


# ***PR 2009/30 - Income tax: Olive Growers Australia Project 2007 for 2009 Growers (pre 1 June 2009)***

 This cover sheet is provided for information only. It does not form part of *PR 2009/30 - Income tax: Olive Growers Australia Project 2007 for 2009 Growers (pre 1 June 2009)*



## Product Ruling

### Income tax: Olive Growers Australia Project 2007 for 2009 Growers (pre 1 June 2009)

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#### **ⓘ This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, 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.

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**

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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

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 Olive Growers Australia Project 2007 for 2009 Growers 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:

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

set out in the Ruling section of this Product Ruling.

4. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and who have executed the relevant Project Agreements set out in paragraph 37 of this Ruling on or before 31 May 2009. They will stay in the scheme until its completion and derive assessable income from this involvement.

5. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- terminate their involvement in the scheme prior to its completion; or do not derive assessable income from it;
- are accepted into this Project before the date of this Ruling or after 31 May 2009;
- participate in the scheme through offers made other than through the Olive Growers Australia Project 2007 Prospectus and Product Disclosure Statement for 2009 Growers (PDS), or who enter into an undisclosed arrangement with:
  - the promoter; or
  - promoter associate; or

- an independent adviser,  
that is interdependent with scheme obligations and/or  
scheme benefits (which may include tax benefits or  
harvest returns) in any way; or
- do not pay the Application Fee in full on or before  
31 May 2009, unless the Grower has entered into the  
Agreement for 12 Months Instalment Plan with Olive  
Growers Australia Ltd (OGAL) or written evidence of  
finance approval has been given to the Responsible  
Entity by 31 May 2009 and the Application Fee is paid  
in full on or before 15 June 2009.

### **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 37 to 88 of this Ruling.

8. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then this Product Ruling:

- has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- may be withdrawn or modified.

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## Date of effect

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10. This Product Ruling applies prospectively from 6 May 2009, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 6 May 2009 until 31 May 2009, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to 30 June 2011. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

11. However this Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

### Changes in the law

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

13. Entities who are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

### Note to promoters and advisers

14. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling is issued.

### Goods and Services Tax

15. All fees and expenditure referred to in this Product Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as a Grower) to be entitled to claim input tax credits for the GST included in any creditable acquisition it makes, it must be registered or required to be registered for GST and hold a valid tax invoice.

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## **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 37 to 88 of this Ruling.

17. The Grower's participation in the Project must constitute the carrying on of business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Licence agreements and Management agreement.

### **Minimum subscription**

18. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of the PDS, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 100 Lots is achieved.

### **Small business concessions**

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

20. A 'small business entity' can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions, the application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Product Ruling.

### **Assessable income**

#### ***Sections 6-5 and 17-5***

21. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

**Deduction for Management Fees, Licence Fees, and Olive Orchard Operating Costs**

***Sections 8-1, 25-25 and 40-880 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the ITAA 1936***

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

<b>Fee Type</b>	<b>Year ending 30 June 2009</b>	<b>Year ending 30 June 2010</b>	<b>Year ending 30 June 2011</b>
<b>Management Fees</b>	\$1,322 See Notes (i) & (ii)	Nil	Nil
<b>Olive Orchard Operating Costs</b>	Nil	\$627 See Notes (i), (ii) & (iii)	\$440 See Notes (i), (ii) & (iii)
<b>Licence Fees</b>	Amount must be calculated See Notes (i) & (ii)	\$137.50 See Notes (i), (ii) & (iii)	\$137.50 See Notes (i), (ii) & (iii)

**Notes:**

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) The Management Fee, Olive Orchard Operating Costs and Licence Fees are deductible under section 8-1 in the income year that the relevant fee is incurred. For the 2008-09 income year only, the Licence Fee is \$11.45 per Lot per month or part thereof, for the period from when the OGAL contractually accepts an application until midnight 30 June 2009.
- (iii) This Ruling does not apply to Growers who choose to prepay fees (see paragraphs 95 to 99 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.

