



PR 2000/48 - Income tax: Almond Orchards Australia Robinvale 2000

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Product Ruling

Income tax: Almond Orchards Australia Robinvale 2000

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Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Previous Rulings**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

No guarantee of commercial success

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

Potential investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities in future years to confirm the arrangement has been implemented as described below and to ensure that participants in the arrangement include in their income tax returns income derived in those future years.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the person(s) who applied for the 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 Ruling.

What this Product Ruling is about

1. This ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this ruling relates. In this Ruling this arrangement is sometimes referred to as Almond Orchards Australia Robinvale 2000, or just simply as 'the Project' or the 'product'.

Tax law(s)

2. The tax law(s) that are dealt with in this Ruling are:
- section 8-1 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
 - section 27-5 of the ITAA 1997;
 - section 387-165 of the ITAA 1997;
 - section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
 - section 82KZM of the ITAA 1936;
 - section 82KZMB of the ITAA 1936;
 - section 82KZMC of the ITAA 1936;
 - section 82KZMD of the ITAA 1936;
 - Part IVA of the ITAA 1936.

Class of persons

3. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Growers'.

4. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

Qualifications

5. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:

- the Ruling has no binding effect on the Commissioner, as the arrangement entered into is not the arrangement ruled upon; and
- the Ruling will be withdrawn or modified.

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Date of effect

7. This Ruling applies prospectively from 19 April 2000, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

8. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely upon the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, the product ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

9. This Product Ruling is withdrawn and ceases to have effect on 30 June 2002. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

Previous Rulings

10. This Ruling replaces Product Ruling PR 2000/4, which is withdrawn on and from the date this Ruling is made. Product Ruling PR 2000/4 will continue to apply to investors who entered into the Project on or before 19 April 2000.

Arrangement

11. The arrangement that is the subject of this Ruling is described below. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Draft prospectus for Almond Orchards Australia Robinvale 2000 received 15 February 2000;
- **Draft Project Constitution** prepared by Almond Orchards Australia Limited ('AOAL', 'the Manager', or 'the Responsible Entity') received 10 February 2000;
- **Draft Allotment Agreement** between AOAL and the Growers, received 15 February 2000;
- **Draft Management Agreement** between AOAL and the Growers, received 15 February 2000;
- Draft Almond Orchard Management Agreement between the Manager and Select Harvests Limited ('Select') and Almond Management Australia Pty Ltd ('AMA'), received 15 February 2000;
- Draft Custodian agreement between AOAL and Sandhurst Trustees Limited ('the Custodian'), received 4 November 1999;
- Draft Almond Orchard Lease between Kyndalyn Park Pty Ltd and the Custodian, received 28 October 1999;
- Draft Sub-Lease between the Custodian and the Manager, received 28 October 1999;
- Draft Licence Agreement between AMA and the Custodian, received 15 February 2000;
- Draft Sub-Licence Agreement between the Custodian and AOAL, received 15 February 2000;
- Draft Compliance Plan for the Responsible Entity, received 10 February 2000;

- Product Ruling request received 4 November 1999 and amendment to Product Ruling request received 25 January 2000;
- **Loan Agreement** between Growers and AOAL received 23 November 1999;
- Additional correspondence from the AOAL and BDO Nelson Parkhill dated 23 November 1999, 30 November 1999, 2 December 1999, 10 December 1999, 13 December 1999, 21 December 1999, 6 January 2000, 11 January 2000, 17 January 2000, 20 January 2000, 25 January 2000, 8 February 2000, 14 February and 15 February 2000, 6 April 2000 and 12 April 2000.

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

12. The documents highlighted are those Growers enter into. For the purposes of this Ruling there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate¹ of the Grower will be party to. The effect of these agreements is summarised as follows.

13. The arrangement is called Almond Orchards Australia Robinvale 2000. Growers entering the Project will occupy, under licence, land owned by Kyndalyn Park Pty Ltd, 70 kms south of Mildura on the Murray River. The land has been leased to the Custodian, which has, in turn, subleased the land to the Manager. The Manager grants a licence to each Grower, by way of an Allotment Agreement, to conduct almond-growing activities on the land.

