



PR 2008/15 - Income tax: Mediterranean Olives Project 2008 - (Joint Venture Growers)

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 This document has changed over time. This is a consolidated version of the ruling which was published on *27 February 2008*



Product Ruling

Income tax: Mediterranean Olives Project 2008 – (Joint Venture Growers)

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	9
Ruling	18
Scheme	30
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	83
Appendix 2:	
Detailed contents list	105

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

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

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

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

No guarantee of commercial success

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

Potential participants must form their own view about the commercial and financial viability of the product. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

Terms of use of this Product Ruling

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

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the 'Mediterranean Olives Project 2008 - (Joint Venture 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 Joint Venture Growers. Joint Venture 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 Mediterranean Olives Financial Pty Ltd (MOF), or other than as described at paragraphs 75 to 82 of this Ruling; or
- are not Joint Venture Growers. Entities who are not Joint Venture Growers should refer to PR 2008/8.

Qualifications

5. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 30 to 82 of this Ruling.

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

- this Product Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Product Ruling may be withdrawn or modified.

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Superannuation Industry (Supervision) Act 1993

8. 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.

Date of effect

9. This Product Ruling applies prospectively from 27 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 27 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 this 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 Joint Venture 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 Joint Venture Grower in the defined class of entities who enters into the scheme described at paragraph 30 to 82 of this Ruling.

19. The Joint Venture 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 Joint Venture Grower's business of primary production will commence at the time of execution of their Management Agreement, Irrigation Lease and Licence Agreement and Grove Lease.

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

Concessions for 'small business entities'¹

21. From the 2007-08 income year, a range of concessions previously available under the Simplified Tax System (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').

22. 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. Because of these choices and the eligibility conditions the application of the small business concessions to Joint Venture 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

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

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

Deductions for Management Fee, Lease Fee, interest and lease document expenses**Sections 8-1 and 25-20 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936**

24. A **First Joint Venture Grower** may claim tax deductions for fees and expenses, on per hectare 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
Management Fee	\$16,005 See Notes (i), (ii) & (iii)	\$8,745 See Notes (i), (ii) & (iii)	\$7,480 (Indexed) See Notes (i), (ii) & (iii)
Lease Fee	Nil	\$962.50 Indexed See Notes (i), (ii) & (iii)	As incurred See Notes (i), (ii) & (iii)
Interest on loans with Mediterranean Olives Financial Pty Ltd (MOF)	As incurred See Notes (i), (iii) & (iv)	As incurred See Notes (i), (iii) & (iv)	As incurred See Notes (i), (iii) & (iv)
Lease document expenses	As incurred See Notes (i) & (v)	Nil	Nil

Notes:

- (i) If the First Joint Venture Grower is registered or required to be registered for GST, amounts of outgoings would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) The Lease Fee and the Management Fee as set out in the Irrigation Lease and Licence Agreement and the Management Agreement, respectively, are deductible in full under section 8-1 in the year that they are incurred.

- (iii) This Ruling does not apply to First Joint Venture Growers who choose to prepay fees or who choose, or who are required to prepay interest under a loan agreement (see paragraphs 93 to 97 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* (the ITAA 1936). Any First Joint Venture Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.
- (iv) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than MOF is outside the scope of this Ruling. First Joint Venture Growers who borrow from lenders other than MOF may request a private ruling on the deductibility of the interest incurred.
- (v) The fee for registering and stamping the Grove Lease is a lease document expense and is deductible in full under section 25-20 in the year that it is incurred. It is incurred for acquiring a lease over a property that is used or is to be used during the Term of the Project solely for income producing purposes.

Deductions for capital expenditure

Division 40

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

26. An olive tree is considered to be a 'horticultural plant' as defined in subsection 40-520(2). As the First Joint Venture Grower holds the Grove Allotment under a lease, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the olive trees is determined using the formula in section 40-545. The establishment expenditure that can be written-off by the First Joint Venture Grower is limited to the capital expenditure incurred that is attributable to the establishment of the Trees. As olive trees have an effective life of 30 years or more a straight-line write-off of 7% will be applied. The deduction is allowable when the Trees enter their first commercial season (section 40-530, item 2). MOEL will notify the First Joint Venture Grower when their Trees enter their first commercial season and the amount that may be claimed.