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

23. A Grower, who is not a 'small business entity', will also be entitled to tax deductions for the following capital expenses on a per Lot basis.

<b>Fee Type</b>	<b>ITAA 1997 Section</b>	<b>Year ended 30 June 2009</b>	<b>Year ended 30 June 2010</b>	<b>Year ended 30 June 2011</b>
<b>Stakes</b>	40-25	Amount must be calculated – See Notes (i) & (iv)	Amount must be calculated – See Notes (i) & (iv)	Amount must be calculated – See Notes (i) & (iv)
<b>Irrigation</b>	40-515	\$46 See Notes (i) & (v)	\$46 See Notes (i) & (v)	\$45 See Notes (i) & (v)
<b>Planting of Olive Trees</b>	40-515	Nil See Note (vi)	Nil See Note (vi)	Amount must be calculated See Note (vi)

**Notes:**

- (iv) Each Grower's interest in the Stakes (alternately described in the PDS as 'Spacing, Posting and Protection' and 'Acquisition and Installation of Stakes') is a 'depreciating asset'. The 'cost' of the asset is the amount of \$35 per Lot paid by each Grower. The decline in value of the asset is calculated using the formula in either subsection 40-70(1) (diminishing value method) or subsection 40-75(1) (prime cost method). Both formulas rely on the 'effective life' of the Stakes.

Growers can either self-assess the 'effective life' (section 40-105) or use the Commissioner's determination of 'effective life' (section 40-100). The Commissioner has determined that Stakes (including trellising) in the olive and tree nut growing industry have an 'effective life' of 3 years. The Stakes will be installed and first used during the year ended 30 June 2009. The Project Manager will advise Growers when that occurs to enable Growers to calculate the deduction for the decline in value.

If the combined cost of the Stakes for a Grower is less than \$1,000, the interest in the Stakes will be a 'low cost asset', and can be allocated to a 'low-value pool'. Once any low-cost asset of a Grower is allocated to low-value pool, all other low-cost assets the Grower starts to hold in that year or a later year must be allocated to that pool. If the Grower has already allocated an asset to a low-value pool, the Stakes would also have to be allocated to that pool. Otherwise, the Grower must decide whether to create a low-value pool.



If the asset is allocated to a low-value pool, the capital expenditure on the posts will be deducted under the diminishing value methodology of the pool based on a rate of 18.75% in the year the posts are first used and a rate of 37.5% in subsequent years (section 40-440).

If the Stakes are not allocated to a low-value pool, it can be written off based on the effective life of the asset.

- (v) Growers are required to pay \$137 per Lot for 'Acquisition and Installation of Irrigation' or 'irrigation expenses'. Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. As the condition in subsection 40-525(1) is met, a deduction is available under Subdivision 40-F, paragraph 40-515(1)(a). This deduction is equal to one-third of the capital expenditure incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one-third in each of the next 2 years of income (section 40-540).
- (vi) Growers are required to pay \$299 per Lot for 'Initial Planting & Preparation' or 'Replanting, Planting Services & Plants'. Olive trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a licence, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the olive trees is determined using the formula in section 40-545 and is based on the capital expenditure incurred by the Grower that is attributable to their establishment. If the olive trees have an 'effective life' of 30 years or more for the purposes of section 40-545, this results in a straight-line write-off at a rate of 7%. The deduction is allowable when the olive trees enter their first commercial season (section 40-530, item 2). The Project Manager will inform Growers of when the olive trees enter their first commercial season.

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

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

24. A Grower, who is a 'small business entity', will also be entitled to tax deductions relating to stakes, water facilities (for example irrigation), and the planting of the olive trees. Deductions relating to the 'cost' of stakes must be determined under Division 328. A 'small business entity' may claim deductions in relation to water facilities under Subdivision 40-F. If the 'water facility' expenditure is on a 'depreciating asset' used to carry on the business, they may choose to claim deductions under Division 328. Deductions for olive trees must be determined under Subdivision 40-F.