14. There are up to 1000 Allotments of 0.4 hectares on offer. Following execution of the Allotment and Management Agreements 100 trees per Allotment will be planted. The Manager as the Responsible Entity will operate the Project. The Manager does not propose to accept Growers into the Project during the period 22 May 2000 to 30 June 2000.

15. Growers will engage AOAL as the Manager to perform services including the establishment and maintenance of the Orchard and the annual harvesting and marketing of the almonds produced. This Ruling only applies to those parties utilising the services of AOAL. The Manager will engage Select to professionally manage the Orchard and sell the entire production of the Orchard for the life of the Project.

¹ In this Ruling 'associate' has the meaning as defined in section 318 of the ITAA 1936

Years 1 to 3 payments

16. For Growers accepted into the Project on or before 21 May2000 the fees for one allotment for the first three years are:

	Year ended 30 June 2000	Year ended 30 June 2001	Year ended 30 June 2002
Management and administration fees	4,400	1,600	1,500
Farm expenses	1,132	1,489	1,792
Allotment licence fee	1,368	1,396	1,457
Tree establishment	1,625	-	-
Total	\$8,525	\$4,485	\$4,749

Note

- The fees for the year ended 30 June 2000 are incurred on application and are for work to be done in the year in which they are incurred.
- The above fees do not include a GST component, but a GST component is payable in addition to these fees for those fees which are for the year ended 30 June 2001 and subsequent years.

17. The Manager forecasts that a Grower could expect to achieve an internal rate of return of approximately 14% before tax. The term of the Project will be for 15 years. AOAL has a right to buy the Growers' trees at the end of the sixteenth year of the project.

Project Constitution

18. A Grower must pay \$17,759 over a period of three years in order to acquire an interest in the Project (cl 4). The Responsible Entity is required to maintain a register of the Growers (cl 10). There are no withdrawal rights under the Project (cl 11.1). A Grower has the right to assign their Interest only in the circumstances set out in Constitution and on the terms and conditions of the Allotment Agreement and Management Agreement (cl 13).

19. Growers are able to remove the Responsible Entity by taking action under the Corporations Law.

20. Each Grower is vested with the following assets:

- the trees on the Grower's Allotment (cl 8.3(a));

- the Almonds Attributable to the Grower's Allotment (cl 8.3(b)); and
- the Grower's Interest in the Project (cl 8.3(c)).

Compliance Plan

21. The objective of the Compliance Plan is to ensure the interests of the Growers are protected. The Responsible Entity must ensure that the Constitution and the Compliance Plan meet the relevant requirements of the Corporations Law (cl 3.1). The Responsible Entity must ensure that all property of the Project is clearly identified and held separately from any other property of the Responsible Entity or other managed investment schemes (cl 4.1). All Project property will be held by the Custodian (cl 4.1(a)). The Compliance Plan outlines the various reports and reconciliations which will be provided to each Grower by the Manager.

Allotment Agreement

22. The Manager grants each Grower a licence to:

- use and occupy the Allotment for the purpose of developing, planting, growing, maintaining and harvesting the trees; and;
- use the Water Licences and Internal Irrigation system to irrigate their Allotments.

23. A fee of \$1,368 for the first year is payable to the Responsible Entity for this licence (cl 7.1(a)). Subsequent years' fees are specified in Schedule 2 to the Allotment Agreement.

24. The Responsible Entity has a right to require the Grower to sell its trees at the end of the Term of the Licence (cl 3.2(a)). The Agreement details the Grower's and the Responsible Entity's obligations for use of the Allotment under the licence (cl 5 and cl 6). The Responsible Entity may assign its rights and interests under this Agreement (cl 9.1).

25. AOAL or an associate thereof, will buy the water licences and pay for the installation of the internal irrigation system to provide the water supplied as part of this agreement (Refer the Licence Agreement).

