

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

LIST E

SCI 2009 10699

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED
(ACN 066 601 250) and WESTPAC BANKING CORPORATION
(ACN 007 457 141)**

Plaintiff

and

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522) & ORS (according to the attached Schedule)**

Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 3 March 2010
Filed on behalf of: the Second, Third and Fourth Defendants

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This is the exhibit marked '**MAK-12**' now produced and shown to MARK ANTHONY KORDA at the time of swearing this affidavit on 3 March 2010.

Before me:

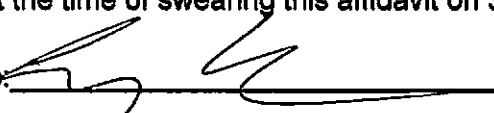

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meaning of the Legal Profession Act 2004

Exhibit 'MAK-12'

Product Ruling 2002/15



Product Ruling

Income tax: 2002 Timbercorp Almond Project (Private Offer No. 1)

Contents	Para
What this Product Ruling is about	1
Date of effect	11
Withdrawal	13
Arrangement	14
Ruling	36
Explanations	51
Example	114
Detailed contents list	115

Potential participants 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, 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. 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 participants 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 this product fits an existing portfolio, etc. We recommend 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 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, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the 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 laws' identified below apply to the defined class of persons who take part in the arrangement to which this Ruling refers. In this Ruling this arrangement is sometimes referred to as the 2002 Timbercorp Almond Project (Private Offer No. 1) or simply as 'the Project'.

Tax laws

2. The tax laws dealt with in this Ruling are:

- Section 6-5 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
- Section 8-1 (ITAA 1997);
- Section 17-5 (ITAA 1997);
- Division 27 (ITAA 1997);
- Division 35 (ITAA 1997);
- Division 328 (ITAA 1997);
- Section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- Section 82KZL (ITAA 1936);
- Section 82KZME (ITAA 1936);
- Section 82KZMF (ITAA 1936); and
- Part IVA (ITAA 1936).

Goods and Services Tax

3. In this Ruling all fees and expenditure referred to include Goods and Services Tax ('GST') where applicable. In order for an entity (referred to in this Ruling as a Grower) to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

Changes in the Law

4. The Government is currently evaluating further changes to the tax system in response to the *Ralph Review of Business Taxation* and continuing business tax reform is expected to be implemented over a

number of years. Although this Ruling deals with the taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering participating in the Project 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

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for participants in projects 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 Ruling is issued.

Class of persons

7. The class of persons to whom this Ruling applies is the persons who are more specifically identified in the Ruling part of this Product Ruling and who enter into the arrangement specified 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. In this Ruling, each of these persons, referred to as 'Growers', will have accepted an offer made under section 708 of the *Corporations Act 2001*.

8. 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

9. The Commissioner rules on the precise arrangement identified in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner. The Ruling will be withdrawn or modified.

10. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning

reproduction and rights should be addressed to the Manager,
Legislative Services, AusInfo, GPO Box 1920, Canberra ACT 2601.

Date of effect

11. This Ruling applies prospectively from 20 February 2002, 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).

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

Withdrawal

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2004. 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 arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the person's involvement in the arrangement.

Arrangement

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

- application for Product Ruling dated 27 August 2001;
- **Information Memorandum** for the 2002 Timbercorp Almond Project (Private Offer No. 1, received 5 February 2002;
- **Licence and Joint Venture Agreement** between Almond Land Pty Ltd, Timbercorp Securities Limited and each Grower, received 5 February 2002;

- **Project and Management Agreement** between Timbercorp Securities Limited, Almond Management Pty Ltd (Project Manager) and each Grower, received 5 February 2002;
- **Almond Orchard Management Agreement** between Almond Management Pty Ltd, Select Harvests Limited, Timbercorp Securities Limited, Timbercorp Limited, Almond Investments Australia Pty Ltd and Almond Land Pty Ltd, received 5 February 2002;
- **2002 Timbercorp Almond Project Private Offer No. 1 Finance Package**, received 5 February 2002;
- **Correspondence** from the applicant dated 18 September 2001 and 5 February 2002.