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

Section 35-55 – exercise of Commissioner’s discretion

27. A Joint Venture 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 these Joint Venture Growers as follows:

- in respect of First Joint Venture Growers for the income years ending **30 June 2008 to 30 June 2013**; and
- in respect of Second Joint Venture Growers, for the income years ending **30 June 2011 to 30 June 2013**.

28. This conditional exercise of the discretion will allow those losses to be offset against the Joint Venture Growers’ other assessable income in the income year in which the losses arise.

Pre-payment provisions and anti-avoidance provisions

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

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

- expenditure by a First Joint Venture Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 94 to 97 of this Ruling);
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Scheme

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

- Application for a Product Ruling received on 18 October 2007 and additional correspondence from the applicant dated 26 October 2007, 8 November 2007, 9 November 2007, 16 November 2007, 11 December 2007, 12 December 2007, 20 December 2007, 21 December 2007, 24 January 2008, 29 January 2008 and 13 February 2008;
- Draft **Combined Product Disclosure Statement and Financial Services Guide** for the Mediterranean Olives Project 2008 issued by MOEL, undated, received on 18 October 2007;
- **Constitution** dated 20 April 2005 and Deeds of Variation of the Constitution of the Mediterranean Olives Project dated 20 April 2005 and 30 May 2006, received on 18 October 2007;
- Compliance Plan of the Mediterranean Olives Project, adopted by MOEL, dated 29 January 2008;
- Draft **Joint Venture Agreement (2008)** between the First Joint Venture Grower and the Second Joint Venture Grower, undated, received on 18 October 2007;
- **Grove Lease 2008 (Joint Venture)** between MOEL and the First Joint Venture Grower, undated, received on 13 February 2008;
- Draft **Irrigation Lease and Licence Agreement 2008 (Joint Venture)** between MOEL and the First Joint Venture Grower, undated, received on 18 October 2007;
- Draft **Management Agreement 2008 (Joint Venture)** between MOEL and the First Joint Venture Grower and the Second Joint Venture Grower, undated, received on 13 February 2008;
- Draft **Loan Agreement 2008 (Joint Venture)** between Mediterranean Olives Financial Pty Ltd (MOF), and the First Joint Venture Grower, undated, received on 18 October 2007;
- Draft Lease between MOEL and Mediterranean Olives Land Pty Ltd, the Land Owner, undated, received on 18 October 2007;

- Draft Principal Sub-Contractor Agreement 2008 between MOEL and De Masi Olive Groves Pty Ltd (as Contractor), undated, received on 18 October 2007;
- Draft Project Coordinator Agreement 2008 between MOEL and de Fina Nominees Pty Ltd, undated, received on 24 January 2008;
- Draft Principal Consultant Agreement 2008 between MOEL and Rocco Frezza (as Principal Consultant), undated, received on 18 October 2007;
- Scheme Property Custody Agreement between MOEL and Sandhurst Trustees Limited (Sandhurst), the Custodian, dated 9 March 2005, received on 18 October 2007; and
- Agreement altering the Scheme Property Custody Agreement between MOEL and Sandhurst, dated 28 February 2006, received on 18 October 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.

31. The documents highlighted are those that a Joint Venture 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 Joint Venture Grower, or any associate of a Joint Venture Grower, will be a party to, which are a part of the scheme.

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

Overview

33. The main features of the Mediterranean Olives Project 2008 (Joint Venture Growers) are as follows:

Location	Serpentine, near Bendigo, Central Victoria
Type of business to be carried on by each entity	Commercial growing of olive trees for the purpose of producing extra virgin olive oil
Term of the Project	23 years
Number of hectares offered for cultivation	84 hectares
Size of each Grove Allotment	One hectare

Number of Trees per hectare	250
Minimum allocation per Grower	One Grove Allotment
Minimum subscription	None
Initial cost per hectare	\$16,005
Ongoing costs and other costs to Joint Venture Growers	Management Fees, Lease Fees, Rent, Agricultural Insurance, Harvesting Fees, Transportation Fees and Extraction Fees.

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

35. The offer to which this Product Ruling applies is for participation in a project consisting of up to 84 hectares situated on two properties, the Judyong property, and the Yarronga property, both at Serpentine, near Bendigo, central Victoria. Each hectare of the Grove Allotment will contain approximately 250 olive trees.