25. The deductions shown in the following Table assume, for representative purposes only, that a Grower has either chosen to or can only claim deductions for expenditure on water facilities under Subdivision 40-F and not under Division 328. If the expenditure has been incurred on 'depreciating assets' and is claimed under Division 328, the deduction is determined as discussed in Note (viii) of paragraph 26 of this Ruling.

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

Fee Type	ITAA 1997 Section	Year ended 30 June 2009	Year ended 30 June 2010	Year ended 30 June 2011
<b>Stakes</b>	328-185 & 328-190	\$35 See Notes (i) & (vii)	See Note (vii)	See Note (vii)
<b>Irrigation</b>	40-515	Amount must be calculated See Notes (i) & (viii)	Amount must be calculated See Notes (i) & (viii)	Amount must be calculated See Notes (i) & (viii)
<b>Planting of Olive Trees</b>	40-515	Nil See Note (vi)	Nil See Note (vi)	Nil See Note (vi)

**Notes:**

- (vii) The amount will be treated as a 'low-cost asset' unless the Grower holds 29 Lots or more in which case the tax deduction allowable in the year ended 30 June 2009 is determined by multiplying the 'cost' of the interest by half the 'general small business pool' rate, that is, by 15%. That part of the 'cost' not deducted in the first year is added to the pool balance. In subsequent years, the full pool rate of 30% will apply.

- (viii) An irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. As the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-F. For the purposes of Division 328, each Grower's interest of \$137 per Lot in the underlying asset is deemed to be a 'depreciating asset'. If the 'cost' apportionable to that deemed 'depreciating asset' is less than \$1,000 (that is, the Grower holds 7 Lots or fewer), the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is a 'small business entity' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset' (that is, the Grower holds 8 Lots or more), the tax deduction allowable in the year ended 30 June 2009 is determined by multiplying its 'cost' by half the relevant small business pool rate. At the end of the year, it is allocated to the relevant small business pool and in subsequent years the full pool rate will apply.

Alternatively, Growers may choose to claim deductions under Subdivision 40-F, paragraph 40-515(1)(a). As the condition in subsection 40-525(1) is met, a deduction is allowable equal to one-third of the capital expenditure incurred by each Grower on the installation of the 'water facility' in the year in which it is incurred and one-third in each of the next 2 years of income (section 40-540).

## **Trading stock**

### **Section 70-35**

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

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

**Section 328-285 – small business entities**

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

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

**Expenditure of a capital nature*****Divisions 40 and 328***

31. Any part of the expenditure of a Grower that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, expenditure attributable to stakes, water facilities, and the establishment of the trees are of a capital nature. This expenditure falls for consideration under Divisions 40 or 328.

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

33. The tax treatment of capital expenditure has been dealt with in a representative way in the Table(s) and accompanying notes of paragraphs 23 and 24 of this Ruling.

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

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

35. The discretion in paragraph 35-55(1)(b) will be exercised for such Growers to whom the loss deferral rule would otherwise apply, for the income years ended 30 June 2009 to 30 June 2013. Exercise of the discretion in this case however is also conditional on the Project being carried out in the manner described in paragraphs 37 to 88 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***

36. For a Grower who commences participation in the Project and incurs expenditure as required by the Licence agreements and Management agreement, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 95 to 99 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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37. 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 29 December 2008, and other documents and correspondence including emails received on 6 February 2009, 3 March 2009, 13 March 2009, 18 March 2009, 27 March 2009, 31 March 2009, 8 April 2009, 8 April 2009, 16 April 2009, and 28 April 2009;
- Olive Growers Australia Project 2007 Draft Prospectus and Product Disclosure Statement For 2009 Growers, received 6 February 2009;
- Draft Management agreement for the Olive Growers Australia Project 2009, between the Growers and OGAL as Responsible Entity, received on 3 March 2009;
- Licence agreement No. 1 for the Olive Growers Australia Project 2009 (Commencement Date to 30 June 2014), between the Growers and OGAL as licensor, received on 3 March 2009;
- Licence agreement No. 2 for the Olive Growers Australia Project 2009 (1 July 2014 to 30 June 2019), between the Growers and OGAL as licensor, received on 3 March 2009;
- Licence agreement No. 3 for the Olive Growers Australia Project 2009 (1 July 2019 to 30 June 2024), between the Growers and OGAL as licensor, received on 3 March 2009;

