



# ***PR 2009/49 - Income tax: Macquarie Almond Investment 2009 - Late Growers***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *9 February 2011*



## Product Ruling

### Income tax: Macquarie Almond Investment 2009 – Late Growers

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
What this Ruling is about	1
Date of effect	10
Ruling	16
Scheme	27
<b>NOT LEGALLY BINDING SECTION:</b>	
Appendix 1:	
<i>Explanation</i>	91
Appendix 2:	
<i>Detailed contents list</i>	111

#### **ⓘ 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 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.

Potential 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 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 Macquarie Almond Investment 2009 (Late Growers) Project or simply as 'the Project'.
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 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 Grower/Investor.
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 27 of this Ruling on or before 15 June 2010. 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 do not derive assessable income from it;
  - are accepted into this Project before the date of this Ruling or after 15 June 2010;
  - who fail to pay the Application Payment of \$9,300 per Almond Lot in full by 15 June 2010, including where this amount is to be paid partly or fully on the Grower's behalf by a lending institution (except where paragraph 84 of this Ruling applies);
  - participate in the scheme through offers made other than through the Product Disclosure Statement; or
  - Growers who choose to withdraw the Produce from their Almond Lots from the Pool at any time prior to any arrangement for marketing or sale of Produce has been entered into by the Manager.

***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 27 to 90 of this Product 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 16 September 2009, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme on or after 16 September 2009 until 15 June 2010, 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 2012. 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 27 to 90 of this Product 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 acceptance of their application, the time at which they become contractually bound by the Constitution, which incorporates the Licence and Management Arrangements, of the Macquarie Almond Investment 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. Due to these choices and the eligibility conditions, the application of the small business concessions to Growers who qualify as a 'small business entity' cannot 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. For Joint Venture Growers this will be a percentage equal to their Fractional Interest, being 51% for First Joint Venture Growers and 49% for Second Joint Venture Growers.

**Deductions for Management Fees, Licence Fee, RE Fee, Operating Fee, interest, borrowing costs, and Almond Trees****Sections 8-1, 25-25, 40-545 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 Almond Lot basis, as set out in the table below.

<b>Fee Type</b>	<b>Year ending 30 June 2010</b>	<b>Year ending 30 June 2011</b>	<b>Year ending 30 June 2012</b>
<b>Fixed management fee</b>	\$8,827 See Notes (i), (ii) & (iii)	\$1,477 See Notes (i), (ii) & (iii)	Nil
<b>Deferred management fee</b>	Nil	Must be calculated See paragraph 69 of this Ruling. See Notes (i), (ii) & (iii)	Must be calculated See paragraph 69 of this Ruling. See Notes (i), (ii) & (iii)
<b>Licence Fee</b>	Must be calculated See Notes (i), (ii), (iii) & (iv)	\$990 See Notes (i), (ii) & (iii)	\$990 See Notes (i), (ii) & (iii)

**PR 2009/49**

<b>RE Fee</b>	\$33 See Notes (i), (ii) & (iii)	\$33 See Notes (i), (ii) & (iii)	\$33 See paragraph 76 of this Ruling. See Notes (i), (ii) & (iii)
<b>Operating Fee</b>	Nil	Nil	As advised See paragraphs 72 to 74 of this Ruling. See Notes (i), (ii), & (iii)
<b>Interest on loan with MBL</b>	As incurred See Notes (ii), (iii) & (v)	As incurred See Notes (ii), (iii) & (v)	As incurred See Notes (ii), (iii) & (v)
<b>Borrowing costs for loan with MBL</b>	Must be calculated See Note (vi)	Must be calculated See Note (vi)	Must be calculated See Note (vi)
<b>Establishment of Almond Trees</b>	See Note (vii)	See Note (vii)	See Note (vii)

**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 Fixed Management Fee, Deferred Management Fee, Licence Fee, RE Fee, Operating Fee, and interest on loans with Macquarie Bank Limited (MBL) 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 99 to 103 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) For the financial year ending 30 June 2010, the Grower will pay a Licence Fee of \$440 per annum. For the 2009-10 income year only the allowable deduction for the Licence Fee is \$36.67 per Almond Lot per month, or part thereof, for the period from when Macquarie Alternative Assets Management Limited (MAAML) contractually accepts an application until midnight 30 June 2010.