36. To participate in the Project, Applicants must complete the Application and Power of Attorney Form in the PDS and lodge with the Responsible Entity the completed forms together with the relevant Application Money on or before 15 June 2008. The Application Amount will be banked into an Application Fund, in accordance with clause 11.2(a) of the Constitution. Upon acceptance of the application and the issue of an interest in the Project to the Joint Venture Grower, the Responsible Entity will apply the Application Money held in the Application Fund in accordance with the Project Agreements, refer clause 14.1 of the Constitution. The Responsible Entity is taken to have issued an interest in the Project to the Applicant when the Applicant's Application is accepted and all relevant Project Agreements have been entered into by the Responsible Entity and the Applicant, in accordance with clause 12.4 of the Constitution.

37. The First Joint Venture Grower will enter into an Irrigation Lease and Licence Agreement with MOEL for the Term of the Project. This agreement grants the First Joint Venture Grower a lease of the Grove Allotment Irrigation Equipment and a licence to the Common Irrigation Equipment.

38. The First Joint Venture Grower will enter into a Grove Lease with MOEL for the Term of the Project. This agreement grants the First Joint Venture Grower a lease in relation to the Common Area and to a parcel of land called a Grove Allotment, on which at least 1/3 of the Trees will be planted on or before 15 June 2008 with the balance of the Trees planted on or before 31 October 2008.

39. The First Joint Venture Grower and the Second Joint Venture Grower will enter into a Management Agreement with MOEL for the Term of the Project, to undertake the First Period Management Services, Further Management Services, Harvesting Services, Transportation Services, Extraction Services and any other services as Quality Horticultural Practice reasonably requires.

40. MOEL will appoint a Principal Sub-Contractor, De Masi Olive Groves Pty Ltd (the Contractor) for the Term of the Project, to perform the First Period Management Services, the Further Management Services, and to harvest the Olives and prepare them for transportation under the terms of the Principal Sub-Contractor Agreement.

41. By agreement with the Contractor under the terms of the Principal Sub-Contractor Agreement, from the commencement of harvest, MOEL shall endeavour to consult with the purchaser of the Olives on a regular basis to determine appropriate times for collection of the harvested Olives.

42. By agreement with the Contractor under the terms of the Principal Sub-Contractor Agreement, MOEL is authorised to negotiate and enter into olive oil agreements to sell the Oil on behalf of the Joint Venture Growers.

43. For the purposes of this Ruling, Applicants whose Applications are accepted on or before 15 June 2008 will become Joint Venture Growers.

44. **Note that Product Ruling PR 2008/8 has been issued for Growers who are not in Joint Ventures.**

Constitution

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

46. The Application Amount paid by Applicants shall be deposited into a bank account the Responsible Entity will arrange to have opened known as the Application Fund account (clause 11). Once the Application is accepted and an Interest is issued to a Grower, the Responsible Entity will apply the Application Money in accordance with the Project Agreements (clause 14).

47. The Responsible Entity will also arrange to have opened an account known as the Proceeds Fund account into which will be paid all money arising from the Project, apart from the Application Money (clause 11). The Application Fund and the Proceeds Fund are known collectively as the Fund (clause 1.1, Definitions).

48. The Constitution, in summary, also sets out provisions in relation to:

- powers of the Responsible Entity (clauses 5 and 6);
- the Responsible Entity's entitlement to be paid fees out of the Fund, and to recover from the Fund all costs, fees and expenses in accordance with the terms of the Project Agreements (clause 7);
- Applications procedures (clause 12);
- maintenance of a Register of Growers, consisting of personal details of each Grower, and the Grove Allotments issued to them (clause 13);
- the termination of Project Agreements (clause 16);
- the assignment and transmission of a Grower's Interest and the conditions under which such assignments and transmissions may be made (clauses 17 & 18);
- additional powers and other activities of the Responsible Entity (clauses 19 and 20);
- procedures for convening meetings of Growers (clause 22);
- distribution of sales proceeds to Growers (clause 24);
- complaints handling and dispute resolution procedures (clauses 26 and 27); and
- winding up the Project (clause 31).

