



# ***PR 2009/29 - Income tax: AIL Almond Grower Project - Miralie: 2009 Growers (to 15 June 2009)***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *6 May 2009*



## Product Ruling

### Income tax: AIL Almond Grower Project – Miralie: 2009 Growers (to 15 June 2009)

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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 under-paid 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

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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. In this Product Ruling this scheme is referred to as the AIL Almond Grower Project – Miralie: 2009 Growers (to 15 June 2009) or simply as 'the Project'. The Project will be offered under a Product Disclosure Statement in relation to the Project and the AIL Almond Asset Trust – Miralie (Asset Trust). **This Product Ruling does not rule on the tax consequences of investing in the Asset Trust.**

2. All legislative references in this Product Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. Where used in this Product Ruling, the word 'associate' has the meaning given in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936). In this Product Ruling, terms defined in the Project agreements have been capitalised.

### Class of entities

3. This part of the Product Ruling specifies which entities:

- are subject to the taxation obligations; and
- can rely on the taxation benefits,

set out in the Ruling section of this Product Ruling.

4. 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 29 of this Ruling on or before 15 June 2009. They will stay in the scheme until its completion and derive assessable income from this involvement.

5. 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:

- terminate their involvement in the scheme prior to its completion, or who do not derive assessable income from it;
- are accepted into this Project before the date of this Ruling or after 15 June 2009;
- participate in the scheme through offers made other than through the Product Disclosure Statement; or who enter into an undisclosed arrangement with the promoter or a promoter associate, or an independent adviser that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits or harvest returns) in any way; or

- elect to take and sell their own produce.

### **Superannuation Industry (Supervision) Act 1993**

6. 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**

7. 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 29 to 96 of this Ruling.

8. 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**

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10. This Product Ruling applies prospectively from 6 May 2009, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 6 May 2009 until 15 June 2009, 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 2011. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

11. 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.

## **Changes in the law**

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

13. 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**

14. 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**

15. 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 any creditable acquisition it makes, it must be registered or required to be registered for GST and hold a valid tax invoice.

# **Ruling**

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## **Application of this Ruling**

16. 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 29 to 96 of this Ruling.

17. 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 2009.

**Small business concessions**

18. 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').

19. 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 Growers who qualify as a 'small business entity' is not able to be dealt with in this Product Ruling.

**Assessable income****Section 6-5**

20. 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.

**Deductions for management fees, annual 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 ITAA 1936**

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

<b>Fee Type</b>	<b>Year ending 30 June 2009</b>	<b>Year ending 30 June 2010</b>	<b>Year ending 30 June 2011</b>
<b>Management fees</b>	\$4,600 See Notes (i), (ii) and (iii)	\$1,200 See Notes (i), (ii) and (iii)	\$1,200 See Notes (i), (ii) and (iii)
<b>Annual rent</b>	Nil	\$850 See Notes (i), (ii) and (iii)	\$950 See Notes (i), (ii) and (iii)
<b>Interest paid to ABL Nominees or to Almond Investors Finance Pty Ltd</b>	As incurred See Notes (iii) and (iv)	As incurred See Notes (iii) and (iv)	As incurred See Notes (iii) and (iv)
<b>Loan Application Fee paid to ABL Nominees or to Almond Investors Finance Pty Ltd</b>	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 management fees and annual rent are deductible under section 8-1 in the income year that the relevant fee is 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 110 to 114 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 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 Almond Investors Finance Pty Ltd or ABL Nominees, is outside the scope of this Ruling. Prepayments of interest to any lender, including Almond Investors Finance Pty Ltd and ABL Nominees, 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 to Almond Investors Finance Pty Ltd is outside the scope of this Ruling.

**Deductions for capital expenditure (non-'small business entities')****Division 40**

22. A Grower, who is not a 'small business entity', will also be entitled to tax deductions relating to Terms Payment Agreement administration fee, water facilities (for example, irrigation) and decline in value of the almond trees. All deductions shown in the following table are determined under Division 40.

