

***PR 2010/28 - Income tax: Great Southern 2008
Almond Income Project (Replacement Responsible
Entity)***

 This cover sheet is provided for information only. It does not form part of *PR 2010/28 - Income tax: Great Southern 2008 Almond Income Project (Replacement Responsible Entity)*



Product Ruling

Income tax: Great Southern 2008 Almond Income Project (Replacement Responsible Entity)

| | |
|-------------------------------------|------|
| Contents | Para |
| LEGALLY BINDING SECTION: | |
| What this Ruling is about | 1 |
| Date of effect | 10 |
| Ruling | 17 |
| Scheme | 44 |
| NOT LEGALLY BINDING SECTION: | |
| Appendix 1: | |
| Explanation | 59 |
| Appendix 2: | |
| Detailed contents list | 83 |

ⓘ 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives 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.

Participants must form their own view about the commercial and financial viability of the product. The Commissioner recommends a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for 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.
2. In this Product Ruling this scheme is referred to as the Great Southern 2008 Almond Income Project or simply as 'the Project'.

Class of entities

3. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as 'Growers'.
4. The class of entities who can rely on those tax benefits consists of those entities that were accepted to participate in the scheme specified below between 19 December 2007 and 15 June 2008 inclusive and continue to do so after this Ruling is made and have executed relevant Project Agreements mentioned in paragraph 44 of this Ruling by 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.
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:
 - have terminated their involvement in the scheme;
 - intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
 - were accepted into this Project before 19 December 2007 or after 15 June 2008; or
 - participate in the scheme through offers made other than through the Product Disclosure Statement.

Superannuation Industry (Supervision) Act 1993

6. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA). The Commissioner gives no assurance that the scheme 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 scheme may contravene the provisions of SISA.

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 44 to 58 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.

9. This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration
Copyright Law Branch
Attorney-General's Department
National Circuit
Barton ACT 2600

or posted at: <http://www.ag.gov.au/cca>

Date of effect

10. This Product Ruling applies from 26 February 2010. It applies only to the specified class of entities that enter into the scheme from 19 December 2007 until 15 June 2008 being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to 30 June 2011 being its period of application. 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 the Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

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 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 Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has 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 its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

Previous Rulings

16. This Ruling replaces Product Ruling PR 2007/102 which is withdrawn on and from 1 December 2010. PR 2007/102 still applies for Growers in relation to the deductibility of costs incurred between 1 July 2006 and 26 February 2010.

Ruling

Application of this Ruling

17. 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 entered into the scheme described at paragraphs 33 to 94 of Product Ruling PR 2007/102 and at paragraphs 44 to 58 of this Ruling.

18. 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 have commenced at the time of execution of their Licence and Management Agreement.

Small business concessions

19. From the 2007-08 income year a range of concessions, previously available under the Simplified Tax System (STS), became available to an entity if it carried on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

20. 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**

21. 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 Project fees, Interest, Loan Establishment Fee and Almond Trees

22. A Grower may claim tax deductions for the following fees and expenses on a per Almondlot basis, as set out in the Table below.

| Fee Type | Year ending 30 June 2010 | Year ending 30 June 2011 |
|-------------------------------------|-------------------------------------|-------------------------------------|
| Ongoing Management fees | \$2,400 | \$2,072 See Note (i) below |
| Ongoing Management Fee (RFM) | \$250 | \$222 |
| Interest on loans | As incurred See Note (ii) below | As incurred See Note (ii) below |
| Loan Establishment Fee | Must be calculated | Must be calculated |

Note:

- (i) The 2010 Scaleback Refund of \$362 received in the year ending 30 June 2011 must be included as assessable income of the Grower.
- (ii) Eligibility of interest deduction is discussed in paragraphs 25, 26 and 66 of this Ruling.

Division 27

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

Section 8-1

24. The Ongoing Management Fees, Licence Fees, Performance Fees, Operating Costs and Expenses and interest expenses are deductible under section 8-1 in the income year that the relevant fees and expenses are incurred.

25. The deductibility or otherwise of interest arising from agreements entered into with financiers other than those listed in PR 2007/102 or with financiers who have since provided replacement agreements on identical terms, is outside the scope of this Ruling.

Sections 82KZME and 82KZMF

26. 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 67 to 71 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.