- (v) The deductibility or otherwise of interest arising from agreements entered into with financiers other than MBL, is outside the scope of this Ruling. Prepayments of interest to any lender, including MBL, 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.
- (vi) The Loan Establishment Fee payable to MBL 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 over five years, whichever is shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than MBL is outside the scope of this Ruling.
- (vii) 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 incurred that is attributable to their establishment. Since the Almond Trees have an 'effective life' greater than 13 but fewer than 30 years, for the purposes of section 40-545, this results in a straight line write off at a rate of 13%. The deduction is allowable when the Almond Trees enter their first commercial season (section 40-530, item 2). MAAML will notify the Grower when their Almond Trees enter their first commercial season and the amount that may be claimed.

### **Joint Venturers**

22. A Joint Venture Grower may claim deductions, on a per Almond Lot basis, for the following expenditure set out in the Table and Notes in paragraph 21 of this Ruling.

#### ***First Joint Venture Grower***

- in the year ending 30 June 2010, \$9,300 for the Fixed Management Fee, Licence Fee and RE Fee (Application Payment); and
- in the years ending 30 June 2011 and 30 June 2012, a percentage equal to its Fractional Interest (being 51%) of the Deferred Management Fee.

A First Joint Venture Grower who borrows from MBL to finance participation in the Project can also claim:

- a deduction for the interest incurred, under section 8-1 subject to Notes (ii) and (v) to the table in paragraph 21 of this Ruling; and
- the borrowing costs payable to MBL, under subsection 25-25(1), as outlined in Note (vi) to the table in paragraph 21 of this Ruling.

### ***Second Joint Venture Grower***

- in the years ending 30 June 2011 and 30 June 2012, 100% of each of the Fixed Management Fee, Licence Fee and RE Fee; and
- in the years ending 30 June 2011 and 30 June 2012, a percentage equal to its Fractional Interest (being 49%) of the Deferred Management Fee.

A Second Joint Venture Grower who borrows from MBL to finance participation in the Project can also claim a deduction for the interest incurred, under section 8-1 subject to Notes (ii) and (v) to the table in paragraph 21 of this Ruling.

23. Each Joint Venturer can also claim deductions for its Fractional Interest (refer to paragraph 61 of this Ruling) in the horticultural plant write-off as explained in Note (vii) to the table in paragraph 21 of this Ruling.

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

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

24. 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 2010 may make losses from the Project that may be affected by the loss deferral rule in section 35-10.

25. 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 ending **30 June 2010** (for First Joint Venturers) and **30 June 2010 to 30 June 2013** (for all other Growers). Exercise of the discretion in this case, however, is also conditional on the Project being carried out in the manner described in paragraphs 27 to 90 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***

26. For a Grower who commences participation in the Project and incurs expenditure as required by the Constitution, 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 99 to 103 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**

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

- Application for a Product Ruling received on 3 August 2009 as constituted by documents provided on 3 August 2009 and a telephone conversation on 13 August 2009;
- Product Disclosure Statement (PDS) of the Macquarie Almond Investment 2009 updated as at 29 April 2009 including the **Application Form** received on 3 August 2009;
- **Constitution of the Macquarie Almond Investment 2009, including Schedule 1 – Licence and Management Arrangements (Constitution)**, received on 3 August 2009;
- Compliance Plan of the Macquarie Almond Project 2009 dated 2 March 2009;
- Draft Lease between Macquarie Farm Assets and Resources Management Limited (MacFARM) (Lessor) and Macquarie Alternative Assets Management Limited (MAAML) (Lessee) received on 3 August 2009;
- Draft MASPL Management Agreement 2009 between Macquarie Agricultural Services Pty Limited (MASPL) and MAAML received on 3 August 2009;
- Draft Almond Crop Supply Agreement between Almondco Australia Limited (Almondco) and MAAML received on 3 August 2009;

- Draft **Loan and Security Agreement and Notice of Mortgage (including Application Form)** between Macquarie Bank Limited (MBL) and the borrowing Grower received on 3 August 2009; and
- Independent Expert's Report prepared by Scholefield Robinson Horticultural Services dated 30 April 2009.

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

28. 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.