Management Agreement

26. Pursuant to the Management Agreement, AOAL is engaged to develop, maintain and generally manage the Project. The fees payable

to AOAL for the provision of these services are set out at cl 5. Growers enter into this Agreement until 30 June 2015. AOAL is entitled to delegate any of its duties and functions for the better performance of its obligations (cl 8.1).

27. In the first financial year of the Project AOAL is to establish the Grower's Trees, maintain the Trees once they are established, and provide management and administrative services to the Growers (cl 4.2).

28. The establishment services to be provided by the Manager in the first year include, among other things:

- prepare the Allotment for planting;
- supply and plant the rootstock;
- supervise the planting of the Trees; and
- prepare and implement an irrigation, drainage and water management plan (cl 4.1).

29. The farming services to be provided by the Manager in the first year include, among other things:

- provide irrigation, fertilisation and nutrients to the trees;
- eradicate any pests or diseases if required; and
- prepare a business plan and annual budget for the Project (cl 4.2 (a)).

30. The administration and management services to be provided by the Manager in the first year include, among other things:

- assisting Growers to complete loan applications;
- preparing reports to Growers on the location of their allotments and the work to be done on the Allotment; and
- reviewing the sales and marketing plan for the Project;
- supervising Select's work (cl 4.2 (b)).

31. For the second and subsequent years the Manager is responsible for farming services, administration and management services, processing and marketing services (cls 4.3(a), 4.3(b), 4.4 and 4.5).

32. Growers have the right to elect to have any almonds harvested from their farm made available to them to sell or deal with as they determine (cl 4.3(a)(xvii)).

33. The Manager will pool for sale all produce of each Grower's business with that of each other Grower and will market and sell all such produce (cl 4.5). The proceeds of the pooled sales will be paid to the Custodian for crediting to the account of each Grower on a proportional basis (cl 15 of the Management Agreement and cl 22 of the Constitution). Where the produce from a Grower's Allotment is of sufficiently reduced quality or quantity, that Grower's share of the pooled sale proceeds may be reduced (cl 4.5(c) of the Management Agreement and clause 22.1 of the Constitution). Income of the Project is to be held on behalf of the Growers by the Custodian and to be applied in payment of the Growers' obligations under the Management and Allotment Agreement. Any net income remaining after the payment of these fees is to be distributed to Growers (cl 22 of the Constitution).

34. The Grower may terminate the Management Agreement in certain instances, including where the Manager defaults in the performance of its duties (cl 10.1).

35. All costs and expenses incurred by the Manager in carrying out its duties are to be borne by it and the Grower has no further obligation to make any payment, save those under cls 5.1 to 5.4 of the Management Agreement (cl 5.5).

36. If in any year of the Project the income resulting from the sale of produce is insufficient to meet the annual Management and Allotment fees of that year, participants are still liable to pay the shortfall pursuant to cl 9.5(e) of the Constitution.

37. There are no sale agreements in place for the almonds that will be produced and harvested under the Project. Growers are paying as part of the management fees an amount to AOAL for it to market and sell the almonds (cl 4.3(a)(xviii)).

Almond Orchard Management Agreement

38. Pursuant to its right to delegate any functions required of it, AOAL has contracted with Select to undertake the obligations under the Management Agreement to establish the Orchard in the first year and undertake all necessary horticultural work in future years. An Almond Orchard Management Agreement exists between the Manager, Select and AMA, detailing those services to be undertaken by Select in each year.

39. Select is required to acquire rootstock for the Growers in the Project by 31 May 2000. Select has contracted to plant those trees by 30 June 2000, subject to the planting being undertaken in appropriate climatic and horticultural conditions (cls 4.1(a) and (c)). Select is then required to undertake cultivation, maintenance and management services over the life of the Project (cl 4.3).