- Licence agreement No. 4 for the Olive Growers Australia Project 2009 (1 July 2024 to 30 June 2029), between the Growers and OGAL as licensor, received on 3 March 2009;
- Draft Constitution for the Olive Growers Australia Project 2007, between the Growers and OGAL as Responsible Entity, received on 16 April 2009;
- Compliance Plan for the Olive Growers Australia Project 2007 dated April 2009, received on 9 April 2009;
- Draft Olive Grove Management Agreement for the Olive Growers Australia Project 2007, between Olive Grove Management Pty Ltd and OGAL, received on 8 April 2009;
- Taxation Opinion for the Olive Growers Australia Project 2007 for 2009 Growers received 29 December 2008;
- Draft Assignment of Licence Agreements for the Olive Growers Australia Project 2009 received 29 December 2008;
- Draft Assignment of Management Agreement for the Olive Growers Australia Project 2009 received 29 December 2008;
- Title Register Search dated 20 September 2007 showing Carcuma Land Holdings Ltd as proprietor and OGAL as holding a lease to 1 July 2027, received on 8 April 2009;
- Draft Memorandum of Lease for OGAL to lease land from Carcuma Land Holdings Ltd from 2 July 2028 to 1 July 2029, received on 8 April 2009;
- Deed of Variation of Contract between the vendor and Carcuma Land Holdings Ltd as purchaser land received 29 December 2008;
- Annual Horticultural Report for the 2007/2008 Financial Year for the Olive Growers Australia Limited Project 2005/2006, Olive Growers Australia Limited Project 2007, and Olive Growers Australia Limited Project 2007 for 2008 Growers received 3 March 2009; and
- Spring 2008 Horticultural Status report for OGAL received 3 March 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.

38. 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.

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

### Overview

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

Location	Approximately 150km south east of Adelaide, 12km north of Coonalpyn,
Type of business to be carried on by each Grower	Establish and maintain an olive grove for the purpose of producing and selling olive oil
Term of the Project	Approximately 20 years
Size of each Lot	0.05 hectares
Olive trees planted per Lot	Approximately 21
Minimum allocation per Grower	Two Lots
Minimum subscription for the Project	100 Lots
Size of the Project	Approximately 2621 Lots or 131.05 hectares
Initial Application Fee for one Lot	\$1,793 Management Fee plus \$11.45 per month Licence Fee
Ongoing costs	Management Fees Licence Fees Olive Orchard Operating Costs Harvest Costs Processing Costs Insurance

41. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. OGAL has been issued with an Australian Financial Service Licence number 288838 and will be the Responsible Entity for the Project.

42. The Project will involve the establishment and maintenance of an olive grove for the purpose of producing and selling olive oil on behalf of the Growers.

43. An offer to participate in the Project will be made through a PDS which incorporates a prospectus. The offer under the PDS is for 131.05 hectares, which corresponds to 2621 Lots in the Project.

44. Under the terms of the PDS, the interests in the Grower's Lots will be issued after a minimum subscription of 100 Lots has been achieved.

45. A Grower that participates in the Project will do so by acquiring an interest in the Project which will consist of a minimum of 2 Lots each of 0.05 hectares in size.

46. Applicants execute a Power of Attorney contained in the PDS, which irrevocably appoints OGAL to enter into, on behalf of the Grower, the Licence agreements and a Management agreement and any other connected or incidental documents.

47. For the purposes of this Ruling, applicants who are accepted to participate in the Project and who execute the Licence agreements and the Management agreement on or before 31 May 2009 will become 2009 Growers.

48. Carcuma Land Holdings Limited is currently the proprietor of the land for the Project, which is located about 12 km north of Coonalpyn in South Australia, and is described as Certificate of Title Register Book Volume 5915, Folio 281, Allotment 52, Deposited plan 62735.