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

### Overview

30. The main features of the Project are as follows:

Location	Sunraysia Region, Victoria
Type of business to be carried on by each Grower	Cultivating, harvesting, and selling almonds
Term of the Project	Approximately 23 years
Number of hectares offered for cultivation	Up to 518.5 hectares
Size of each Almond Lot	0.25 hectares consisting of: <ul style="list-style-type: none"> <li>• at least 0.1512 hectares of Established Orchard; and</li> <li>• no more than 0.0988 hectares of New Orchard.</li> </ul>
Minimum allocation per Grower	One Almond Lot
Minimum subscription	None
Number of trees per hectare	Approximately 324
Initial cost per Almond Lot (referred to as the 'Application Payment')	\$9,300
Ongoing costs	RE Fee Licence Fee Fixed and Deferred Management Fees
Other costs	Operating Fee Performance Fee

31. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. MAAML has been issued with an Australian Financial Service Licence No 225758 and will be the Responsible Entity for the Project.

32. The Project will involve cultivating, harvesting, and selling almonds.

33. The Responsible Entity is currently leasing Land from MacFARM for the purposes of the Project. The Land is within the Sunraysia region of Victoria. Specifically, it is described as Volume 10798 Folio 594. MacFARM will be the owner of the Orchard Assets and will establish the Almond Orchard.

34. 313.5 hectares of the Land (Established Orchard) was planted with Almond Trees in October 2008. The remaining 205 hectares of the Land (New Orchard) are available for planting Almond Trees and for development as an Orchard. Each Almond Lot will be comprised of a minimum of 60% Established Orchard and a maximum of 40% New Orchard. As required by the Lease, MacFARM completed all of the Pre-planting Capital Works before 15 June 2009 and planted 15% of the total Almond Trees before 23 June 2009. The remaining 85% Almond Trees will be planted by 30 September 2009.

35. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS).

36. Applications to participate in the Project must be made on the Application Form included in the PDS. There is no minimum amount to be raised under the PDS.

37. A Grower that participates in the Project will do so by acquiring an interest in the Project that will consist of a minimum of one Almond Lot of 0.25 hectares in size. The Responsible Entity will grant Growers a Licence to use and occupy one or more identifiable Almond Lots for the Term of the Project.

38. The Responsible Entity will allocate Almond Lots to Late Growers, place their details in a Register and enter into Agreements on the Grower's behalf in relation to the Almond Lot(s) allocated to the Grower. Each Grower will use their Almond Lot for the purpose of carrying on a business of cultivating and harvesting almonds and the sale of harvested Produce.

39. Pursuant to the Constitution, Growers will appoint the Responsible Entity to cultivate and maintain the Trees and be responsible for harvesting, procuring the processing and sale of the Growers Produce.

40. The Responsible Entity has subcontracted MASPL to act as Orchard Manager for the Project. The Orchard Manager will provide full farm management services, including ongoing maintenance and management of the Orchard and harvesting of the Almond Lots.

41. The Responsible Entity has appointed Scholefield Robinson Horticultural Services, an independent horticulturalist to provide horticultural and technical advice to the Responsible Entity and the Orchard Manager and review the horticultural practices of the Orchard Manager.

42. The Responsible Entity has appointed Almondco Australia Limited under the Almondco Supply Agreement to act as Marketing Agent to process, market and sell the harvested Almonds.

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

## **Constitution**

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

45. In order to acquire an interest in the Project, the Grower must make an application for Almond Lots in accordance with clause 6. Among other things, the application must be completed in a form approved by the Responsible Entity and accompanied by payment of the Application Payment.

46. The issue date for an interest will be the later of when MAAML accepts the application or when the Application Payment is received. Where the Application Payment is to be funded wholly or partially by a loan from MBL, the issue date will be when MAAML actually receives the funds or receives written confirmation that the loan has been approved (clause 6.7).

47. Under clause 6.9, MAAML accounts for the Application Payment in a special trust account and deposits the money into a bank account solely for Application Payments for the Project.

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

- Powers of the Responsible Entity (clause 9);
- Rights and liabilities of the Responsible Entity (clause 11);
- A Grower's right to attend, and vote at, Grower meetings (clause 21); and
- Termination of the scheme (clause 24).

**Schedule 1 to the Constitution – Licence and Management Arrangements**

49. The terms of the Licence and Management Arrangements are set out in Schedule 1 of the Constitution.

50. Clause 2 specifies that MAAML, as Lessee of the Land, will grant each Grower a non-exclusive Licence for the term of the Project. The Licence allows the Grower to occupy and use the Grower's Almond Lot and access and use the Infrastructure for the sole purpose of conducting their almond growing business.