40. Select is required to harvest the almonds on behalf of the Growers (cl 4.4) and process those almonds (cl 5). Select guarantees the sale of those almonds by the end of the Season following harvest and will endeavour to maximise the price obtained for the sale (cl 6.1). Select is entitled to charge fees for the processing and marketing of the almonds at an agreed rate per kilogram of processed Almonds (cls 12.1, 12.2 and 13.1) as well as any drying fee that may be applicable (cl 5.6). A Bonus fee of 10% of the amount by which the net income from sales for a financial year exceeds forecast may be payable (cl 14A).

Finance

41. This Ruling does not apply if a Grower enters into a finance agreement with any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- entities associated with the Project (other than AOAL) are involved in the provision of finance for the Project;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- additional benefits will be granted to the borrowers for the purpose of section 82KL or the funding arrangements transform the project into a 'scheme' to which Part IVA applies;
- the loan is non-arm's length;
- repayments of principal and 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) back to the lender or any associate; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

Ruling

42. For a Grower who invests in the Project by 21 May 2000, who incurs the fees set out in paragraph 16, the following deductions will be available for the years ended 30 June 2000 to 30 June 2002:

	Year ended 30 June 2000	Year ended 30 June 2001	Year ended 30 June 2002
Management and administration fees	4,400	1,600	1,500
Farm expenses	1,132	1,489	1,792
Allotment licence fee	1,368	1,396	1,457
Purchase and planting of trees	0	0	0
Total	\$6,900	\$4,485	\$4,749

Management fee

43. Management fees are deductible under section 8-1. For fees incurred from 1 July 2000 new section 27-5 of the ITAA 1997 will apply to reduce the amount of the deduction allowable by any input tax credit to which the Grower is entitled.

Farm expenses

44. Farm expenses are deductible under section 8-1. For fees incurred from 1 July 2000 new section 27-5 of the ITAA 1997 will apply to reduce the amount of the deduction allowable by any input tax credit to which the Grower is entitled.

Allotment Licence fee

45. The Allotment Licence fee is deductible under section 8-1. For fees incurred from 1 July 2000 new section 27-5 of the ITAA 1997 will apply to reduce the amount of the deduction allowable by any input tax credit to which the Grower is entitled.

Purchase and planting of trees

46. The costs of purchasing and planting trees are capital in nature. A deduction is allowable under Subdivision 387-C at the rate of 13% per annum, commencing from the time the trees enter their first commercial season. For Growers who enter the Project on or before 21 May 2000 it is likely the first commercial season will be in the financial year ended 30 June 2003. The Manager will advise Growers of details of amounts that can be claimed in this respect.

Sections 82KL, 82KZM and Part IVA

47. For a Grower who invests in the Projects the following provisions of the ITAA 1936 have application as indicated:

- (i) section 82KL does not apply to deny the deductions otherwise allowable;
- (ii) the expenditure by Growers does not fall within the scope of section 82KZM; and
- (iii) 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.

Explanations

Section 8-1

48. Consideration of whether the Management fees, Farm expenses and Allotment licence fees are deductible under section 8-1 begins with an examination of paragraph 8-1(1)(a). To be deductible under this paragraph:

- the outgoings in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under paragraph 8-1(1)(b) if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether paragraph 8-1(1)(b) applies. However, that does not preclude the application of the paragraph 8-1(1)(a) and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

49. An outgoing or a loss incurred in carrying on a business for the purpose of gaining or producing assessable income is deductible under the general deduction provisions of section 8-1, provided it is not expenditure or a loss of capital or of a capital, domestic or private nature. A business includes a 'primary production business', which is defined under subsection 995-1(1) to include a business of propagating and cultivating plants. Where there is a business, or a future business of growing almonds for sale at a profit, the gross sale

proceeds from the sale of almonds from the Project will constitute assessable income under section 6-5. The generation of ‘business income’ from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income. These operations will be the planting, tending, and maintaining of almond trees and the harvesting of the almonds.

50. Under the Management Agreement, Growers engage AOAL to farm their Allotment on their behalf. They also have the right to have the harvested almonds made available to themselves to sell or utilise how they wish. The purpose for which the participant utilises the almonds will then be a determining factor as to whether the amounts incurred on any Management fees, Farm expenses or Allotment licence fees will be an allowable deduction.