Section 25-25

27. The Loan Establishment Fee payable is a borrowing expense and is deductible under section 25-25. It was incurred for borrowing money that was used solely for income producing purposes. The deduction was to be spread over the period of the loan or five years, whichever is shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers not listed in PR 2007/34 is outside the scope of this Ruling.

Section 40-515

28. Almond Trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under 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(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 incurred 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 capital expenditure incurred that is attributable to the establishment of the Almond Trees is \$1,388 per 0.2158 hectare Almondlot. The Responsible Entity will inform Growers when the Almond Trees enter their first commercial season.

Joint Venture Growers

29. A Joint Venture Grower may claim deductions for the abovementioned expenses as follows.

First Joint Venture Grower

30. A First Joint Venture Grower will be able to claim 40% of the Ongoing Management Fees, Licence Fees, Performance Fees, Operating Costs and Expenses in all financial years commencing from and including the 2013 Financial Year.

31. A First Joint Venture Grower who borrowed from those financiers listed in paragraphs 86 to 94 of PR 2007/102 and with financiers who have since provided replacement agreements on identical terms to finance participation in the Project can claim:

- a deduction for the interest incurred, under section 8-1; and
- the borrowing costs payable, under section 25-25.

Second Joint Venture Grower

32. A Second Joint Venture Grower will be able to claim 100% of the Ongoing Management Fees, Licence Fees, Performance Fees, Operating Costs and Expenses for the 2009-10 to 2011-12 financial years and 60% of these fees in all financial years commencing from and including the 2013 financial year.

33. A Second Joint Venture Grower who borrowed from those financiers listed in paragraphs 86 to 94 of PR 2007/102 and with financiers who have since provided replacement agreements on identical terms to finance participation in the Project can also claim:

- a deduction for the interest incurred, under section 8-1; and
- the borrowing costs payable under section 25-25.

34. The First Joint Venturer and Second Joint Venturer can also claim deductions for their Fractional Interest (40% and 60% respectively) in the horticultural plant write-off.

Treatment of trading stock

Section 328-285 – small business entities

35. A Grower who is a 'small business entity' may, in some years, hold almonds that will constitute trading stock on hand. Where, for such a Grower, for an income year, the difference between the value of all their trading stock at the start and a reasonable estimate of it at the end, is less than \$5,000, they can choose not to account for that difference under the ordinary trading stock rules in Division 70 (subsection 328-285(1)).

36. Where the small business entity chooses to account for changes in the value of their trading stock for an income year, they will have to do a stocktake and account for the change in the value of all their trading stock (Subdivision 70-C).

Section 70-35 – non-small business entities

37. A Grower who is not a 'small business entity' may, in some years, hold almonds that will constitute trading stock on hand. Where, in an income year, the value of trading stock on hand at the *end* of an income year exceeds the value of trading stock on hand at the *start* of an income year a Grower must include the amount of that excess in assessable income.

38. Alternatively, where the value of trading stock on hand at the *start* of an income year exceeds the value of trading stock on hand at the *end* of an income year, a Grower may claim the amount of that excess as an allowable deduction.

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

39. For each of the income years ending 30 June 2011 and 30 June 2012, the Commissioner will exercise the discretion in subsection 35-55(1) once the following conditions are satisfied for the year concerned:

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

40. If these conditions are met for a given year, the Commissioner will exercise the discretion for that year under:

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

41. If the Commissioner determines that the discretion will not be exercised for a particular year or years the Grower will be informed of that decision and the reasons. In any year where the discretion is not exercised losses incurred by a Grower will be subject to the loss deferral rule in section 35-10 and the Grower will not be able to offset the losses from the Project against other assessable income.

42. The issue of this Product Ruling of itself does not constitute the exercise of the Commissioner's discretion in subsection 35-55(1) for any income year.