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

Compliance Plan

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

51. The Compliance Plan sets out the systems and methods by which the Board of Directors, its officers, agents and employees will ensure that the Project and the Responsible Entity continue to comply with all relevant parts of the *Corporations Act 2001* and the Constitution and continuously monitor and review such compliance.

Project Land

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

Judyong Property

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

Yarronga Property

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

53. A Head Lease is entered into between Mediterranean Olives Land Pty Ltd and MOEL under which the Project Land is leased to MOEL. Pursuant to the Head Lease MOEL holds an estate in leasehold in the Project Land of which the Grove Allotment and Common Area form part. MOEL is authorised to grant leases of allotments of the Project Land to Growers including Joint Venture Growers in order that the Project may be carried out.

Joint Venture Agreement

54. The First Joint Venture Grower and the Second Joint Venture Grower will enter into a Joint Venture Agreement to associate themselves as joint venturers for the purpose of carrying out horticultural operations on the Grove under this Project (clause 1).

55. This agreement provides that each Joint Venture Grower will be entitled to 50% of the Olives harvested and the Oil processed from the Olives, insurance proceeds and every other asset arising from their participation in the Project (clause 5). This agreement also specifies the fees for which each of the Joint Venture Growers will be responsible (see paragraphs 68 to 74 of this Ruling).

Grove Lease

56. The First Joint Venture Grower enters into a Grove Lease with MOEL on the basis that the First Joint Venture Grower has entered into a Joint Venture Agreement with the Second Joint Venture Grower to carry out this Project and that MOEL has agreed to lease to the First Joint Venture Grower the Grove Allotment for the purpose of the Joint Venture.

57. Each Grove Allotment consists of an allotment of a one hectare portion of the Project Land and the Trees growing on the Grove Allotment. The PDS and Management Agreement provide that the Project Manager will ensure that for all Applications, at least 1/3 of the Trees will be planted by 15 June 2008 with the balance of Trees planted on or before 31 October 2008.

58. The term of the Grove Lease is from the Commencement Date until 30 June 2031 (item 4 of Schedule 1), or such later date as agreed, in writing, before 30 June 2031 (clause 2.2). The Grove Lease also details provisions for early termination of the Lease by the First Joint Venture Grower or MOEL and the effects of termination (clause 12).

Irrigation Lease and Licence Agreement

59. The First Joint Venture Growers enter into an Irrigation Lease and Licence Agreement with MOEL on the basis that the First Joint Venture Grower has entered into a Joint Venture Agreement with the Second Joint Venture Grower to carry out this Project. MOEL agrees to lease the Grove Allotment Irrigation Equipment and grant a licence to the First Joint Venture Grower over the Common Irrigation Equipment for the Term of this Project (clause 2.1).

60. The term of this agreement is from the Commencement Date until 30 June 2031 (item 5 of Schedule 1) or such later date as agreed, in writing, before 30 June 2031 (clause 2.2). This agreement details provisions for early termination of the agreement by either the Project Manager or the First Joint Venture Grower, and the effects of termination (clause 9).

Management Agreement

61. The First Joint Venture Grower and the Second Joint Venture Grower enter into a Management Agreement with MOEL as Project Manager on the basis that the First Joint Venture Grower and the Second Joint Venture Grower have entered into a Joint Venture to conduct an olive grove and have been accepted as a participant in the Project. The term of the agreement is from the Commencement Date until 30 June 2031, or such later date as agreed, in writing, before 30 June 2031 (clauses 2 and 3).

62. The Joint Venture Growers engage MOEL as an independent contractor to manage and cultivate the Grove Allotments during the Term of the Project according to Quality Horticultural Practice (clause 4). MOEL will harvest the Olives, process the Olives into extra virgin olive oil and sell the Oil on behalf of the First Joint Venture Grower and the Second Joint Venture Grower. During the term of the Project MOEL will perform the following services:

- the First Period Management Services;
- the Further Management Services;

- the Harvesting Services;
- the Transportation Services;
- the Extraction Services; and
- any other services as Quality Horticultural Practice reasonably requires (clause 5).

63. MOEL shall provide the Joint Venture Growers with the First Period Management Services as set out in detail at Schedule 2, Item 1 of this agreement. The services are to be provided in the period from the Commencement Date to 30 June 2008.

