Overview

33. The main features of the AIL Almond Grower Project – Swan Hill 2008 are as follows:

Location	Swan Hill district, Victoria; approximately 45 km north-west of Swan Hill and 5 km south-east of Piangil
Type of business to be carried on by each Grower	Cultivating Almond Trees on their designated 0.125 hectare Allotments and harvesting the Almonds for

	processing and sale
Term of the Project	17 years
Number of hectares offered for cultivation	375 hectares
Size of each Allotment	0.125 hectares
Minimum allocation per Grower	1 Allotment
Number of plants per Allotment	40 Almond Trees
Initial cost	\$7,300 per Allotment comprising of \$4,600 Growing and Management Fees and \$2,700 Irrigation Charge. \$1 per Unit in the Asset Trust
Ongoing costs and other growing costs	Growing and Management Fees, Deferred Management Fees, Land and Assets rent, Performance Fees, Processing and Marketing Fees, interest payments and borrowing costs

34. Both the Project and the Asset Trust are registered as Managed Investment Schemes under the *Corporations Act 2001*. AIL has been issued with an Australian Financial Service Licence 224314 and will be the Responsible Entity for the Project.

35. Applications to participate in the Project must be made on the Application form shown in the PDS. There is no minimum amount that must be raised under the PDS. The maximum offer under the PDS is for 3,000 Grower Allotments and 3,000 Units in the Asset Trust. The Responsible Entity of the Project may accept oversubscription in the Project at its discretion. A Custodian will be appointed under the Custodian Agreement to protect the interests of the Grower and the Orchard Asset Owner in their dealings with the Responsible Entities of the Asset Trust and of the Project.

36. Under a Power of Attorney contained in the Application Form, Applicants that are accepted to participate in the Project will enter into an Allotment Management Agreement and an Allotment Sub-Lease Agreement with the Responsible Entity of the Project.

37. A Grower that participates in the Project will do so by acquiring an interest in the Project which will consist of a minimum of one Allotment of 0.125 hectares in size. The Grower or a nominee of the Grower must also subscribe for the equivalent number of Units in the Asset Trust as Allotments in the Project.

38. Growers' Applications accepted on or before 15 June 2008 will commence participation from the time their Application is accepted (being the Grower Commencement Date). This Ruling only applies in respect of Growers whose Grower Commencement Date is

on or after the date of issue of this Product Ruling and on or before 15 June 2008.

39. The land on which the Project will be conducted is in the Swan Hill District in Victoria, approximately 45 km north-west of Swan Hill and 5 km south-east of Piangil and adjacent to Miralie-Cocamba Road, Algie Road and Hayward Road. The specific details of the land covered by this Product Ruling are Volume 8060 Folio 660, Volume 6121 Folios 114 and 115, Volume 3661 Folio 040 and part of Volume 9128 Folio 870. If additional land is acquired for use in the Project, AIL will notify the Tax Office and request an addendum to this Product Ruling to include that land.

40. An Allotment Sub-Lease Agreement will be entered into between the Responsible Entity of the Project, the Custodian of the Project (or duly appointed sub-custodian), and each Grower for the purpose of growing, maintaining and harvesting Almond Trees. The Term of the Allotment Sub-Lease commences on the Grower Commencement Date and ends on 15 June 2025 unless terminated earlier. Under the Allotment Sub-Lease Agreement AIL will ensure that 40% of each Grower's Trees are planted by 23 June 2008 and the remainder by 30 September 2008. AIL will notify the Tax Office if the Trees are not planted in accordance with these dates.

41. Each Grower will engage the Responsible Entity of the Project to manage their business and to carry out the duties that are usual or necessary for operating an almond orchard on the Grower's Allotment.

42. Each Grower will use their Allotment for the purpose of carrying on a business of cultivating and harvesting Almonds and the sale of harvested produce.

Constitution of the AIL Almond Grower Project – Swan Hill

43. The Constitution establishes the Project and operates as a deed binding all Growers and the Responsible Entity of the Project (clause 2). The Constitution sets out the terms under which AIL agrees to act as Responsible Entity and thereby manage the Project (clause 3). Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

44. In order to acquire an interest in the Project, the Grower must make an application for an Allotment in accordance with clauses 6 and 7. Among other things, the Application must be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant and accompanied by payment of the Contribution in a form acceptable to the Responsible Entity.