Is the Grower in business?

51. Generally, a Grower will be carrying on a business of growing almonds where:

- they have an identifiable interest in specific growing almond trees coupled with a right to harvest and sell the almonds resulting from those trees;
- the horticulture activities are carried out on their behalf; and
- the weight of the general indicators of a business, as developed by the Courts, points to them carrying on such a business.

52. By weighing up all of the attributes of the Project it is accepted that Growers in the Project will be in a business of primary production from the date that ‘business operations’ are first commenced on their behalf. ‘Business operations’, in this context, mean such things as surveying of the land, installation of the irrigation items, and other preplanting work, all conducted as part of a co-ordinated and concerted plan to grow and harvest almonds for sale at a profit.

53. For this Project investors have, under the Allotment Agreement, rights in the form of a licence over an identifiable number of growing trees, consistent with the intention to carry on a business of growing almonds.

54. Under the Management Agreement, Growers appoint AOAL, as Manager, to provide services such as preplanting and planting of almond trees, the installation of irrigation, and all horticultural operations necessary to develop a mature fruit bearing tree.

55. Growers only have the right to use the land in question for almond-growing purposes. AOAL may come onto the land to carry out its obligations under the Management Agreement. The Growers' degree of control over AOAL, as evidenced by the Agreements, is sufficient. Under the general terms of the Project, Growers are entitled to receive regular progress reports on AOAL's activities. Growers are able to terminate arrangements with AOAL in certain instances, such as cases of default. The horticulture activities described in the Management Agreement are carried out on the Growers' behalf. Growers control their investment.

56. The general indicators of a business, as developed by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the arrangement's description in this Ruling for all these indicators. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections contained in the Prospectus that suggest the Project should return a 'before-tax' profit to the Growers, i.e., a 'profit' in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

57. Growers will engage the professional services of a Manager who holds itself out as having the appropriate credentials. There is a means to identify which trees Growers have an interest in. The services are based on accepted horticultural practices and are of the type ordinarily found in horticulture ventures that would commonly be said to be businesses.

58. Growers have a continuing interest in the trees from the time they are acquired until the termination of the Project. The horticulture activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. The Growers' horticulture activities will constitute the carrying on of a business.

Deductibility of expenses

59. The Management, Farm expenses and Allotment licence fees, will relate to the gaining of income from this business, and hence have a sufficient connection to the operations by which this income is to be gained. They will, thus, be deductible under paragraph 8-1(1)(a), to the extent that they are not capital or of a capital nature (see further below). Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fees are not considered to be grossly excessive. The tests of deductibility under paragraph 8-1(1)(a) are met. The exclusions do not apply, except as set out below.

60. Section 27-5 operates to deny a deduction that would otherwise be available under section 8-1, to the extent that the loss or outgoing incurred (after 1 July 2000) includes an amount relating to a GST input tax credit to which a Grower is entitled.

Expenditure of a capital nature

61. Any part of the expenditure of a Grower entering into the horticulture business that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. It is apparent from the Project's Agreements that certain payments made are attributable to the acquisition of capital assets. These include preplanting costs and the cost of establishing the trees. However, expenditures of this nature can fall for consideration under specific deduction provisions of the ITAA 1997 relevant to the carrying on of a business of primary production.

62. The Manager, AOAL, has identified the relevant expenditures that are of a capital nature. A Grower entering into the Project incurs and pays a separate amount to AOAL for these capital items (refer cl 5 of the Management Agreement). These amounts are detailed at paragraph 16 of this Ruling.

Subdivision 387-C: horticultural provisions

63. The capital costs relating to establishing the almond trees are deductible as a 'write-off', over time, under Subdivision 387-C. This Subdivision allows capital expenditure incurred in establishing horticultural plants to be written off where the plants are used in a business of 'horticulture'. Under subsection 387-170(3), the definition of 'horticulture' covers the cultivation of almond trees.