Prepayment provisions and anti-avoidance provisions

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

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

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 68 to 72 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

44. The scheme that is the subject of this Ruling is identified and described in paragraphs 33 to 94 of Product Ruling PR 2007/102 and:

- additional documents, correspondence and emails received on 18 January 2010, 20 January 2010, 27 January 2010, 4 February 2010, 5 January 2010, 26 May 2010, 5 August 2010, 30 September 2010, and 3 November 2010;
- Copy of Head Lease Agreements for the Moral land between Lachlan Farming Limited (as Lessor) and Australian Executor Trustees Limited as Custodian of RFM Riverbank (Lessee), dated 22 May 2008, received on 5 August 2010;
- Copy of Sublease Agreement between Australian Executor Trustees Limited as custodian of RFM Riverbank (as Lessor) and Australian Executor Trustees Limited (as Lessee), received on 5 August 2010;
- Copy of Licence Agreement for the Moorall land between Australian Executor Trustees Limited (as Licensor) and RFM (as Licensee) dated 9 April 2010, received on 5 August 2010; and

- Copy of **Licence and Management Agreement** between Rural Funds Management Limited (RFM) (the Responsible Entity) as Licensor, RFM as Manager, and the Grower, received on 27 January 2010.

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

45. The documents highlighted are those that a Grower has entered 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.

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

Overview

47. The main features of the Great Southern Almond Income Project are those that were set out in paragraphs 36 to 94 of PR 2007/102 with changes to those features set out in the following paragraphs.

Replacement of Responsible Entity

48. RFM was appointed as the Responsible Entity of the Project on 26 February 2010 and has taken over the rights and responsibilities set out in the Licence and Management Agreement and the Ongoing Management Services Agreement entered into with RFM Farming Pty Ltd.

Lease Agreements

49. The Land for the Project is at Moorabool and is described in Item 3 of the Reference Schedule to the Lease as Lot 46 of DP 1109773.

50. Lachlan Farming Limited (LFL) sold the Land to Australian Executor Trustees Limited as Custodian of RFM Riverbank on 9 April 2010. On registration of the Land transfer, the LFL Head Lease will merge leaving the underlying Sublease from Australian Executor Trustees Limited as Custodian of RFM Riverbank to the Custodian (Sublessee) of the Project. The Sublease commenced on 9 April 2010 and ends on 2 July 2028.

Licence Agreement

51. The Sublessee has entered into a Licence Agreement with RFM in respect of the Land leased by Australian Executor Trustees Limited as Custodian of RFM Riverbank. The Licence Agreement commenced 9 April 2010 and will terminate 2 July 2028.

Licence and Management Agreement (LMA)

52. The terms of the LMA are set out in Schedule 1 of the Constitution.

53. Following the appointment of RFM as Responsible Entity each Almondlot has been reduced by approximately 14% to accommodate all Growers on the Moorall land. The Almondlots are now 0.2158 hectares in size.

Fees

54. Under the terms of the LMA a Grower was to have made and will make payments as described below on a per Almondlot basis.

2010 invoice

55. Growers were invoiced \$2,650 on 4 March 2010, which was payable by 19 March 2010 and consisted of the following fees:

- \$2400 for Ongoing Management Fee (includes Licence Fee); and
- \$250 Ongoing Management Fee (RFM).

2011 Invoice

56. Growers were invoiced \$1,932.23 on 22 June 2010, which was payable by 31 July 2010 and consisted the following fees and adjustments:

- \$2,072.16 for Ongoing Management Fee (includes Licence Fee);
- \$222.08 for Ongoing Management Fee (RFM); and
- \$362.01 credit in respect of the 2010 Invoice amount to allow for the reduction in the Almondlot sizes.

Other fees

57. By 1 July 2011 the Growers will be invoiced for Ongoing Management Fees (includes a Licence Fee) of \$2,400 (to be adjusted for the reduction in Almondlot size) and Ongoing management Fee (RFM) of \$250 (adjusted for CPI from 1 July 2010 and the reduction in Almondlot size), payable by 31 July 2011.

58. By 1 July each year, commencing 1 July 2012, the Growers will be invoiced and due to pay by 31 July of each year the following fees:

- Ongoing Management Fee (RFM) of \$250 adjusted by CPI from 1 July 2010 and reduced to reflect the reduction in the Almondlot size;
- Grower's Proportional Share of the forecast Head Lease costs in lieu of a Licence fee, with adjustments for actual versus forecast costs invoiced in the following year;
- Grower's Proportional Share of the forecast Operating Costs and Expenses reasonably incurred by the Responsible Entity, with adjustments for actual versus forecast costs invoiced in the following year;
- Performance Fees set out in the LMA; and
- any other payments made by the Responsible Entity in accordance with clause 31.2 of the Constitution.

Commissioner of Taxation

1 December 2010

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Is the Grower carrying on a business?