45. Under clause 6.2 of the Constitution, the Responsible Entity or Custodian holds the Contribution on trust. The Responsible Entity will deposit all Contributions received from Applicants in a Grower's Application Account (clause 7.7).

46. Once the Responsible Entity has accepted the Application and all of the Project documents have been executed and remain in force (clause 7.6) and the Grower's Allotment has been issued, the Contribution may be transferred and applied against the fees due to the Responsible Entity (clause 8.1).

47. In summary, the Constitution also sets out provisions relating to:

- the preparation and execution of the Allotment Sub-Lease Agreement and the Allotment Management Agreement by AIL in its capacity as the Applicant's attorney (clause 7);
- the acceptance, at the Responsible Entity's discretion, that payment of a Grower's Contribution may be made by instalments (clause 7);
- the composition of a Grower's Allotment (clause 11);
- the requirement that Project Assets be held on trust and the appointment of a Custodian to hold the Project Assets on behalf of the Growers (clause 12);
- the keeping and maintenance of a Register of Growers (clause 13);
- the transfer of a Grower's Allotment (clause 14);
- the powers, rights and liabilities of the Responsible Entity of the Project (clauses 19 and 20);
- the opening of a Growers Proceeds Account at an Australian bank, the payment of proceeds into the Grower's Proceeds Account, deductions that may be made from the Grower's Proceeds Account and distributions to Growers from the Grower's Proceeds Account (clauses 24, 25, 26 and 27); and
- the termination of the Project (clause 29).

Constitution of the AIL Almond Asset Trust – 2007

48. The Constitution of the Asset Trust establishes the AIL Almond Asset Trust – 2007 and operates as a deed binding all Orchard Asset Owners and the Responsible Entity of the Asset Trust (clause 1.2). The Constitution sets out the terms under which AIL agrees to act as Responsible Entity and thereby manage the Asset Trust (clause 1.3). Upon acceptance into the Asset Trust, Orchard Asset Owners are bound by the Constitution by virtue of their participation in the Asset Trust.

49. In summary, the Constitution of the Asset Trust also sets out provisions relating to:

- the powers of investment by the Responsible Entity of the Asset Trust (clause 3);

- the purpose, term and vesting of the Asset Trust (clause 4);
- the payment and holding of Contributions by the Responsible Entity of the Asset Trust or Custodian (clause 6);
- the keeping and maintenance of a Register of Orchard Asset Owners (clause 8);
- the purchase of the Property and Water Rights (clause 9.3);
- the amounts payable for the Units and the circumstances under which an Orchard Asset Owner will be required to contribute further funds to the Trust (clause 11);
- the powers and duties of the Responsible Entity of the Asset Trust (clause 12);
- the income of the Asset Trust and deductions from distributions (clauses 16 and 17);
- the transfer of Units in the Orchard Asset Trust (clause 19);
- the winding up of the Asset Trust (clause 22); and
- the use of the Trust Property (clause 27.1).

Compliance Plan

50. As required by the *Corporations Act 2001*, AIL has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that AIL manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

Option to Purchase and Contract of Sale

51. Each landowner will grant a Call Option to Almond Investors Land Pty Ltd to purchase the various titles making up the Land to be used for the Project on the terms of the Contract of Sale of Land (Annexure B of the Option to Purchase Agreement). Volume 9128 Folio 870 which will be partly used for the Project, is owned by the Asset Trust under an executed Contract of Sale.

52. In order to secure tenure over the Land for the Term of the Project, an Interim Head Lease or Interim Sub-Lease Agreement or a Contract of Sale of Land will be executed by the relevant parties prior to acceptance of any Applicants to the Project.

Interim Head Lease/Interim Sub-Lease

53. Where a Contract of Sale has not been executed each landowner will grant a Lease over the Land to Sandhurst Trustees Limited, the Custodian of the Asset Trust (or a duly appointed sub-custodian), and to AIL, the Responsible Entity of the Asset Trust, or to Almond Investors Land Pty Ltd. Almond Investors Land Pty Ltd will subsequently enter into an Interim Sub-Lease with Sandhurst Trustees Limited, the Custodian of the Asset Trust (or duly appointed sub-custodian) and AIL, the Responsible Entity of the Asset Trust.