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

15. The documents highlighted are those Growers enter into or become a party to. 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 part of the arrangements to which this Ruling applies.

16. In accordance with the above documents, a Grower who participates in the arrangement must have accepted an offer that was made under section 708 of the *Corporations Act 2001*. This Ruling does not apply unless the Grower:

- is a 'sophisticated investor' for the purposes of subsections 708(8)-(9) of the *Corporations Act 2001*;
- has accepted an offer made by a licensed dealer where the offer meets the requirements of sub-section 708(10) of the *Corporations Act 2001*;
- is a 'professional investor' for the purposes of paragraphs (a), (b) or (h) of subsection 708(11) of the *Corporations Act 2001*; or
- is associated with Timbercorp Securities Limited for the purposes of subsection 708 (12).

17. Each of these categories is explained in paragraphs 51 to 56 in the Explanations area of this Product Ruling.

Overview

18. The arrangement is the 2002 Timbercorp Almond Project (Private Offer No. 1).

PR 2002/15

Location	Liparoo and/or Carina, north west Victoria
Type of business each participant is carrying on	Cultivating almond trees on their designated 0.25 hectare Almondlots and harvesting the almonds for processing and sale.
Area under cultivation	Up to 250 hectares, divided into 1000 Almondlots of 0.25 hectares each. Option to accept oversubscriptions and cultivate additional land.
Minimum subscription	No minimum subscription
Number of almond trees	An average of 247 trees per hectare or 62 trees per Almondlot.
Minimum number of Almondlots per Grower	Ten, although the promoter reserves the right in its absolute discretion to accept applications for less than ten.
The term of the Project	Approximately 20 years commencing on acceptance of a Grower's application and ending on 30 June 2022.
Subscription amount per Almondlot (0.25 hectares)	\$6050, comprising management fee of \$5198 and licence fee of \$852.
Ongoing fees per Almondlots (0.25 hectares)	<ul style="list-style-type: none"> • Management fees of \$1548 for each of the years ended 30 June 2003 and 30 June 2004. • Licence fees of \$852 fixed for the years ended 30 June 2003 and 2004 and indexed for CPI each year thereafter. • From the year ending 30 June 2005, Growers will be required to pay management fees that will be estimated by the Project Manager and adjusted once the actual costs of managing the Grower's Almondlots are determined. • From the financial year ending 30 June 2004, each Grower will pay its proportion (90%) of the following additional annual fees: <ul style="list-style-type: none"> (a) a management fee equal

	<p>to 2.5% of annual proceeds from the sale of almonds; and</p> <p>(b) an incentive fee, being 25% of so much of the annual proceeds (after deducting the fee referred to in paragraph (a) above) payable to a Grower in a financial year as exceeds the proceeds estimated in the prospectus, less any allowance for inflation arriving at such estimate, but indexed from the date of the Project and Management Agreement. This fee will be calculated on a 2 year rolling basis to allow for variations in yields from year to year.</p>
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19. The Land Owner, Almond Land Pty Ltd, has established approximately 1,130 hectares of almond orchards including all infrastructure and other capital works necessary to operate a commercial almond growing operation on two sites approximately 125 kilometres south-east of Mildura in north-west Victoria. The Liparoo site consists of approximately 900 hectares and the Carina site consists of approximately 140 hectares. Approximately 240 hectares at the Liparoo site were subscribed by applicants under the 2001 Timbercorp Almond Project leaving approximately 650 hectares at this site available for subscription.

20. The Project Manager, Almond Management Pty Ltd, will only provide services following the execution of the Licence and Joint Venture Agreement and the Project and Management Agreement. Applications will not be accepted after 30 June 2002. From 1 June 2002, applications will only be accepted where the Project Manager is reasonably satisfied that it can complete the services in respect of which the subscription moneys were payable on application. The subscription moneys payable on application are payable in respect of services to be wholly provided by 30 June 2002. The fees payable on 31 October 2002 and 31 October of subsequent years are payable in respect of services to be wholly provided by the next 30 June after the date the fees were payable.