49. OGAL currently leases the land from Carcuma Land Holdings Ltd, and will obtain an extension of that lease until midnight 1 July 2029.

50. This Land will be divided into 0.05 hectare lots and licensed to Growers accepted in the Project.

51. Each Grower will use their Lots to carry on a business of cultivating and harvesting olives for the purpose of producing and then selling olive oil.

### **Constitution**

52. The Constitution establishes the Project and operates as a deed binding all Growers and OGAL. The Constitution sets out the terms and conditions under which OGAL 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.



53. In order to acquire an interest in the Project, the Grower must make an application for Lots in accordance with clauses 4 and 7. Among other things, the application must be completed in a form approved by the Responsible Entity, signed by or on behalf of the applicant, lodged at a registered office of the Responsible Entity, and accompanied by payment of the Application Fee in a form acceptable to the Responsible Entity.

54. Clause 4.11 allows payment of the Application Fee by monthly instalments over a period of up to 12 months.

55. Under clause 3 of the Constitution, OGAL as Responsible Entity holds the Project Property on bare trust. The Application Fees must be or deposited into an Application Fund trust account (clause and 7.11).

56. Within 10 business days after receiving an application, the Responsible Entity will confirm in writing whether the application has been accepted or refused (clause 7.8).

57. The Responsible Entity will cause the Licence agreements and the Management agreement to be executed (clause 7.14) on or before 31 May 2009, after which the Application Fees may be transferred and applied against the fees due to OGAL (clause 7.15).

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

- Fees and expenses (clause 4);
- Period and termination of the Project (clause 10);
- how the Gross Proceeds from the Project are administered (clause 13);
- the requirement to maintain a Register of Growers (clause 14); and
- Insurance (clause 17).

## **Compliance Plan**

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

## **Memorandum of Lease and Memorandum of Extension of Lease**

60. Carcuma Land Holdings Ltd is the proprietor of the land upon which the Lots will be developed.

61. OGAL has advised that it entered into a Memorandum of Lease with Carcuma Land Holdings Ltd, which with existing and proposed Memorandum of Extension of Lease will allow OGAL to use the property for horticultural purposes and to grant licences to use the Land until midnight of 1 July 2029.

### **Licence agreements**

62. Each Grower will execute Licence agreements whereby the Responsible Entity as Licensor grants a licence to the Grower for a portion of the Project land, for the purpose of establishing and maintaining an olive grove for the production and sale of olive oil.

63. Each Grower will enter into four consecutive Licence agreements with the Licensor, with Licence agreement – No. 1 from Commencement Date (being the date the application is accepted) to 30 June 2014, Licence agreement – No. 2 from 1 July 2014 to 30 June 2019, Licence agreement – No. 3 from 1 July 2019 to 30 June 2024, and Licence agreement – No. 4 from 1 July 2024 to 30 June 2029.

64. The agreements give the Grower a licence to enter onto their Lots to conduct the Grower's Business (clause 1.1). The olives and olive oil will be the property of the Grower (clause 3.1). The Licensor will provide suitable irrigation and sufficient water supply (clause 5.4).

### **Management agreement**

65. Under the Management agreement the Grower appoints OGAL as Responsible Entity to manage the Lots and to carry out the management services subject to the terms and conditions of the agreement. The agreement will commence on the Commencement Date (being the date the application is accepted) and shall continue until its termination at midnight 30 June 2029.

66. The Management agreement requires the Responsible Entity, during the Establishment Period (from Commencement Date until midnight 30 June 2009), to provide services which include:

- preparing the olive grove;
- obtaining and planting olive trees;
- spacing, posts and protection for the olive trees;
- installation of irrigation; and
- replacement and replanting of any olive trees (at the Grower's costs if caused by fire, flood, disease, drought, plague or any other cause beyond the reasonable control of the Responsible Entity).

67. The agreement further specifies the ongoing olive grove maintenance and management obligations of the Responsible Entity during the entire Term of the agreement, including matters such as:

- insurance;
- pruning;
- fertilising;
- replacement of trees;
- annual reports;
- harvesting;
- processing olives to extract olive oil; and
- selling the olive oil and collecting the proceeds.