64. Throughout the remainder of the Term of the Project, after the First Period Management Services have been provided, MOEL shall provide the Joint Venture Growers with the Further Management Services, Schedule 2, Item 2, and the Harvesting Services, Transportation Services, and Extraction Services, Schedule 2, Items 3, 4 and 5 respectively.

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

66. The Olives harvested from the Grove Allotment will be pooled with the Olives produced by all other Growers participating in the Project and the proceeds from the sale of the Olives and/or Oil will be shared among all the Growers in accordance with the provisions of the Constitution (clause 8.3).

Pooling of Olives and distribution of proceeds

67. Clauses 15 and 24 of the Constitution and clause 8.3 of the Management Agreement set out provisions relating to the pooling of Olives harvested, the Oil processed available for sale and held on behalf of the Joint Venture Growers. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed Olives and/or Oil to the pool giving rise to sale proceeds are entitled to benefit from distribution of those proceeds; and
- any Olives and/or Oil making up the pool must consist only of Olives and/or Oil contributed by Growers participating in the Mediterranean Olives Project 2008.

Project Fees

68. The Joint Venture Agreement sets out the payments that a First Joint Venture Grower and a Second Joint Venture Grower will be responsible for (clauses 6 and 7, respectively) and these are as follows:

First Joint Venture Grower

- all fees payable until 30 June 2010 (including insurance fees) in accordance with the terms and conditions of the Project Agreements;
- all payments for Rent in accordance with the terms and conditions of the Grove Lease;
- all payments for Lease Fees in accordance with the terms and conditions of the Irrigation Lease and Licence Agreement;
- from 1 July 2010, 50% of all insurance fees; and
- from 1 July 2010, 50% of all harvesting, transportation and extraction costs payable out of the proceeds of the sale of the Oil.

Second Joint Venture Grower

- from 1 July 2010, all Management Fees payable in accordance with the terms and conditions of the Management Agreement;
- from 1 July 2010, 50% of all insurance fees; and
- from 1 July 2010, 50% of all harvesting, transportation and extraction costs payable out of the proceeds of the sale of the Oil.

69. Having regard to the foregoing provisions of the Joint Venture Agreement, the following fees listed below are payable per hectare under the Grove Lease, the Irrigation Lease and Licence Agreement and the Management Agreement.

Fees payable under the Grove Lease

70. Rent per hectare (Item 3 of Schedule 1):

- for the period from Commencement Date to 30 June 2008, **nil**;
- for the period 1 July 2008 to 30 June 2009, **nil**;
- for the period 1 July 2009 to 30 June 2010, **nil**;
- for the period 1 July 2010 to 30 June 2011, **\$1,188**, Indexed, payable on 31 October 2010;
- for the period 1 July 2011 to 30 June 2012, **\$2,376**, Indexed, payable on 31 October 2011; and

- for subsequent Financial Years from and including the Financial Year ending 30 June 2013, the Rent payable in the previous year, Indexed, and payable on 31 October in each subsequent Financial Year.

Fees payable under the Irrigation Lease and Licence Agreement

71. Lease Fee per hectare (Item 4 of Schedule1):
- for the period from Commencement Date to 30 June 2008, **nil**;
 - for the period 1 July 2008 to 30 June 2009, **\$962.50**, Indexed, payable on 31 October 2008; and
 - for subsequent Financial Years from and including the Financial Year ending 30 June 2010, the Lease Fee payable in the previous year, Indexed, payable on 31 October in each subsequent Financial Year.

Fees payable under the Management Agreement

72. Management Fee per hectare (Item 4 of Schedule 1):
- for the period from Commencement Date to 30 June 2008, **\$16,005**, payable on application (Application Amount);
 - for the period 1 July 2008 to 30 June 2009, **\$8,745**, payable on 31 October 2008;
 - for the period 1 July 2009 to 30 June 2012, **\$7,480**, Indexed, payable on 31 October in each year;
 - for the period 1 July 2012 to 30 June 2017, **\$4,840**, Indexed, payable on 31 October in each year;
 - for the period 1 July 2017 to 30 June 2018, **\$4,482.50**, Indexed, payable on 31 October 2017; and
 - for subsequent Financial Years from and including the Financial Year ending 30 June 2019, the Management Fee payable in the previous year, Indexed, payable on 31 October in each subsequent Financial Year.