<b>Fee Type</b>	<b>ITAA 1997 Section</b>	<b>Year ending 30 June 2009</b>	<b>Year ending 30 June 2010</b>	<b>Year ending 30 June 2011</b>
<b>Administration fee payable under a Terms Payment Agreement</b>	40-880	\$10 See Notes (vi) and (vii)	\$10 See Notes (vi) and (vii)	\$10 See Notes (vi) and (vii)
<b>Irrigation Charge</b>	40-515	\$1,000 See Notes (vi) and (viii)	\$1,000 See Notes (vi) and (viii)	\$1,000 See Notes (vi) and (viii)
<b>Establishment of the almond trees</b>	40-515	See Notes (vi) and (ix)	See Notes (vi) and (ix)	See Notes (vi) and (ix)

**Notes:**

- (vi) 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.
- (vii) The administration fee payable to Almond Investors Limited (AIL), in respect of a Terms Payment Agreement of \$50 per Allotment, 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 105 and 106 of this Ruling).
- (viii) Any 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. As the condition in subsection 40-525(1) is met, a deduction is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure of \$3,000 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).

- (ix) Almond trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a lease or a licence, 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. If the almond trees have an 'effective life' of 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 inform Growers of when the almond trees enter their first commercial season and the amount incurred by the Responsible Entity of the Project in establishing the almond trees.

### **Deductions for capital expenditure (small business entities)**

#### ***Subdivision 328-D and Subdivisions 40-F and 40-G***

23. A Grower, who is a 'small business entity', will also be entitled to tax deductions relating to Terms Payment Agreement administration fee, water facilities (for example, irrigation) and decline in value of the almond trees. A 'small business entity' may claim deductions in relation to water facilities under Subdivision 40-F. If the 'water facility' expenditure is on a 'depreciating asset' used to carry on the business, they may choose to claim deductions under Division 328.

24. The deductions shown in the following table assume, for representative purposes only, that a Grower has either chosen to or can only claim deductions for expenditure on water facilities under Subdivisions 40-F and not under Division 328. If the expenditure has been incurred on 'depreciating assets' and is claimed under Division 328, the deduction is determined as discussed in Note (xii) of paragraph 25 of this Ruling.

25. Under Division 328, if the 'cost' of a 'depreciating asset' at the end of the income year is less than \$1,000 (a 'low-cost asset'), it can be claimed as an immediate deduction when first used or 'installed ready for use'. This is so provided the Grower is a 'small business entity' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income.

<b>Fee Type</b>	<b>ITAA 1997 Section</b>	<b>Year ending 30 June 2009</b>	<b>Year ending 30 June 2010</b>	<b>Year ending 30 June 2011</b>
<b>Administration fee payable under a Terms Payment Agreement</b>	40-880	\$10 See Notes (x) and (xi)	\$10 See Notes (x) and (xi)	\$10 See Notes (x) and (xi)
<b>Irrigation Charge</b>	40-515	\$1,000 See Notes (x) and (xii)	\$1,000 See Notes (x) and (xii)	\$1,000 See Notes (x) and (xii)
<b>Establishment of the almond trees</b>	40-515	See Notes (x) and (xiii)	See Notes (x) and (xiii)	See Notes (x) and (xiii)

**Notes:**

- (x) 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.
- (xi) The administration fee payable to Almond Investors Limited (AIL), in respect of a Terms Payment Agreement of \$50 per Allotment, 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 105 and 106 of this Ruling).
- (xii) Any 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. As the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-F. For the purposes of Division 328, each Grower's interest in the underlying asset is deemed to be a 'depreciating asset'. A Grower in the Project will pay a \$3,000 Irrigation Charge. If the 'cost' apportionable to that deemed 'depreciating asset' is less than \$1,000, the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is a 'small business entity' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction allowable in the year ended 30 June 2009 is determined by multiplying its 'cost' by half the relevant small business pool rate.

At the end of the year, it is allocated to the relevant small business pool and in subsequent years the full pool rate will apply.

Alternatively, Growers may choose to claim deductions under Subdivision 40-F, paragraph 40-515(1)(a). As the condition in subsection 40-525(1) is met, a deduction is allowable 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).

- (xiii) Almond trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a lease or a licence, 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. If the almond trees have an 'effective life' of 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 inform Growers of when the almond trees enter their first commercial season and the amount incurred by the Responsible Entity of the Project in establishing the almond trees.

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

#### ***Section 35-55 – exercise of Commissioner's discretion***

26. Growers who will stay in the Project until its completion will be considered to be carrying on a business of primary production. Such Growers who are individuals and accepted into the Project in the year ended 30 June 2009 may make losses from the Project that may be affected by the loss deferral rule in section 35-10 in Division 35.

27. The discretion in paragraph 35-55(1)(b) will be exercised for such Growers to whom the loss deferral rule would otherwise apply, for the income years ended 30 June 2009 to 30 June 2014. Exercise of the discretion in this case however is also conditional on the Project being carried out in the manner described in paragraphs 29 to 96 of this Ruling, but will allow Growers referred to who make losses, to offset them against their other assessable income in the income years in which those losses arise.