## **Olive Orchard Management Agreement**

68. Under this agreement, OGAL engages Olive Grove Management Pty Ltd (OGAM) to provide the Initial Services, Ongoing Services, and Harvesting Services in respect of the Grower's olive groves. OGAM has the additional obligation to report any breaches of the Constitution or the Compliance Plan.

69. The term of the agreement is from Commencement Date (being the date of execution of this agreement, expected to be 4 May 2009) until the earlier of:

- completion of the Project;
- OGAM becoming insolvent;
- failure by OGAM or OGAL to remedy a breach of the agreement; or
- OGAM or OGAL giving notice of termination of the agreement.

## **Pooling of crops and the Grower's entitlement to Net Proceeds**

70. The Constitution and the Compliance Plan set out provisions relating to the Grower's entitlement to the proceeds from sale of olive oil. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- all moneys from the sale of olive oil are deposited in the Gross Proceeds Account, and only Growers who have contributed proceeds from the sale of olive oil are entitled to benefit from distributions from the Gross Proceeds Account; and
- any pooled produce must consist only of olive oil contributed by Growers of the same Project Class.

71. The Grower's interest in the Gross Proceeds Account is in proportion to the number of Lots they have contributing to the Gross Proceeds (clause 3.3 of the Constitution). Certain Project expenses can be deducted from the Gross Proceeds (noted at clause 13.3 of the Constitution), including the Grower's obligations under the Licence and Management agreements, and a Grower is only entitled to their proportion of the resultant Net Proceeds.

72. In the event of a partial or total destruction of the trees or olives on a Grower's Lot, the Grower's Proportion will be reduced accordingly (clause 13.3.3 of the Constitution).

### **Fees**

73. Under the terms of the Management agreement and the Licence agreements, a Grower will make payments as described below on a per Lot basis.

#### ***Fees payable under the Management agreement***

74. The Management agreement obligates the Grower to pay an initial and ongoing Management Fee, ongoing Olive Orchard Operating Costs, Harvesting Costs, Processing Costs, and insurance.

#### ***Management Fee***

75. The Application Fee of \$1,793 is to be paid by each Grower on application. After acceptance of the application and execution of the Management agreement, the amount of \$1,793 is paid to the Responsible Entity as a Management Fee in return for the Responsible Entity carrying out the Olive Grove establishment and Annual Report activities detailed at clauses 2 and 4 of the agreement for the period from Commencement Date to midnight on 30 June 2009. Clause 12.2 of the agreement states that the Management Fee comprises:

- \$299 for preparing the Lot to grow olives, obtaining trees, and planting the trees;
- \$35 for spacing, posting and protecting the olive trees;
- \$137 for installing irrigation; and
- \$1,322 for all other activities.

76. Commencing 1 July 2012 and on 1 July of each financial year until the end of the Project, the Grower must pay the Grower's Proportion of the actual direct costs of Olive Grove Management Pty Ltd.

## *Olive Orchard Operating Costs*

77. These costs are to be paid for the year in advance, being
- \$627 on 1 July 2009, \$440 on 1 July 2010 and \$440 on 1 July 2011, paid directly by the Grower; and
  - on 1 July 2012 and each 1 July thereafter until the end of the Project, the Grower must pay an amount equal to 8.25% of the Grower's Proportion of Gross Proceeds, paid to the Responsible Entity from the Grower's Proportion of Gross Proceeds.

## *Harvesting Costs*

78. On 1 July immediately after each harvest until the end of the Project, the Grower's Proportion of any costs or expenses of harvest will be deducted from the Grower's Proportion of Gross Proceeds.

## *Processing Costs*

79. On 1 July immediately after each harvest until the end of the Project, the Grower's Proportion of any costs or expenses of processing will be deducted from the Grower's Proportion of Gross Proceeds.

## *Insurance Costs*

80. Any insurance taken out by the Responsible Entity as detailed at clause 11 of the agreement is payable or reimbursable to the Responsible Entity.