64. The write-off commences from the time the trees are used or held ready for use for the purpose of producing assessable income in a horticultural business (see sections 387-165 and 387-170). The write-off rate will be 13% per year, assuming an effective life of the plants of greater than 13 but less than 30 years (see section 387-185). The write-off deductions will, for a Grower who has been accepted into the Project by 21 May 2000 and whose primary production business has commenced, start in the fourth year of the Project, on the basis that it is then that the almond trees enter their first commercial season and, hence, begin to be used for the purpose of producing assessable income in a horticultural business.

65. Costs of establishing horticultural plants may include the cost of acquiring the plants, the cost of establishing the plants, and the costs of ploughing, contouring, top dressing, fertilising and stone

removal. Expressly excluded is expenditure incurred on draining swamps or the clearing of land.

66. AOAL has identified that the relevant expenditure attributable to the establishment of the almond trees is \$1,625. This amount will be subject to the horticultural provisions and allowable as a deduction under Subdivision 387-C.

67. For a Grower entering into the Project by 21 May 2000, no deduction will be allowable for the years ended 30 June 2000, 30 June 2001 and 30 June 2002. There will be an amount deductible for the year ended 30 June 2003 in accordance with paragraph 46.

Alternative view

68. The applicant has indicated disagreement with the ATO view that the almond trees do not commence to be used for the purpose of producing assessable income in a horticultural business until their first commercial season, and has submitted an alternative view that the almond trees commence to be so used immediately after their planting.

Section 82KL

69. The operation of section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. Here no 'additional benefit' has been identified to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1.

Section 82KZM

70. Section 82KZM operates to spread over more than one income year a deduction for prepaid expenditure that would otherwise be immediately deductible, in full, under section 8-1. The section applies to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement that is not wholly done within the same year of income as the execution of the relevant agreement.

71. Management fees, Farm expenses and Allotment Licence fees are incurred on execution of the Management and Allotment Agreements. In each instance, the fees are charged for providing services to a Grower by 30 June of the year of execution of the Agreement. The fees are expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the arrangement's description that the fee has been inflated to result in reduced fees being payable for subsequent years.

72. There is also no evidence that might suggest the services covered by the fees could not be provided within the same year of income as the expenditure in question is incurred. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial fee is for AOAL doing ‘things’ that are not to be wholly done within the year of income of the fee being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditure by Grower. New sections 82KZMB, 82KZMC and 82KZMD will not apply to the Project since the services to be provided in respect of the initial fee are to be completed in the same year of income as the expenditure is incurred (see paragraph 82KZMA(3)(c)).

Part IVA

73. For Part IVA 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). The Project will be a ‘scheme’ commencing generally on the date when the Prospectus was issued. The Growers will obtain a ‘tax benefit’ from entering into the scheme, in the form of the deduction for the initial fee, allowable under section 8-1, that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

74. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the eventual harvesting of the trees. Further, there are no features of the Project, for example, such as the Management fees and Farm expenses fee being ‘excessive’, and uncommercial, predominantly financed by a non-recourse loan, and resulting in insufficient ‘real money’ coming into the Responsible Entity’s hands, that might suggest the Projects were so ‘tax driven’, and so designed to produce a tax deduction of a certain magnitude that would attract the operation of Part IVA.

Detailed contents list

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Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

TR 92/1; TR 92/20; TR 97/11;
TR 97/16; TR 98/22; TD 93/34;
PR 1999/95

Subject references:

- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees expenses
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- taxation administration
- tax avoidance

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA(3)(c)
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 318
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 8-1(1)(a)
- ITAA 1997 8-1(1)(b)
- ITAA 1997 27-5
- ITAA 1997 387-C
- ITAA 1997 387-165
- ITAA 1997 387-170
- ITAA 1997 387-170(3)
- ITAA 1997 387-175
- ITAA 1997 387-185
- ITAA 1997 995-1(1)

ATO references:

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