51. Under the Licence, it is acknowledged that all right, title and interest in the Produce vest with the Grower. However, the terms of the Licence do not confer ownership of the Trees, Infrastructure and Water Licences to the Grower. Ownership of the Trees, Infrastructure and Water Licences remains with the Lessor (clause 2.3).

52. Under clause 6.1, Growers engage MAAML as an independent contractor to manage and conduct the Project and to perform the Operational Services and administrative services on their behalf in accordance with good horticultural and environmental practices during the Term of the Project.

53. In each subsequent year during the project, MAAML will provide the Operational Services listed in clause 7.4. At the time that the Produce is ready for harvest, MAAML will test the Produce, harvest any Trees ready for harvesting, and deliver the harvested Produce for processing and sale (clauses 8 and 9).

54. In summary, Schedule 1 to the Constitution also sets out provisions relating to:

- Licence Fees (clause 3);
- Administrative services (clause 10);
- Fixed and Deferred Management Fees (clause 11.1 and 11.2);
- Operating Fee (clause 11.3);
- Performance Fee (clause 11.4);
- RE Fee (clause 11.5); and
- Insurance (clause 12).

***Pooling of amounts and distribution of Proceeds***

55. MAAML, as agent for the Grower, will process, market and sell the Grower's Produce along with that of other Growers for as high a price as it can reasonably achieve. The Produce from each Almond Lot and the proceeds from the sale of Produce will be pooled with that of all other Growers. Each Grower is entitled to receive a share of the sale proceeds proportional to their Interest in the Project (clause 9 of the Constitution).

56. Clause 16 of the Constitution sets out provisions relating to the pooling and distribution of the Harvest Proceeds from the sale of the Grower's Produce. Proceeds can include both sale proceeds and insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed Produce are entitled to benefit from distributions of Harvest Proceeds from the pool; and
- any pooled Produce must consist only of Produce contributed by Growers from the same Project.

57. Under clause 16.9 of the Constitution, a Grower may withdraw from the pooling arrangements at any time, unless the Manager has already entered into arrangements for the marketing or sale of the Produce.

58. Where there is partial damage or destruction of a Grower's Almond Lot, MAAML will assess the damage and determine whether the Almond Lot and its associated Interest are to be terminated. Where the Almond Lot is not to be terminated, MAAML may determine the percentage of the Almond Lot that is no longer commercially viable. The Grower's Proportional Interest in the pooled Produce will be reduced accordingly (clause 9.8 of the Constitution).

### ***Joint Venturers***

59. As an alternative to participation by a single entity as a Grower, the terms of the Constitution provide that two entities may enter into a Joint Venture. The Constitution defines Joint Venturer as an entity notified in the Grower's Application as a Joint Venturer. All such Joint Venturers in respect of an Interest will be treated for all purposes as one Grower.

60. Joint Venturers are known as First Joint Venturers and Second Joint Venturers. Each Joint Venturer will hold a Fractional Interest and is apportioned specific responsibilities, rights and entitlements under clause 32 of the Constitution.

61. The PDS states the Fractional Interest of the First Joint Venturer is 51% and the Fractional Interest of the Second Joint Venturer is 49%.

### **Lease**

62. The Project Land is situated southeast of Robinvale and approximately 13km from the Murray River in the Sunraysia region of North West Victoria. The Project Land, Almond Trees, Irrigation Infrastructure, all other Infrastructure and assets on the Land and Water Licences will at all times remain the property of the Lessor. All right, title and interest in the Almonds produced by the Trees on the Land vest in the Lessee or its sub-lessees or licensees.

63. The Responsible Entity will lease the Land, and acquire rights to access and use the Almond Trees, Irrigation Infrastructure, all other Infrastructure and assets on the Land and Water Licences according to the terms and conditions set out in the Lease.

64. Under clause 1.2 of the Lease, the Lessor is required to:

- carry out and complete all of the Pre-planting Capital Works by 15 June 2009;
- plant all of the Almond Trees on Part A, being no less than 15% of each Almond Lot, by 23 June 2009; and
- plant the remaining 85% of the Almond Trees by 30 September 2009.

65. The Lessor agrees to acquire the Water Licences and maintain the Water Licences during the Term. The Lessor is also required to ensure that all rights under the Water Licences are fully exploited to maximise the benefits to the Responsible Entity and its sub-lessees, licencees or sub-licencees, which includes the Growers.