73. MOEL will arrange Agricultural Insurance on behalf of the Joint Venture Growers. The premium payable will be at the rate of approximately 1% of the insured value. The Joint Venture Growers will pay to MOEL in equal shares the amount of the insurance premium plus an amount equivalent to 10% of the insurance premium for MOEL's service in procuring the insurance cover. Payment must be made within 30 days of issue of an invoice by MOEL to Joint Venture Growers (Management Agreement, clause 12.2 (b)(i)).

74. Joint Venture Growers are also liable to pay Harvesting Fees, Transportation Fees and Extraction Fees on 30 days written notice from MOEL, or MOEL will deduct the fees from the proceeds of sale of the Oil prior to making any distribution to the Joint Venture Growers.

Finance

75. A First Joint Venture Grower who does not pay the Application Amount in full upon application can fund their involvement in the Project as follows:

- by borrowing from Mediterranean Olives Financial Pty Ltd (MOF), a lender associated with MOEL; or
- by borrowing from an independent lender external to the Project.

76. **This Product Ruling does not apply to finance arrangements entered into by Second Joint Venture Growers.**

77. A First Joint Venture Grower cannot rely on any part of this Ruling if the Application Amount is not paid in full on or before 15 June 2008 by the First Joint Venture Grower or on the First Joint Venture Grower's behalf by a lending institution. Where an application is accepted subject to finance approval by any lending institution other than MOF, First Joint Venture Growers cannot rely on this Ruling if written evidence of that approval has not been given to MOEL by the lending institution on or before 15 June 2008. The lending institution must provide the full amount of the loan monies to MOEL no later than 30 June 2008.

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

79. This Ruling only applies to loan monies for the Application Amount and Management Fee and Lease Fee payable for the period 1 July 2008 to 30 June 2009. This Ruling does not apply to any additional loans made to First Joint Venture Growers by MOF.

Loans from MOF

80. MOF offers finance to the First Joint Venture Growers which is subject to terms and conditions of a Loan Agreement. MOF offers to advance to the First Joint Venture Growers the Principal Sum on a commercial full recourse basis under the following options:

Option 1

- up to 80% of the Application Amount for the period from Commencement Date to 30 June 2008. The loan funds will be made available by MOF to MOEL by 15 June 2008; and
- interest is at a fixed rate of 11.5% per annum on the Principal Sum outstanding. The First Joint Venture Grower will repay the Principal Sum and interest by equal monthly instalments by way of direct debit, commencing on 15 July 2008 until 15 June 2013.

Option 2

- up to 80% of the Application Amount for the period from Commencement Date to 30 June 2008 and up to 80% of the Management Fee and Lease Fee for the period 1 July 2008 to 30 June 2009;
- the first amount (up to 80% of the Application Amount) will be made available to MOEL by 15 June 2008 and the second amount (up to 80% of the Management Fee and Lease Fee) will be made available to MOEL by 31 October 2008; and
- interest is at a fixed rate of 11.5% per annum on the loan amount outstanding. The First Joint Venture Grower will repay the Principal Sum and interest by equal monthly instalments by way of direct debit, commencing on 15 July 2008 until 15 June 2013.

81. MOF will take security over the First Joint Venture Growers' Interest in accordance with the terms and conditions of the Management Agreement, the Grove Lease, the Irrigation Lease and Licence Agreement and Sale Agreements. In the event of default in payment of the Principal Sum, interest at the rate of 15.5% per annum will be payable by the First Joint Venture Grower from the first date of default until the unpaid amount is paid (clause 4).

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

- there are split loan features of a type referred to in Taxation Ruling 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;

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

Commissioner of Taxation27 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.***

Are the Joint Venture Growers carrying on a business?

83. For the amounts set out in paragraphs 24 to 26 of this Ruling to constitute allowable deductions the Joint Venture Growers' horticulture activities as participant in the Mediterranean Olives Project 2008 – (Joint Venture Growers) must amount to the carrying on of a business of primary production.

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

85. 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?

86. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Mediterranean Olives Project 2008 - (Joint Venture Growers). As Taxation Ruling TR 2000/8 sets out, the relevant principles have been established in such decisions as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

87. Having applied these principles to the arrangement set out above, a Joint Venture Grower in the Mediterranean Olives Project 2008 – (Joint Venture Growers) is accepted to be carrying on a business of growing, harvesting and processing Olives into extra virgin olive oil for sale.