54. The Term of the Interim Head Lease and Interim Sub-Lease is the term of the Project. Rent is payable under these Interim Lease Agreements to the relevant Lessor (clause 3).

55. Each Lessor consents to the works that are permitted to be carried out and will be carried out on the Land in accordance with the Trust Head Lease, including and without limitation the planting of Trees, the installation of the Irrigation System and the construction and maintenance of the access roads to the Allotments (clause 7).

56. If settlement under a Contract of Sale occurs, the Interim Head Lease and the Interim Sub-Lease (for that part of the Land that is the subject of the Contract of Sale) is automatically surrendered with effect from midnight on the day immediately before the Settlement Date (clause 15).

Trust Head Lease

57. For the Term of the Project Sandhurst Trustees Limited, the Custodian of the Asset Trust (or duly appointed sub-custodian) or Almond Investors Land Pty Ltd (as relevant), will grant to Sandhurst Trustees Limited, the Custodian of the Project (or a duly appointed sub-custodian) a lease over the Land and the Trees, together with the right to use the Project Water Rights (clause 2). The lessor under this lease document will be the same entity that is the lessee under the Interim Head Lease.

58. The Annual Rent payable under the Trust Head Lease will be an amount equal to the Annual Sub-Lease Rent for the equivalent period (clause 3 and Schedule 1).

59. AIL, as Responsible Entity of the Asset Trust will, at its own cost and expense, procure the grant of the Project Water Rights and arrange for the Trees to be planted on each Allotment complying with Best Agricultural Practice (clause 10).

Allotment Sub-Lease Agreement

60. Each Grower will enter into an Allotment Sub-Lease Agreement with the Responsible Entity of the Project and Sandhurst Trustees Limited, the Custodian of the Project (or a duly appointed sub-custodian).

61. Each Grower is granted a sub-lease of their Grower's Allotment and the Trees and the right to use the Project Water Rights. The Grower's Allotment is to be used only for the purposes of growing, maintaining and harvesting the Trees, including the installation of the Irrigation System (clause 2).

62. The Term of the Allotment Sub-Lease commences on the Grower Commencement Date and ends on 15 June 2025, unless terminated earlier in accordance with the Allotment Sub-Lease Agreement or the Constitution of the Project (clause 3).

63. The Responsible Entity of the Project will ensure that the Trustee of the Asset Trust, properly and skilfully prepares each Grower's Allotment, plants and establishes the Trees, and acquires the Project Water Rights with sufficient volumes of water to be used to irrigate the Grower's Allotment during the Term of the Project. A minimum of 40% of the Trees are to be planted on each Grower's Allotment by no later than 23 June 2008 and the remaining Trees are to be planted on each Grower's Allotment by no later than 30 September 2008 (clause 4).

64. The Allotment Sub-Lease also sets out:

- the Grower's obligations including, at its own cost, the installation and maintenance of all or part of the Irrigation System (clause 6);
- the Responsible Entity's obligations (clause 7);
- the annual Land and Assets rent payable by the Grower (clause 8 and Schedule 3); and
- the termination of the Allotment Sub-Lease by the Grower or Responsible Entity (clause 9).

Allotment Management Agreement

65. Each Grower will enter into an Allotment Management Agreement with the Responsible Entity of the Project whereby the Grower engages the Responsible Entity as an independent contractor to manage the Grower's Allotment (clause 2).

66. The term of the Allotment Management Agreement begins on the Grower Commencement Date and ends on the earlier of the termination of the Grower's Interest or 15 June 2025 (clause 3).

67. The Responsible Entity of the Project will carry out the Initial Services in the first Financial Year (the Initial Period), in accordance with sound horticultural, environmental and industry practices. The Initial Services are set out in Part 1 of Schedule 3 to the Agreement and include Orchard Management Services, Orchard Maintenance Services and Administration and Management Services.

68. In the second and subsequent Financial Years the Responsible Entity of the Project will carry out the services set out in Part 2 of Schedule 3, in accordance with sound horticultural,

environmental and industry practices. These services include Farming Services and Administration and Management Services (clause 4).