### **Management Agreement**

66. Under the Constitution, MAAML is appointed by each of the Growers to manage the Grower's Business. Under the Management Agreement, MAAML subcontracts some of its management obligations to MASPL. MAAML engages MASPL to provide Orchard Operational Services set out in clauses 4 and 5 of the Management Agreement for the Term of the Project. These services include ongoing maintenance and management of the Orchard, harvesting the Almond Lots and providing reports in respect of the Almond Lots. MAAML grants a sub-licence to MASPL to access and use the Land and Infrastructure for all purposes necessary to carry out its obligations under the Management Agreement (clause 7).

### **Compliance Plan**

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

## **Fees**

### ***Management Fees***

#### *Fixed Management Fees*

68. Growers will pay the Manager the following Fixed Management Fees per Interest (clause 11.1(b) of Schedule 1 of the Constitution):

- (i) on Application, \$8,827 for services to be provided from date of entry into the Project up to 30 June 2010; and
- (ii) in consideration for services to be provided in the financial year ending 30 June 2011, \$1,477 payable on 31 October 2010.

#### *Deferred Management Fees*

69. Growers will pay the Manager, in addition to the fees payable in paragraph 68 of this Ruling, the following Deferred Management Fees per Interest (clause 11.2 of Schedule 1 of the Constitution):

- (i) in part consideration for services to be provided in the financial year ending 30 June 2010, 4.4% per annum of:
  - (a) any Sale Proceeds; and
  - (b) insurance proceeds,  
received from the commencement of the Service Term up to and including 30 June 2014. The fee is payable when the proceeds are received by the Manager.
- (ii) the balance of the consideration for services to be provided in the financial year ending 30 June 2010 (4.4%) and in consideration for services to be provided in the financial year ending 30 June 2011 (3.3%), amounting to a total of 7.7% per annum of:
  - (a) any Sale Proceeds; and
  - (b) insurance proceeds,  
received in the period from 1 July 2014 to the last day of the Service Term. The fee is payable when the proceeds are received by the Manager.

***Licence Fee***

70. In consideration of the Manager granting a Licence to the Grower, the Grower will pay a Licence Fee for each Licence. Licence Fees are payable as follows (clause 3.2 of Schedule 1 of the Constitution):

- (i) for the financial year ending 30 June 2010, \$440 per Interest, payable on Application;
- (ii) for the financial years ending 30 June 2011 to 30 June 2014 (inclusive), \$990 per Interest, payable on 31 October each year;
- (iii) for the financial year ending 30 June 2015, \$1,540 per Interest, payable on 31 October in that year; and
- (iv) for the financial year ending 30 June 2016 and for each financial year thereafter, a fee equal to the Licence Fee payable in the previous year, as Indexed.

71. The Licence Fees will be indexed on 31 October 2015 and on each 31 October thereafter for the remaining Term of the Project (clause 3.3 of Schedule 1 of the Constitution).

***Operating Fee***

72. Under clause 11.3 of Schedule 1 of the Constitution, for each Financial Year following 30 June 2011, the Manager will prepare an estimate of the operating costs in respect of all of the Grower's Almond Lots (Operating Fee Estimate). The Operating Fee Estimate will be adjusted to incorporate any difference between the Operating Fee Estimate from the immediately preceding Financial Year and the operating costs actually incurred (Adjusted Operating Fee Estimate).

73. The Manager will notify the Grower of the Adjusted Operating Fee Estimate by 1 October in each year, and the Grower's Proportional Interest of the Adjusted Operating Fee Estimate for each year of the Service Term commencing 1 July 2011 will be payable by the Grower either:

- (i) if the Grower makes no election or elects to pay annually, for the first time on 31 October 2011 and every 31 October thereafter during the Service Term; or
- (ii) if the Grower elects to pay quarterly, for the first time on 31 October 2011 and every 31 January, 30 April, 31 July and 31 October (or if the relevant payment date is not a Business Day, on the Business Day immediately preceding the relevant payment date). The amount payable is to be in equal quarterly instalments except where the Adjusted Operating Fee Estimate is greater than the Operating Fee Estimate, in which case the amount payable on 31 October will be increased by the difference.

74. A Grower may elect to change its payment obligations from annually to quarterly or from quarterly to annually, for the next year commencing 1 July, by giving written notice to the Manager of its election at least 30 days prior to the commencement of that year.