Expenditure of a capital nature

Division 40

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

Deductibility of the Management Fee, the Lease Fee and interest on loans with MOF***Section 8-1***

89. The Lease Fee and the Management Fee identified at paragraph 24 of this Ruling are deductible under section 8-1 (see paragraphs 43 and 44 of Taxation Ruling TR 2000/8). A 'non-income producing' purpose (see paragraphs 47 and 48 of Taxation Ruling TR 2000/8) is not identifiable in the arrangement.

90. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Subject to the application of the prepayment provisions (see paragraphs 93 to 97 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.)

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

92. Other than where the prepayment provisions apply (see paragraphs 93 to 97 of this Ruling) a First Joint Venture Grower can claim a deduction for such interest in the year in which it is incurred.

Prepayment provisions***Sections 82KZME and 82KZMF***

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

Application of the prepayment provisions to this Project

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

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

96. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a First Joint Venture Grower in this Project prepay all or some of the expenditure payable under any of the Project Agreements or prepay interest under a loan agreement (including loan agreements with lenders other than MOF).

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

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

Sections 35-10 and 35-55

98. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the years ending **30 June 2008 to 30 June 2013**, the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 Income tax: non commercial business losses: Commissioner’s discretion. 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 Joint Venture Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the olive growing industry, a Joint Venture Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

99. A Joint Venture Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income in the year it is incurred.

100. 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 Joint Venture Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Section 82KL – recouped expenditure

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

Part IVA – general tax avoidance provisions

102. 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).

103. The Mediterranean Olives Project 2008 – (Joint Venture Growers) will be a 'scheme'. A Joint Venture Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 24 to 26 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.

104. Joint Venture Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and processing the Olives for sale, to be processed into extra virgin olive oil or the processing of the olives into extra virgin olive oil, for sale. There are no facts that would suggest that Joint Venture Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Class of entities	2
Qualifications	5
Superannuation Industry (Supervision) Act 1993	8
Date of effect	9
Changes in the law	14
Note to promoters and advisers	16
Goods and Services Tax	17
Ruling	18
Application of this Ruling	18
Concessions for 'small business entities'	21
Assessable Income	23
<i>Sections 6-5 and 17-5</i>	23
Deductions for Management Fee, Lease Fee, interest and lease document expenses	24
<i>Sections 8-1 and 25-20 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936</i>	24
Deductions for capital expenditure	25
<i>Division 40</i>	25
Division 35 – deferral of losses from non-commercial business activities	27
<i>Section 35-55 – exercise of Commissioner's discretion</i>	27
Pre-payment provisions and anti-avoidance provisions	29
<i>Sections 82KZME, 82KZMF and 82KL and Part IVA</i>	29
Scheme	30
Overview	33
Constitution	45
Compliance Plan	50
Project Land	52
Joint Venture Agreement	54
Grove Lease	56
Irrigation Lease and Licence Agreement	59

Management Agreement	61
Pooling of Olives and distribution of proceeds	67
Project Fees	68
<i>Fees payable under the Grove Lease</i>	70
<i>Fees payable under the Irrigation Lease and Licence Agreement</i>	71
<i>Fees payable under the Management Agreement</i>	72
Finance	75
<i>Loans from MOF</i>	80
Appendix 1 – Explanation	83
Are the Joint Venture Growers carrying on a business?	83
Expenditure of a capital nature	88
<i>Division 40</i>	88
Deductibility of the Management Fee, the Lease Fee and interest on loans with MOF	89
<i>Section 8-1</i>	89
Prepayment provisions	93
<i>Sections 82KZME and 82KZMF</i>	93
<i>Application of the prepayment provisions to this Project</i>	94
Division 35 – deferral of losses from non-commercial business activities and the Commissioner’s discretion	98
<i>Sections 35-10 and 35-55</i>	98
Section 82KL – recouped expenditure	101
Part IVA – general tax avoidance provisions	102
Appendix 2 – Detailed contents list	105

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 2007/6;
PR 2008/8

Subject references:

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

- 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 25-20
- 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)
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- Copyright Act 1968
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- SISA 1993

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA

Case references:

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

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