59. For the expenditure set out in paragraphs 21 to 27 to constitute allowable deductions the Grower's almond growing activities as a participant in the Great Southern 2008 Almond Income Project must amount to the carrying on of a business of primary production.

60. 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?

61. 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).

62. 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 Ongoing Management Fees, Licence Fees, Performance Fees, Operating Costs and Expenses and Interest on loans

Section 8-1

63. The Ongoing Management Fees, Licence Fees, Performance Fees, Operating Costs and Expenses 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 these fees.

64. 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 67 to 71 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).

65. Some Growers may have financed their participation in the Project through a Loan Agreement with financiers listed in paragraphs 86 to 94 of PR 2007/102 or with financiers who have provided replacement agreements on identical terms. Applying the same principles as that used for the Ongoing Management Fees, Licence Fees, Performance Fees, Operating Costs and Expenses, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

66. Other than where the prepayment provisions apply (see paragraphs 67 to 71 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

Prepayment provisions

Sections 82KZL to 82KZMF

67. 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.

68. 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

69. Under the scheme to which this Product Ruling applies Ongoing Management Fees, Licence Fees, Performance Fees, Operating Costs and Expenses are incurred annually and the interest payable to financiers listed in paragraphs 86 to 94 of PR 2007/102 or with financiers who have provided replacement agreements on identical terms is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

70. 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 LMA, or prepays interest under a loan agreement (including loan agreements with financiers listed in paragraphs 86 to 94 of PR 2007/102 or with financiers who have provided replacement agreements on identical terms).

71. 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.

Deferral of losses from non-commercial business activities and the Commissioner's discretion

Sections 35-10 and 35-55

72. Based on information provided with the application for this Product Ruling, a Grower accepted into the Project in the year ended 30 June 2008 who carries on a business of almond growing individually (alone or in partnership) is expected to incur losses from their participation in the Project which will be subject to Division 35.¹ These losses will be subject to the loss deferral rule in section 35-10 unless an exception applies or, for each income year in which losses are incurred, the Commissioner exercises the discretion in subsection 35-55(1) on 30 June of that specific income year.

73. The exceptions to the loss deferral rule depend upon the circumstances of individual Growers and are outside the scope of this Ruling.

74. The Commissioner will apply the principles set out in Taxation Ruling TR 2007/6 *Income tax: non commercial business losses: Commissioner's discretion* when exercising the discretion.

75. Where a Grower with income for NCL purposes of less than \$250,000 (that is, the Grower satisfies the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(b) is exercised for that year, the Commissioner will be satisfied that:

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

¹ Division 35 does not apply to Growers who do not carry on a business or who carry on a business other than as individuals (alone or in partnership).

76. Where a Grower with income for NCL purposes of \$250,000 or more (that is, the Grower does not satisfy the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(c) is exercised for that year, the Commissioner will be satisfied that:

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

77. A Grower will satisfy the income requirement in subsection 35-10(2E) where the sum of the following amounts is less than \$250,000:

- taxable income for that year (ignoring any loss arising from participation in the Project or any other business activity);
- total reportable fringe benefits for that year;
- reportable superannuation contributions for that year; and
- total net investment losses for that year.

78. In each individual year where the Commissioner's discretion is exercised a Grower within either paragraphs 75 or 76 of this Ruling who would otherwise be required to defer a loss arising from their participation in the Project under section 35-10 until a later income year is able to offset that loss against their other assessable income.

Section 82KL – recouped expenditure

79. 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

80. 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.

81. The Great Southern 2008 Almond Income Project is a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the expenditure detailed at paragraphs 21 to 27 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

