


# ***PR 2011/22 - Income tax: Cool Climate Apricot Project - 2008 Growers***

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## Product Ruling

### Income tax: Cool Climate Apricot Project – 2008 Growers

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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, 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**

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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**

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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 part, below, apply to the defined class of entities who participate in the scheme to which this Product Ruling relates. In this Ruling this scheme is referred to as the Cool Climate Apricot Project 2008 Growers, or simply as 'the Project'.
2. All legislative referenced in this Product Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.

### 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 this Product Ruling are entities that were accepted into the Project as individuals (alone or in partnership) as set out in paragraphs 7 to 8 of Product Ruling PR 2008/42. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Growers.

### Qualifications

5. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 27 to 67 of Product Ruling PR 2008/42.
6. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then:
  - this Product Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
  - this Product Ruling may be withdrawn or modified.

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## **Date of effect**

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8. This Product Ruling applies only to the specified class of entities that enter into the scheme set out in paragraphs 27 to 67 of Product Ruling PR 2008/42 between 30 April 2008 and 30 June 2008. This Ruling provides advice on the availability of tax benefits to the specified class of entities.

9. 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**

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

### **Note to promoters and advisers**

11. 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 Ruling has issued.

## Ruling

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### Application of this Ruling

#### ***Continuing application of PR 2008/42***

12. Although now withdrawn, the taxation obligations and benefits for a Grower in the defined class of entities who entered into the scheme described at paragraphs 27 to 67 of Product Ruling PR 2008/42 and who entered into the specified scheme between 30 April 2008 and 15 June 2008 inclusive continue to apply. This is subject to there being no material difference in the scheme or in the entities involvement in the scheme.

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

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

##### *2010-11 to 2011-12 income years*

13. For the 2010-11 to 2011-12 income years, the Commissioner will exercise the discretion in subsection 35-55(1) once the following conditions are satisfied:

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

14. If these conditions are met for the 2010-11 to 2011-12 income years, 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).

15. 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.

16. 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.

## **Scheme**

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17. The scheme that is the subject of this Ruling is identified and described in paragraphs 27 to 67 of PR 2008/42 and:

- additional documents, correspondence and emails received on 18 July 2011, 7 September 2011, 10 October 2011 and 25 October 2011.

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

18. For the purposes of describing the scheme to which this Product Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which an Investor or any associate of an Investor, will be a party to, which are a part of the scheme.

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

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**Commissioner of Taxation**

7 December 2011

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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.*

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

#### **Sections 35-10 and 35-55**

20. Based on information provided with the application for this Product Ruling, a Grower who was accepted into the Project in the 2007-08 income year and carries on a business of growing apricots individually (alone or in partnership) is expected to incur losses from their participation in the Project for each of the income years from 2005-06 to 2011-12.<sup>1</sup> 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.

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

22. 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.

23. PR 2008/42 dealt with losses incurred from the 2007-08 to 2009-10 income years.

24. However, an income requirement was introduced to Division 35 in the 2009-10 income year which has application for Growers in the 2010-11 and 2011-12 income years.

25. 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

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<sup>1</sup> 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).

- there is an objective expectation that within a period that is commercially viable for the apricot growing 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)).

26. For the 2010-11 to 2011-12 income years, 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 apricot growing 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)).

27. 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.

28. Whether or not the necessary objective expectation about the future performance of the Project exists must be determined for each particular year and may change from year to year. Therefore, whether or not an objective expectation exists in any income year can be affected by decisions about how a particular activity is operated over the life of the Project.

29. In each individual year where the Commissioner's discretion is exercised a Grower within either paragraph 26 or 27 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.

## **Appendix 2 – Detailed contents list**

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2007/6; PR 2008/42

*Subject references:*

- Commissioner's discretion
- Non commercial loss
- product rulings

*Legislative references:*

- TAA 1953
  - Copyright Act 1968
  - ITAA 1997 Div 35
  - ITAA 1997 35-10
  - ITAA 1997 35-10(2)
  - ITAA 1997 35-10(2C)
  - ITAA 1997 35-10(2E)
  - ITAA 1997 35-55
  - ITAA 1997 35-55(1)
  - ITAA 1997 35-55(1)(b)
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*ATO references*

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