69. The Responsible Entity of the Project also agrees to carry out processing duties relating to the Almonds harvested from the Grower's Allotment and, if elected by the Grower to do so, will also be responsible for the marketing and sale of the Almonds attributable to the Grower's Allotment (clause 4). The processing duties are set out in Part 3 of Schedule 3 to the Agreement.

70. The Allotment Management Agreement also:

- provides that each Grower will own the Grower Irrigation (clause 4);
- sets out the fees payable by the Grower to the Responsible Entity of the Project (clause 5 and Schedule 4); and
- sets out when the Allotment Management Agreement may be terminated (clause 10).

Orchard Management Agreement

71. The Responsible Entity of the Project appoints RMONPRO Developments Pty Ltd as the Orchard Manager for the Project. The Orchard Manager is engaged as an independent contractor to provide the Orchard Services and to oversee the hulling and cracking operation and the processing and marketing relationship with the marketing entity.

72. The Orchard Management Agreement commences on the date of its execution and continues until the Project ends in accordance with the Constitution of the Project (clause 2).

73. RMONPRO Developments Pty Ltd must ensure that the Initial Services are provided to each Grower as required by the Allotment Management Agreement (clause 5).

74. The Orchard Manager must cultivate, maintain and manage the Almond Trees and the Orchard in a manner consistent with the Management Plan, in a good workmanlike and commercially responsible manner and to a standard consistent with Best Horticultural Practice (clause 5).

75. The Orchard Management Agreement also:

- sets out the fees payable by the Responsible Entity of the Project (clause 7 and parts 1 and 2 of Schedule 2); and
- sets out when the Orchard Management Agreement may be terminated (clause 8).

Almond Crop Supply Agreement

76. AIL will enter into an agreement with Almondco conferring on Almondco the right to market and sell the Almonds.

77. AIL agrees to supply Almondco as soon as they can be harvested and prepared for delivery, all of the Almond crop produced by AIL (clause 1).

78. Almondco agrees to prepare the Almonds for market, market and use its best endeavours to sell the Almonds at the best price available at the time of sale. The proceeds of sale of the Almonds and of other Almonds pooled therewith will be distributed at the same rate per kilogram for like variety, grade and quality in accordance with the provisions of the Constitution of the Project (clause 3).

Pooling of Almonds and distributions from the Growers' Proceeds Account

79. The Constitution of the Project (clause 25), Allotment Management Agreement (clause 4.4) and Almond Crop Supply Agreement (clause 3) provide for the pooling of produce from all Growers' Allotments in the Project.

80. The Constitution of the Project provides that the Responsible Entity of the Project may store, market and sell the produce without having regard to the quantity or quality of the particular produce from the Allotments (clause 25).

81. The Allotment Management Agreement provides for the aggregation of Almonds from the Grower's Allotment together with Almonds of other Grower's Allotments. The proceeds of the sale of Almonds will be divided pro rata according to the number of Grower's Allotments contributing to the produce. However, a Grower's entitlement is reduced where the Grower's Allotment is totally or partially destroyed; the level of production is otherwise reduced or inadequate; or is otherwise materially different compared to other Growers' Allotments (clause 4).

82. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed Almonds to the sales pool are entitled to benefit from distributions of the proceeds of sale from the pooled Almonds; and
- any pooled Almonds must consist only of Almonds contributed by 2008 Growers in the Project.

Fees

83. The Fees payable by an Orchard Asset Owner to the Responsible Entity of the Asset Trust are set out in the Constitution of the Asset Trust and includes:

- \$1 per Unit on Application (clause 7 and Item 1 of Schedule 3); and
- a maximum amount of \$2,000 per Unit if the Responsible Entity of the Asset Trust makes Further Calls (clause 11).