## ***Fees payable under the Licence agreements***

81. Under Licence agreement – No. 1, for the period to midnight 30 June 2009, an Application Fee of \$11.45 per month must be paid on application, which is subsequently transferred to the Responsible Entity as an initial licence fee after acceptance and execution of the licence agreement. From 1 July 2009 to 1 July 2013, each 1 July the annual licence fee of \$137.50 must be paid.

82. Under Licence agreement – No.2, Licence agreement – No.3, and Licence agreement – No.4, from 1 July 2014 to 1 July 2028, each 1 July the amount of 4.95% of the Grower's Proportion of the Gross Proceeds will be paid to the Responsible Entity (or it may be deducted from the Grower's Proportion of the Gross Proceeds).

**Where costs and expenses exceed the Gross Proceeds**

83. Clause 13 of the Constitution provides that all interest from authorised investments and moneys received on account of the sale of olive oil will be deposited into the Gross Proceeds Account. If the fees payable to the Responsible Entity under the Management and Licence agreements exceeds the Gross Proceeds, each Grower must pay the Grower's Proportion of the deficiency.

**Finance and 12 months instalment plan**

84. A Grower who does not pay the Application Fee in full upon application can enter a 12 months instalment plan with the Responsible Entity, or borrow from an independent lender external to the Project.

85. Growers cannot rely on any part of this Ruling if the Application Fee is not paid in full on or before 31 May 2009. However, this condition does not apply if the Application Fee is financed and written evidence of that approval has been given to the Responsible Entity by 31 May 2009 and the Application Fee is paid in full on or before 15 June 2009.

86. A Grower who enters into a finance arrangement may request a private ruling on the deductibility or otherwise of any interest incurred.

87. Where the Responsible Entity accepts an application from a Grower to pay all or part of the Application Fee under a 12 months instalment plan, a deposit of between 10% and 90% of the Application Fee is required to be paid on or before 31 May 2009, with the balance of the Amount of Principal to be paid by the Grower in 12 equal monthly instalments via direct debit. The full amount of the Application Fee must be paid no later than 12 months from the date the Grower is accepted to participate in the Project.

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

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

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- 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 are involved or become involved in the provision of finance to Growers for the Project.

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**Commissioner of Taxation**

6 May 2009

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## Appendix 1 – Explanation

**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?**

89. For the amounts set out in paragraphs 22 and 23 to 26 of this Ruling to constitute allowable deductions the Grower's horticultural activities as a participant in the Project must amount to the carrying on of a business of primary production.

90. 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?

91. 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).

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

### **Deductibility of the Management Fee, Olive Orchard Operating Costs, and Licence Fees**

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

93. The Management Fees, Olive Orchard Operating Costs and Licence Fees are deductible under section 8-1. A 'non-income producing' purpose is not identifiable in the arrangement and there is no capital component evident in the Management Fees, Olive Orchard Operating Costs and Licence Fees.

94. 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 95 to 99 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.)



## **Prepayment provisions**

### ***Sections 82KZL to 82KZMF***

95. 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.

96. 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***

97. Under the scheme to which this Product Ruling applies Management Fees, Olive Orchard Operating Costs and Licence Fees are incurred annually. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

98. 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 Licence agreements and/or the Management agreement.

99. 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**

100. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the years ending 30 June 2009 to 30 June 2013, 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 olive cultivation and olive oil processing industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

101. 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.

102. 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**

103. 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**

104. 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).

105. The 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 paragraphs 22 and 23 to 26 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.

106. 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 olives. 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

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

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## References

### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 97/7; TR 97/11; TR 98/22

### *Subject references:*

- carrying on a business
- commencement of business
- licence fee expenses
- management fee expenses
- non-commercial losses
- primary production
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- tax administration
- tax avoidance
- tax shelters

### *Legislative references:*

- ITAA 1936
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A
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- SISA 1993

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- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085

### ATO references

NO: 2009/1753

ISSN: 1441-1172

ATOlaw topic: Income Tax~~Product~~olives