## **RE Fee**

75. An RE Fee is charged by the Responsible Entity for undertaking the role of responsible entity of the Project. An RE Fee is payable by Growers as follows per Interest (clause 11.5(b) of Schedule 1 of the Constitution):

- (i) in consideration for the services to be provided in the period from the Commencement Date to 30 June 2010, \$33 payable on Application;
- (ii) for the financial year ending 30 June 2011, \$33 payable on 31 October in that year;
- (iii) for the financial years ending 30 June 2012 and each financial year thereafter, \$33 (Indexed from 30 June 2009), payable on 31 October each year.

76. The RE Fee for the year ended 30 June 2012 will be indexed from 30 June 2009. All other RE Fees will be indexed on 31 October 2012 and on each 31 October thereafter for the remaining Term of the Project (clause 11.6 of Schedule 1 of the Constitution).

## **Performance Fees**

77. For the financial year ending 30 June 2014 (and each financial year thereafter), when the Performance Fee Threshold is exceeded, a Performance Fee is payable by 31 October of that year.

78. The Performance Fee is equal to 27.5% of the excess of the Net Sale Proceeds (if any) over the Performance Fee Threshold (clause 11.4 of Schedule 1 of the Constitution).

## **Payment of fees by Joint Venturers**

79. For Joint Venturers these Fees are apportioned as prescribed in clause 32.2 of the Constitution, per Interest.

80. The First Joint Venturer is solely responsible for paying:

- (i) 100% of the Application Payment;
- (ii) a percentage equal to its Fractional Interest (being 51%) of the Deferred Management Fee; and

- (iii) a percentage equal to its Fractional Interest (being 51%) of each of the Fixed Management Fee, Licence Fee, RE Fee, Operating Fee and any other amounts payable in relation to the Interest in all Financial Years commencing from and including the 2014 Financial Year.
81. The Second Joint Venturer is solely responsible for paying:
- (i) 100% of each of the RE Fee, Fixed Management Fee, and Licence Fee in the 2011 to 2013 Financial Years (inclusive); and
  - (ii) all other amounts that are not payable by the First Joint Venturer.

### **Finance**

82. A Grower who does not pay the Application Payment in full upon application can borrow from MBL for the Project or from an independent lender external to the Project.

83. 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 MBL that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling and summarised below. A Grower who enters into a finance arrangement with an independent lender external to the Project may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

84. Growers cannot rely on any part of this Ruling if the Application Payment is not paid in full on or before 15 June 2010, other than where the Application Payment is subject to finance. Where an application is accepted subject to finance approval by any lending institution, including MBL, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by the lending institution on or before 15 June 2010. The lending institution, including MBL, must provide the full Application Payment to the Responsible Entity on or before 30 June 2010.

### ***Finance offered by MBL***

85. The Loan Options described in paragraphs 87 and 88 of this Ruling are offered by MBL to Growers and First Joint Venturers. The Loan Options described in paragraph 88 of this Ruling are the only Loan Options available to Second Joint Venturers, to finance their Interests in the Project. Upon acceptance of the Grower's application by MBL, the Grower will be bound by the terms and conditions of the Loan Agreement.

86. Growers will grant a mortgage in favour of MBL by way of equitable mortgage over all of its present and future right, title and interest in and to its Project Interest, including the right to receive all moneys under or in respect of the Project Interest.

### ***Loan Options***

87. 12 month interest free loan with terms and conditions as follows:

- finance for up to 100% of the Application Payment;
- Loan Establishment Fee of 1% of the loan amount; and
- repayments in 12 equal monthly instalments.

88. Five or seven year loans with terms and conditions as follows:

- finance for up to 100% of the Application Payment and up to 100% of the Fixed Management Fee, Licence Fee and RE Fee payable on 31 October 2010;
- no Loan Establishment Fee applies to these loans;
- draw downs on the loans will be as follows:
  - (a) Growers – on application and 31 October 2010 respectively;
  - (b) First Joint Venturers – on application; and
  - (c) Second Joint Venturers – 31 October 2010;
- repayments of equal monthly instalments of principal and interest; and
- indicative interest rates of 9.95% and 9.99% per annum for the five and seven year loans respectively.

89. If two investors choose to participate in the Project as Joint Venturers by nominating a First Joint Venturer and a Second Joint Venturer in their application, the First Joint Venturer and Second Joint Venturer may apply for a separate Investment Loan to meet their respective obligations as detailed in paragraphs 80 and 81 of this Ruling.