84. The Fees payable by a Grower are set out in clause 7 and Schedule 3 of the Constitution of the Project, clause 5 and Schedule 4 of the Allotment Management Agreement, and clause 8 and Schedule 3 of the Allotment Sub-Lease Agreement:

Allotment Management Agreement

- for the Initial Services to be provided from the Grower Commencement Date until 30 June 2008 (the First Financial Year), a fee of **\$4,600** per Allotment is payable upon Application;
- for the Grower Irrigation an Irrigation Charge of **\$2,700** payable upon Application;
- for services to be provided in the Financial Years ended 30 June 2009 (the Second Financial Year) and 30 June 2010 (the Third Financial Year) a fee comprised of two components is payable per Allotment. The first component of **\$1,200** is payable on 1 November 2008 and 1 November 2009 respectively. The second component is a deferred management fee which totals **7.7%** of the Gross Proceeds. The deferred component of the fee payable for services provided in the Second and Third Financial Years is payable in each Financial Year beginning from and including the Financial Year ended 30 June 2014 (the Seventh Financial Year);
- for services to be provided in the Financial Years ended 30 June 2011, 30 June 2012 and 30 June 2013 (the Fourth, Fifth and Sixth Financial Years), a fee of **\$1,200** is payable on 1 November of each relevant year;
- for services to be provided in each subsequent Financial Year beginning from the Financial Year ended 30 June 2014 (the Seventh Financial Year) a fee comprised of two components – the Growing Fee and the Management Fee is payable per Allotment. The Growing Fee component will be paid based on the estimated costs of operating the Grower's Allotment (see paragraph 85 of this Ruling). This fee is payable on 1 November in each of the respective Financial Years;
- a Performance Fee equal to **22%** of so much of the annual Net Proceeds payable to the Grower in a Financial Year that exceeds the Hurdle Net Proceeds, as set out in the PDS for that Financial Year; and

- Processing and Marketing Fees for the Almonds attributable to the Grower's Allotment, as charged.

Allotment Sub-Lease Agreement

Land and Assets rent for each Allotment is equal to the sum of the fixed and variable rent as follows:

- for the period from the Grower Commencement Date until 30 June 2008 (the First Financial Year), no Land and Assets rent is payable; and

Fixed Rent:

- for the Financial Years ended 30 June 2009, 30 June 2010 and 30 June 2011 (the Second, Third and Fourth Financial Years), fixed rent of **\$750** is payable on 1 November 2008, 2009 and 2010 respectively;
- for the Financial Year ended 30 June 2012 (the Fifth Financial Year), fixed rent of **\$1,200** is payable on 1 November 2011; and
- for each subsequent Financial Year beginning from the Financial Year ended 30 June 2013 (the Sixth Financial Year), an amount equal to the fixed rent paid in the previous Financial Year, indexed by the increase in the CPI, is payable on 1 November of the relevant Financial Year.

Variable Rent:

- for the Financial Years ended 30 June 2009, 30 June 2010, 30 June 2011 and 30 June 2012 (Second, Third, Fourth and Fifth Financial Years), no variable rent is payable;
- for the Financial Year ended 30 June 2013 (the Sixth Financial Year) and each subsequent Financial Year, the variable rent shall be calculated as set out in Part 1 of Schedule 3 of the Allotment Sub-Lease Agreement; and
- the variable rent amount will be notified to each Grower on or before 14 October during that Financial Year and shall be payable on 1 November during that Financial Year.

85. As noted above, from the Financial Year ended 30 June 2014 (the Seventh Financial Year) the annual fee payable by a Grower under the Allotment Management Agreement will consist of an amount for the estimated costs of operating the Grower's Allotment. The estimated costs of operating the Grower's Allotment for a Financial Year will include an adjustment for the difference between the actual costs and the estimated costs of managing the Grower's Allotment during the preceding Financial Year.

86. Fees payable by a Grower under the Allotment Management Agreement and Allotment Sub-Lease Agreement are to be paid when due. If gross income attributable to the Grower's Allotment is insufficient to meet these fees, no portion of these fees may be carried forward to the subsequent Financial Year.

Finance

87. A Grower can fund their participation in the Project by:

- using their own funds;
- entering into a Terms Payment Agreement with AIL;
- borrowing from Almond Investors Finance Pty Ltd, a financier associated with AIL;
- borrowing from ABL Nominees the preferred financier and an independent third party financier not associated with AIL; or
- borrowing from an independent lender external to the Project.