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

28. 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 110 to 114 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**

29. 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 18 August 2008, 14 November 2008, 22 December 2008, 5 January 2009, 16 January 2009, 29 January 2009, 2 February 2009, 26 February 2009, 20 March 2009, 25 March 2009, 27 March 2009, 30 March 2009, 31 March 2009, 1 April 2009, 6 April 2009, 7 April 2009, 8 April 2009, 9 April 2009, 15 April 2009, 21 April 2009 and 22 April 2009;
- Draft **Product Disclosure Statement (PDS)** for the 2009 AIL Almond Orchard Project, received on 22 April 2009;
- Draft **Constitution of the AIL Almond Grower Project – Miralie** between Almond Investors Limited (AIL) (the Responsible Entity of the Project) and each Grower, dated 16 December 2008;
- Draft **Supplementary Constitution of the AIL Almond Grower Project – Miralie**, dated 12 March 2009;
- Draft **Constitution of the AIL Almond Asset Trust – Miralie** between AIL (the Responsible Entity of the Asset Trust), the Initial Unit Holder and each Orchard Asset Owner (Unit Holder), dated 16 December 2008;

- Draft **Supplementary Constitution of the AIL Almond Asset Trust – Miralie**, undated, received on 26 February 2009;
- Draft **Second Supplementary Constitution of the AIL Almond Asset Trust – Miralie**, undated, received on 21 April 2009;
- Draft Compliance Plan for the AIL Almond Grower Project – Miralie, dated 23 July 2008;
- 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;
- Executed Lease and Variation of Lease (Interim Head Lease) between the landowner and Almond Investors Land Pty Ltd, dated 22 November 2007 and 5 January 2009, respectively;
- Draft Lease (Interim Sub-Lease) between Almond Investors Land Pty Ltd and Sandhurst Trustees (the Custodian of the Asset Trust), dated 6 August 2008;
- Draft Lease (Trust Head Lease) between Sandhurst Trustees Limited and Sandhurst Nominees (Victoria) Limited, dated 6 August 2008;
- Amended Option Deed between the landowner and Almond Investors Land Pty Ltd, dated 10 June 2008;
- 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, dated 27 March 2009;
- Draft **Allotment Management Agreement** between AIL (the Responsible Entity of the Project) and each Grower, dated 16 December 2008;
- Draft Orchard Management Agreement between AIL (the Responsible Entity of the Project) and RMONPRO Developments Pty Ltd, dated 6 August 2008;
- Draft Orchard Establishment Agreement between AIL (the Responsible Entity of the Asset Trust), RMONPRO Developments Pty Ltd and the independent contractor, dated 6 August 2008;
- Almond Crop Supply Agreement between Almondco Australia Limited (Almondco) and Almond Investors Limited, dated 8 November 2002;

- Draft **Finance Application** for the Project, received on 27 March 2009. This document includes the **Loan Agreement** between ABL Nominees or Almond Investors Finance Pty Ltd and a Borrower; and
- Draft **Terms Payment Agreement** between AIL (the Responsible Entity of the Project) and a Grower, received on 18 August 2008.

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

30. 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.

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

### Overview

32. The main features of the AIL Almond Grower Project – Miralie: 2009 Growers 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	231 hectares
Size of each Allotment	0.125 hectares
Minimum allocation per Grower	1 Allotment
Number of plants per Allotment	40 almond trees
Initial cost	\$7,600 per Allotment comprising of \$4,600 management fee and \$3,000 Irrigation Charge.

Ongoing costs and other growing costs	Annual management fees, Deferred Management Fees, annual rent, Performance Fees, Processing and Marketing Fees, interest payments and borrowing costs
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33. The Project will be a registered managed investment scheme 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.

34. Applications to participate in the Project must be made on the Application form shown in the PDS. The PDS for the Project also provides that the Grower must subscribe for unit(s) in the Asset Trust. This Ruling does not address the tax consequences of an investment in the Asset Trust. There is no minimum amount that must be raised under the PDS. The maximum offer under the PDS is for 1,850 Grower Allotments. The Responsible Entity of the Project may accept oversubscription in the Project at its discretion.

35. 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.

36. 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.

37. Growers' Applications accepted on or before 15 June 2009 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 2009.

38. 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 detail of the land covered by this Product Ruling is part of Certificate of Title Volume 8060 Folio 660.