90. 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-arms 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 MBL, excluding its assigns, are involved or become involved in the provision of finance to Growers for the Project.

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**Commissioner of Taxation**16 September 2009

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## 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?**

91. For the amounts set out in paragraphs 21 to 23 of this Ruling to constitute allowable deductions the Grower’s cultivation, harvesting and selling of almonds as a participant in the Project must amount to the carrying on of a business of primary production.

92. 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?

93. 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).

94. 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 Fee (fixed and deferred), Licence Fee, RE Fee, Operating Fee and interest**

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

95. The Management Fee (fixed and deferred), Licence Fee, RE Fee and Operating Fee 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 Fee (fixed and deferred), RE Fee and Operating Fee. 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 99 to 103 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.)

96. In respect of the Licence Fee, the amount paid in the 2009-10 income year that relates to the period prior to a Grower joining the project is considered to be a capital expense and not allowable as a deduction. Accordingly the deduction claimed must be apportioned in accordance with note (iv) to the table at paragraph 21 of this Ruling.

97. Some Growers may finance their participation in the Project through a Loan Agreement with MBL. Applying the same principles as that used for the Management Fee, Licence Fee, and RE Fee, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

98. Other than where the prepayment provisions apply (see paragraphs 99 to 103 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***

99. 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.

100. 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***

101. Under the scheme to which this Product Ruling applies Management Fees, Rent and other fees are incurred annually and the interest payable to MBL is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

102. 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 Management Agreement and/or the Sub-lease, or prepays interest under a loan agreement (including loan agreements with lenders other than MBL). 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.

103. 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**

104. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ending **30 June 2010** (for First Joint Venturers) and **30 June 2010 to 30 June 2013** (for all other Growers), 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.

105. 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.

106. 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**

107. 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**

108. 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).

109. The Macquarie Almond Investment 2009 – Late Growers Project 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 paragraph 21 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.

110. 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**

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

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Class of entities	3
Superannuation Industry (Supervision) Act 1993	6
Qualifications	7
<b>Date of effect</b>	<b>10</b>
Changes in the law	12
Note to promoters and advisers	14
Goods and Services Tax	15
<b>Ruling</b>	<b>16</b>
Application of this Ruling	16
Small business concessions	18
Assessable income	20
<i>Section 6-5</i>	20
Deductions for Management Fees, Licence Fee, RE Fee, Operating Fee, interest, borrowing costs, and Almond Trees	21
<i>Sections 8-1, 25-25, 40-545 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the Income Tax Assessment Act 1936</i>	21
Joint Venturers	22
Division 35 – deferral of losses from non-commercial business activities	24
<i>Section 35-55 – exercise of Commissioner’s discretion</i>	24
Prepayment provisions and anti-avoidance provisions	26
<i>Sections 82KZME, 82KZMF and 82KL and Part IVA</i>	26
<b>Scheme</b>	<b>27</b>
Overview	30
Constitution	44
Schedule 1 to the Constitution – Licence and Management Arrangements	49
<i>Pooling of amounts and distribution of Proceeds</i>	55
<i>Joint Venturers</i>	59
Lease	62
Management Agreement	66

Compliance Plan	67
Fees	68
<i>Management Fees</i>	68
<i>Fixed Management Fees</i>	68
<i>Deferred Management Fees</i>	69
<i>Licence Fee</i>	70
<i>Operating Fee</i>	72
<i>RE Fee</i>	75
<i>Performance Fees</i>	77
Payment of fees by Joint Venturers	79
Finance	82
<i>Finance offered by MBL</i>	85
<i>Loan Options</i>	87
<b>Appendix 1 – Explanation</b>	<b>91</b>
Is the Grower carrying on a business?	91
Deductibility of the Management Fee (fixed and deferred), Licence Fee, RE Fee, Operating Fee and interest	95
<i>Section 8-1</i>	95
Prepayment provisions	99
<i>Sections 82KZL to 82KZMF</i>	99
<i>Application of the prepayment provisions to this Project</i>	101
Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner’s discretion	104
Section 82KL – recouped expenditure	107
Part IVA – general tax avoidance provisions	108
<b>Appendix 2 – Detailed contents list</b>	<b>111</b>

## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

PR 2009/9; TR 97/7; TR 97/11;  
TR 98/22

*Subject references:*

- carrying on a business
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

*Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
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- ITAA 1997 35-10
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- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085

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