82. 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

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

| | Paragraph |
|--|------------------|
| What this Ruling is about | 1 |
| Class of entities | 3 |
| <i>Superannuation Industry (Supervision) Act 1993</i> | 6 |
| Qualifications | 7 |
| Date of effect | 10 |
| Changes in the law | 12 |
| Note to promoters and advisers | 14 |
| Goods and Services Tax | 15 |
| Previous Rulings | 16 |
| Ruling | 17 |
| Application of this Ruling | 17 |
| Small business concessions | 19 |
| Assessable income | 21 |
| <i>Section 6-5</i> | 21 |
| Deductions for Project fees, interest, Loan Establishment Fee and Almond Trees | 22 |
| <i>Division 27</i> | 23 |
| <i>Section 8-1</i> | 24 |
| <i>Sections 82KZME and 82KZMF</i> | 26 |
| <i>Section 25-25</i> | 27 |
| <i>Section 40-515</i> | 28 |
| Joint Venture Growers | 29 |
| <i>First Joint Venture Growers</i> | 30 |
| <i>Second Joint Venture Growers</i> | 32 |
| Treatment of trading stock | 35 |
| <i>Section 328-285 – small business entities</i> | 35 |
| <i>Section 70-35 – non-small business entities</i> | 37 |
| Division 35 – deferral of losses from non-commercial business activities | 39 |
| <i>Section 35-55 – annual exercise of Commissioner’s discretion</i> | 39 |
| Prepayment provisions and anti-avoidance provisions | 43 |
| <i>Sections 82KZME, 82KZMF, 82KL and Part IVA</i> | 43 |

| | |
|--|-----------|
| Scheme | 44 |
| Overview | 47 |
| Replacement of Responsible Entity | 48 |
| Lease Agreements | 49 |
| Licence Agreement | 51 |
| Licence and Management Agreement (LMA) | 52 |
| Fees | 54 |
| <i>2010 invoice</i> | 55 |
| <i>2011 invoice</i> | 56 |
| <i>Other fees</i> | 57 |
| Appendix 1 – Explanation | 59 |
| Is the Grower carrying on a business? | 59 |
| Deductibility of the Ongoing Management Fees, Licence Fees, Performance Fees, Operating Costs and Expenses and Interest on loans | 63 |
| <i>Section 8-1</i> | 63 |
| Prepayment provisions | 67 |
| <i>Sections 82KZL to 82KZMF</i> | 67 |
| <i>Application of the prepayment provisions to this Project</i> | 69 |
| Deferral of losses from non-commercial business activities and the Commissioner’s discretion | 72 |
| <i>Sections 35-10 and 35-55</i> | 72 |
| Section 82KL – recouped expenditure | 79 |
| Part IVA – general anti-avoidance provisions | 80 |
| Appendix 2 – Detailed contents list | 83 |

References

- Previous draft:*
- Not previously issued as a draft
- Related Rulings/Determinations:*
- TR 97/7; TR 97/11; TR 2007/6
- Previous Rulings/Determinations:*
- PR 2007/102
- Subject references:*
- carrying on a business
 - non-commercial losses
 - primary production
 - producing assessable income
 - product rulings
 - public rulings
 - tax benefit under tax avoidance schemes
 - tax shelters project
 - taxation administration
- Legislative references:*
- ITAA 1936 82KL
 - ITAA 1936 Pt III Div 3 Subdiv H
 - ITAA 1936 82KZL
 - ITAA 1936 82KZME
 - ITAA 1936 82KZMF
 - ITAA 1936 Pt IVA
 - ITAA 1936 177A
 - ITAA 1936 177C
 - ITAA 1936 177D
 - ITAA 1936 177D(b)
 - ITAA 1997 6-5
 - ITAA 1997 8-1
- ITAA 1997 17-5
 - ITAA 1997 25-25
 - ITAA 1997 Div 27
 - ITAA 1997 Div 35
 - ITAA 1997 35-10
 - ITAA 1997 35-10(2)
 - ITAA 1936 35-10(2C)
 - ITAA 1997 35-10(2E)
 - ITAA 1997 35-55
 - ITAA 1997 35-55(1)
 - ITAA 1997 35-55(1)(b)
 - ITAA 1997 35-55(1)(c)
 - ITAA 1997 40-515
 - ITAA 1997 40-515(b)
 - ITAA 1997 40-520(2)
 - ITAA 1997 40-525(2)
 - ITAA 1997 40-530
 - ITAA 1997 40-545
 - ITAA 1997 Div 70
 - ITAA 1997 Subdiv 70C
 - ITAA 1997 70-35
 - ITAA 1997 Div 328
 - ITAA 1997 328-285
 - ITAA 1997 328-285(1)
 - SISA 1993
 - TAA 1953
 - Copyright Act 1968
- Case references:*
- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085
-

ATO references

NO: 1-28E8CUG
 ISSN: 1441-1172
 ATOLaw topic: Income Tax ~ Product ~ almond