88. 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 Almond Investors Finance Pty Ltd or with ABL Nominees 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 ABL Nominees may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

89. A Grower cannot rely on any part of this Product Ruling if the fees payable on application, of \$7,300 per Allotment, other than fees payable subject to a finance arrangement or a Terms Agreement, is not paid in full by 15 June 2008. Where an application is accepted by AIL, subject to finance approval by any lending institution, a Grower cannot rely on this Ruling if written evidence of that approval has not been given to AIL by 15 June 2008.

90. To apply for finance with either Almond Investors Finance Pty Ltd or ABL Nominees a Borrower will execute a Power of Attorney contained in the Finance Application. The Power of Attorney appoints AIL to enter into, on behalf of the Borrower, a Loan Agreement between either Almond Investors Finance Pty Ltd or ABL Nominees. The Power of Attorney grants AIL the discretion to determine which financier will provide the finance the subject of the application. In the first instance the Application Fee, Irrigation Fee and Ongoing Fee Finance will be sought from ABL Nominees for all finance applications. In the event that finance is not provided by ABL Nominees then finance may be sought from Almond Investors Finance Pty Ltd.

Terms Agreement

91. Where AIL agrees to accept an application from a Grower to pay the Application Amount of \$7,300 per Allotment, in instalments, the Grower will enter into a Terms Payment Agreement.

92. The Grower may pay the Application Amount for each Grower Allotment by 12 equal monthly instalments payable in arrears on the last day of each month with the first such instalment due on 15 July 2008 (clause 2.1(b)). The Responsible Entity of the Project may charge the Grower interest on overdue amounts (clause 3).

93. The Terms Payment Agreement also requires that, at the time of Application, the Grower pay a terms administration fee of \$50.00 for each Grower Allotment (clause 2.1(a)).

94. As security for the payment of amounts due to AIL under the Terms Payment Arrangement, the Grower charges in favour of AIL all the Grower's present and future rights, title, interest, assets and undertakings in the Grower Project (clause 4).

Finance offered by Almond Investors Finance Pty Ltd

95. Almond Investors Finance Pty Ltd will provide loans to fund:

- the Application Fee or the Application and Irrigation Fee combined (these are referred to in the Loan Terms as the Initial Loan Amount), due in the First Financial Year on or before 15 June 2008; and/or
- the Ongoing Fee Finance, which is drawn down progressively to fund part of the Grower's costs in the Financial Years following the First Financial Year up to and including amounts payable in the Sixth Financial Year (these are referred to in the Loan Terms as the Further Loan Amounts). These fees are payable under the Allotment Management Agreement and the Allotment Sub-Lease Agreement.

96. The Loans offered by Almond Investors Finance will have:

- a maximum term of 10 years repayable by equal monthly interest and principal instalments; and
- the Loan Application Fee (see below) may be added to the Loan amount.

97. **Note: Growers who enter into loans with Almond Investors Finance Pty Ltd that include any interest only period are not covered by this Product Ruling.**

98. Common features contained in all loans offered by Almond Investors Finance Pty Ltd are:

- the current indicative interest rate is 10.5%;

- all Loans are full recourse to the Borrower and Almond Investors Finance Pty Ltd will pursue legal action against any defaulting Borrowers;
- the maximum loan will be \$1,000,000;
- the Borrower incurs a Loan Application Fee of \$300 plus 0.5% of the value of the loan;
- interest is payable on the balance of the Loan Account monthly in arrears (clause 3);
- repayments are to be made in monthly instalments (clause 4);
- as security for the Secured Obligations, the Borrower grants a fixed charge over the Charged Property to Almond Investors Finance Pty Ltd (clause 6);
- if the Borrower Defaults, all amounts owing by the Borrower under the Loan Agreement are immediately due and payable to Almond Investors Finance Pty Ltd on request (clause 7); and
- a third party Guarantor must unconditionally and irrevocably guarantee to pay Almond Investors Finance Pty Ltd all amounts due by the Borrower to Almond Investors Finance Pty Ltd under the Loan Agreement (clause 9).

Finance offered by ABL Nominees – Application Fee or Application and Irrigation Fee combined

99. ABL Nominees will provide loans to fund the Application Fee or the Application and Irrigation Fee combined (these are referred to in the Loan Terms as the Initial Loan Amount), due in the First Financial Year on or before 15 June 2008.