39. 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 Agreement commences on the Grower Commencement Date and ends on 15 June 2026 unless terminated earlier. Under the Allotment Sub-Lease Agreement AIL will ensure that 40% of each Grower's Trees are planted by 23 June 2009 and the remainder by 30 September 2009. AIL will notify the Tax Office if the Trees are not planted in accordance with these dates.

40. 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.

41. 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 – Miralie**

42. 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.

43. 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.

44. 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 Growers' Application Account (clause 7.7).

45. 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).

46. 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 under a Terms Payment Arrangement (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 (clauses 12 and 19);

- 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 Growers' Proceeds Account, deductions that may be made from the Growers' Proceeds Account and distributions to Growers from the Growers' Proceeds Account (clauses 24, 25, 26 and 27); and
- the termination of the Project (clause 29) and winding up of the Project (clause 30).

## **Compliance Plan**

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

## **Interim Head Lease/Interim Sub-Lease and Trust Head Lease**

48. In order to secure tenure over the land on which the Project will be conducted for the Term of the Project, the Interim Head Lease has been executed. The Interim Sub-lease will be executed by the relevant parties prior to acceptance of any Applicants to the Project. Each Lessor under the Interim Head Lease and Interim Sub-Lease 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.

49. The Trust Head Lease will also be executed by the relevant parties prior to acceptance of any Applicants to the Project. Under this agreement, the Lessor 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.

## **Allotment Sub-Lease Agreement**

50. 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).

51. 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).

52. The Term of the Allotment Sub-Lease Agreement commences on the Grower Commencement Date and ends on 15 June 2026, unless terminated earlier in accordance with the Allotment Sub-Lease Agreement or the Constitution of the Project (clause 3).

53. 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 2009 and the remaining Trees are to be planted on each Grower's Allotment by no later than 30 September 2009 (clause 4).

54. The Allotment Sub-Lease Agreement 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 rent payable by the Grower (clause 8 and Schedule 3); and
- the termination of the Allotment Sub-Lease Agreement by the Grower or Responsible Entity (clause 9).

### **Allotment Management Agreement**

55. 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).

56. 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 2026 (clause 3).

57. 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.

58. 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).

59. 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.

60. The Allotment Management Agreement also:

- provides that the Responsible Entity will install the Grower Irrigation and each Grower will own their proportion of the Irrigation System (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**

61. 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.

62. 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).

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

64. 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).

65. 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**

66. AIL has entered into an agreement with Almondco conferring on Almondco the right to market and sell the Almonds.

67. 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).

68. Almondco agrees to prepare the Almonds for 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**

69. 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.

70. 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).

71. 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).

72. 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 2009 Growers in the Project.

**Fees**

73. 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 2009 (the First Financial Year), a fee of **\$4,600** per Allotment is payable upon Application;
- for the Grower Irrigation an Irrigation Charge of **\$3,000** payable upon Application;
- for services to be provided in the Financial Years ended 30 June 2010 (the Second Financial Year) and 30 June 2011 (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 2009 and 1 November 2010, respectively. The second component is a deferred management fee which totals **7.7%** of the Gross Proceeds in respect of that Financial Year. 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 2015 (the Seventh Financial Year);
- for services to be provided in the Financial Year ended 30 June 2012 (the Fourth Financial Year), a fee of **\$1,200** is payable on 1 November 2011;
- for services to be provided in the Financial Years ended 30 June 2013 (the Fifth Financial Year) and 30 June 2014, (the Sixth Financial Year), a fee of **\$241** and **\$217**, respectively, is payable on 1 November in the Financial Year to which they relate;
- for services to be provided from the Financial Year ended 30 June 2013 (the Fifth Financial Year) and each subsequent Financial Year during the Term of the Project, a fee based on the estimated costs of operating the Grower's Allotment is payable on 1 November in the Financial Year to which they relate;
- 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***

Annual rent for each Allotment is payable as follows:

- for the period from the Grower Commencement Date until 30 June 2009 (the First Financial Year), no annual rent is payable;
- for the Financial Years ended 30 June 2010, 30 June 2011 and 30 June 2012 (the Second, Third and Fourth Financial Years), fixed rent of **\$850**, **\$950** and **\$1,050**, respectively, is payable on 1 November in each of the respective Financial Years;
- for the Financial Year ended 30 June 2013 (the Fifth Financial Year), fixed rent of **\$1,200** is payable on 1 November 2012; and
- for each subsequent Financial Year beginning from the Financial Year ended 30 June 2014 (the Sixth Financial Year), the rent will be calculated in accordance with the formula set out in Schedule and will be payable on 1 November in each of the respective Financial Years.