100. The maximum loan term will be 10 years, with an initial interest only repayment period of 3 years followed by 7 years principal and interest repayments.

101. The Loan Application Fee (see below) may be added to the Loan amount.

Finance offered by ABL Nominees – Ongoing Fee Finance

102. ABL Nominees will also provide loans to fund the Ongoing Fee Finance, which is drawn down progressively to fund part of the Grower's costs in the Financial Years following the First Financial Year up to and including amounts payable in the Sixth Financial Year (these are referred to in the Loan Terms as the Further Loan Amounts). These fees are payable under the Allotment Management Agreement and the Allotment Sub-Lease Agreement.

103. The maximum loan term for Ongoing Fee Finance will be 10 years repayable by equal monthly interest and principal instalments.

104. The Loan Application Fee (see below) may be added to the Ongoing Fee Finance Loan amount.

105. Common features contained in all the loans provided by ABL Nominees are that:

- the current indicative interest rate is 10.5%;
- all Loans are full recourse to the Borrower and ABL Nominees will pursue legal action against any defaulting Borrowers;
- the maximum Loan will be \$1,000,000;
- a Borrower incurs a Loan Application Fee of \$300 plus 0.5% of the value of the loan;
- interest is payable on the balance of the Loan Account monthly in arrears (clause 3);
- repayments are to be made in monthly instalments (clause 4);
- as security for the Secured Obligations, the Borrower grants a fixed charge over the Charged Property to ABL Nominees (clause 6);
- if the Borrower Defaults, all amounts owing by the Borrower under the Loan Agreement are immediately due and payable to ABL Nominees on request (clause 7); and
- a third party Guarantor must unconditionally and irrevocably guarantee to pay ABL Nominees all amounts due by the Borrower to ABL Nominees under the Loan Agreement (clause 9).

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

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' 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 interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism) back to the lender or any associate;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Almond Investors Finance Pty Ltd are involved or become involved in the provision of finance to Growers for the Project.

Commissioner of Taxation13 February 2008

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?

107. For the amounts set out in paragraphs 23 and 24 of this Ruling to constitute allowable deductions the Grower’s horticultural activities as a participant in the AIL Almond Growers Project – Swan Hill 2008 must amount to the carrying on of a business of primary production.

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

109. 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?

110. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the AIL Almond Growers Project – Swan Hill 2008. 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.

111. Having applied these principles to the arrangement set out above, a Grower in the AIL Almond Growers Project – Swan Hill 2008 is accepted to be carrying on a business of growing and harvesting Almonds for sale.

Deductibility of the Growing and Management Fees, Land and Assets rent and interest on loans with Almond Investors Finance Pty Ltd and ABL Nominees

Section 8-1

112. The Growing and Management Fees and the Land and Assets rent 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 Growing and Management Fees and the Land and Assets rent (see paragraphs 49 to 51 of TR 2000/8).

113. 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 124 to 125 below) 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.)

114. Some Growers may finance their participation in the Project through a Loan Agreement with Almond Investors Finance Pty Ltd or ABL Nominees. Applying the same principles as that used for the Growing and Management Fees and the Land and Assets rent, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

115. Other than where the prepayment provisions apply (see paragraphs 124 and 125 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

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

Borrowing costs

Section 25-25

117. A deduction is allowable for expenditure incurred by a Grower in borrowing money to the extent that the borrowed money is used for the purpose of producing assessable income (subsection 25-25(1)).

118. In this Project the Loan Application Fee payable to ABL Nominees or Almond Investors Finance Pty Ltd of \$300 plus 0.5% of the loan value, is incurred to borrow money that is used or is to be used solely for income producing purposes during each income year over the term of the loan.

119. The deduction for the borrowing expense is spread over the period of the loan or 5 years, whichever is the shorter (subsection 25-25(4)).

Administration fee payable under a Terms Payment Agreement

Section 40-880

120. Growers who elect to pay their Application Amount of \$7,300 per Allotment, under the Terms Payment Agreement must pay an administration fee of \$50. This expenditure does not constitute a borrowing expense and is therefore not deductible under section 25-25. As it is capital in nature it is also not deductible under section 8-1.

121. However, section 40-880 will allow the administration fee to be deducted on a straight line basis over five income years. Section 40-880 applies to capital expenditure that is incurred in relation to a business and which is not taken into account elsewhere or denied deductibility under another provision of income tax law.

Prepayment provisions

Sections 82KZME, 82KZMF and 82KZL

122. 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.

123. 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

124. Under the scheme to which this Product Ruling applies Growing and Management Fees and Land and Assets rent are incurred annually and the interest payable to Almond Investors Finance Pty Ltd or ABL Nominees is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

125. 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 Allotment Management Agreement and/or the Allotment Sub-Lease Agreement, or prepays interest under a loan agreement (including loan agreements with lenders other than Almond Investors Finance Pty Ltd or ABL Nominees).

126. 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.

Expenditure of a capital nature

Division 40

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

128. The tax treatment of capital expenditure has been dealt with in a representative way in paragraph 24 of this Ruling, the table and its accompanying notes.

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

129. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ended 30 June 2008 to 30 June 2013, 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.

130. 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.

131. 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.

131A. The Responsible Entity advised on 6 October 2014 that the almond growing business of Growers would not produce a tax profit in the financial years ending 30 June 2014 or 30 June 2015, and requested the Commissioner extend his discretion to allow losses to be claimed in these financial years. The Responsible Entity has forecast that Growers will make tax profits in each of the financial years ending 30 June 2016 to 30 June 2025. The Commissioner accepts that the period of the requested extension is within the lead time for the almond growing industry.

131B. Where, in the financial years ended 30 June 2014 and/or 30 June 2015, a Grower with income for non-commercial loss purposes of less than \$250,000 (that is, the Grower satisfies the income requirement in subsection 35-10(2E)) incurs a loss from carrying on their business activity the discretion in subsection 35-55(1)(b) is exercised for that year, because the Commissioner has determined:

- it is because of its nature that the business activity of the 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 growing industry, the Grower's business activity will satisfy one of the four tests set out in Division 35 or produce assessable income for a financial year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C)).

131C. Where, in the financial year ended 30 June 2014 and/or 30 June 2015, a Grower with income for non-commercial loss purposes of \$250,000 or more (that is, the Grower does not satisfy the income requirement in subsection 35-10(2E)) incurs a loss from carrying on their business activity, the discretion in paragraph 35-55(1)(c) is exercised for that year, because the Commissioner has determined:

- it is because of its nature that the business activity of the Grower will not produce assessable income greater than the deductions attributable to it; and
- there is an objective expectation that within a period that is commercially viable for the almond growing industry, the Grower's business activity will produce assessable income for a financial year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C)).

131D. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) or 35-55(1)(c) is conditional on the Project being carried on the manner described in paragraphs 30 to 106 of this Product Ruling during the financial years specified. If the Project is carried out in a materially different way to that described in this Product Ruling, a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

131E. In each individual year where the Commissioner's discretion is exercised, a Grower within the meaning of either paragraph 131B or paragraph 131C of this Product Ruling, who would otherwise be required to defer a loss arising from their participation in the Project under section 35-10 until a later financial year, is able to offset that loss against their other assessable income.

Section 82KL – recouped expenditure

132. 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

133. 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).

134. The AIL Almond Grower Project – Swan Hill 2008, 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 23 and 24 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.

135. 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.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

*Related Rulings/Determinations:*TR 97/7; TR 97/11; TR 98/22;
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Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt III Div 6
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
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- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 25-25(1)
- ITAA 1997 25-25(4)
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(2C)
- ITAA 1997 35-10(2E)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(b)
- ITAA 1997 35-55(1)(c)
- ITAA 1997 Div 40
- ITAA 1997 Subdiv 40-F
- ITAA 1997 40-515(1)(a)
- ITAA 1997 40-515(1)(b)
- ITAA 1997 40-520(1)
- ITAA 1997 40-520(2)
- ITAA 1997 40-525(2)
- ITAA 1997 40-530
- ITAA 1997 40-540
- ITAA 1997 40-545
- ITAA 1997 40-880
- ITAA 1997 Pt 3-1
- ITAA 1997 108-5
- ITAA 1997 110-25(2)
- ITAA 1997 328-110
- 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

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