74. As noted above, from the Financial Year ended 30 June 2013 (the Fifth 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.

75. 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**

76. 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.

77. 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.

78. A Grower cannot rely on any part of this Product Ruling if the fees payable on application, of \$7,600 per Allotment, other than fees payable subject to a Terms Agreement, is not paid in full by 15 June 2009. 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 2009. The lending institution must provide the full amount of the loan monies to AIL no later than 30 June 2009.

79. 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.

80. In the event that finance is not provided by ABL Nominees then finance may be sought from Almond Investors Finance Pty Ltd. This Ruling will not apply to Growers who enter into finance arrangements with Almond Investors Finance Pty Ltd that do not comply with the written undertakings given to the Tax Office by Almond Investors Finance Pty Ltd dated 21 April 2009. Growers should seek assurances from Almond Investors Finance Pty Ltd that these undertakings will be complied with.

### ***Terms Payment Agreement***

81. Where AIL agrees to accept an application from a Grower to pay the Application Amount of \$7,600 per Allotment, in instalments, the Grower will enter into a Terms Payment Agreement.

82. 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 2009 (clause 2.1(b)). The Responsible Entity of the Project may charge the Grower interest on overdue amounts (clause 3).

83. The Terms Payment Agreement also requires that, at the time of Application, the Grower pay a terms administration fee of \$50 for each Grower Allotment (clause 2.1(a)).

84. As security for the payment of amounts due to ALL under the Terms Payment Arrangement, the Grower charges in favour of ALL 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***

85. 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 2009; 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.

86. The Loans offered by Almond Investors Finance Pty Ltd 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.

87. **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.**

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

- the current indicative interest rate is 9.95%;
- 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 \$250,000;
- 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 by direct debit facility (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***

89. 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 2009.

90. 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.

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

### ***Finance offered by ABL Nominees – Ongoing Fee Finance***

92. 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.

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

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

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

- the current indicative interest rate is 9.95%;
- 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 by direct debit facility (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).

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

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;

- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Almond Investors Finance Pty Ltd or ABL Nominees, are involved or become involved in the provision of finance to Growers for the Project.

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**Commissioner of Taxation**

6 May 2009

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## **Appendix 1 – Explanation**

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**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?**

97. For the amounts set out in paragraphs 21, 22 and 25 of this Ruling to constitute allowable deductions the Grower's horticultural activities as a participant in the AIL Almond Grower Project – Miralie: 2009 Growers must amount to the carrying on of a business of primary production.

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

99. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Ruling, the Full Federal Court in *Hance v. FC of T; Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 applied these principles to conclude that 'Growers' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

100. Application of these principles to the arrangement set out above leads to the conclusion that Growers (as described in paragraphs 3 and 4 of this Ruling), who stay in the Project until its completion, will be carrying on a business of primary production involving growing and harvesting almonds for sale.

### **Deductibility of the management fees, annual rent and interest on loans with Almond Investors Finance Pty Ltd and ABL Nominees**

#### **Section 8-1**

101. The management fees and annual rent are deductible under section 8-1. A 'non-income producing' purpose is not identifiable in the arrangement and there is no capital component evident in the management fees and annual rent.

102. 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 110 to 114 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.)

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

104. Other than where the prepayment provisions apply (see paragraphs 110 to 114 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

## **Administration fee payable under a Terms Payment Agreement**

### ***Section 40-880***

105. Growers who elect to pay their Grower's contribution 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.

106. 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.

## **Expenditure of a capital nature**

### ***Division 40 and Division 328***

107. 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 water facilities and the establishment of the plants is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328.

108. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is a 'small business entity'.

109. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 22 and 25 of this Ruling in the table(s) and accompanying notes.

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

110. 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.

111. 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***

112. Under the scheme to which this Product Ruling applies management fees, annual rent and other fees are incurred annually and the interest payable to Almond Investors Finance Pty Ltd and 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.

113. 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 and ABL Nominees). Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

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

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

115. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for 30 June 2009 to 30 June 2014, based on the evidence supplied, the Commissioner has determined that for those income years:

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

116. 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.

117. The exercise of the Commissioner’s discretion under paragraph 35-55(1)(b) for Growers who will stay in the Project until its completion is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

## **Section 82KL – recouped expenditure**

118. 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**

119. 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).

120. The AIL Almond Grower Project – Miralie: 2009 Growers 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 21 and 22 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.

121. 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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