21. Growers (in joint venture with Almond Land Pty Ltd) will enter into the Project and Management Agreement with Almond Management Pty Ltd, to perform services in relation to the cultivation and management of their Almondlots. Under the Almond Orchard Management Agreement, Almond Management Pty Ltd has engaged Select Harvests Limited to undertake the day to day management of the Almondlots, harvest and process the almonds and sell the almonds through its established domestic and overseas channels.

22. Under the Almond Orchard Management Agreement, Select Harvests Limited will pool the Growers' almonds with all other almonds sold by it. Each Grower will receive the same pooled average price as Select Harvests Limited receives. Accordingly, each Grower will receive a pro-rata share of the net sale proceeds less his or her annual costs. Almond Management Pty Ltd, as agent of the Growers, can choose to sell the Growers' almonds outside the pooling arrangements operated by Select Harvests Limited and to direct Select Harvests Limited to sell the almonds separately. Select Harvests Limited guarantees to Almond Management that the entire annual crop of almonds available for harvest in a particular season will be sold by 30 June in the financial year after the year in which the harvest for that season commences. However, Select Harvest Limited does not guarantee the sale price of the almonds.

23. Timbercorp Securities Limited will endeavour to arrange insurance on the Growers' behalf. Where this is available, Growers are required to insure their Almondlots against damage or destruction by fire and other insurable risks. Timbercorp Securities Limited will arrange payment of insurance premiums to the appropriate insurers.

Licence and Joint Venture Agreement

24. Under the Licence and Joint Venture Agreement, the land owner, Almond Land Pty Ltd, warrants that it has, at its own cost, established the Almondlots (separate identifiable areas of land comprising allotments of 0.25 hectares) on the Land and constructed necessary infrastructure and carried out capital works. Under this agreement each Grower will be given a right to use and occupy a minimum of ten 0.25 hectare Almondlots for a period of approximately 20 years ending on 30 June 2022, for the purpose of cultivating the Almondlots for the production of almonds for processing and sale. The Responsible Entity has the discretion to accept an application for less than ten Almondlots.

25. Under the agreement, each Grower will enter into a joint venture arrangement with Almond Land Pty Ltd (on a 90%:10% basis) in respect of the cultivation and management of their Almondlots. As a result, each Grower will be responsible for 90% of all management costs associated with the cultivation and management

of their Almondlots and will be entitled to 90% of all produce. In return for paying an annual licence fee, each applicant Grower obtains a non-exclusive licence to use and occupy Almondlots (in joint venture with Almond Land Pty Ltd). Under the terms of the agreement, a Grower may only use the land for the purpose of cultivating and harvesting almonds for processing and sale.

26. The Grower must pay Almond Land Pty Ltd a licence fee of \$852 per Almondlot on the Commencement Date for the period ending 30 June 2002 and, for each of the years ended 30 June 2003 and 2004, payable on 31 October of the relevant year. For each year ending 30 June thereafter for the Term of the Agreement a licence fee of \$852 per Almondlot, indexed by the CPI, is payable on 31 October of the relevant year. If a Grower fails to pay an amount payable by the due date, Almond Land Pty Ltd can deduct the amount from any Proceeds of the Grower or offer that Grower's Almondlots for sale.

27. At the expiration of the Project, each Grower must return the Almondlots to Almond Land in good condition but is not required to remove the almond trees or restore the Almondlots to their original condition.

Project and Management Agreement

28. Under the Project and Management Agreement, each Grower (in joint venture with Almond Land Pty Ltd) engages Almond Management Pty Ltd to manage and cultivate the orchard on behalf of the Grower in accordance with the Management Plan, harvest the almonds, procure the processing of the almonds and market the almonds. Almond Management Pty Ltd is required to perform the services listed in a proper and efficient manner in accordance with good horticultural and environmental practices. Included in the services are pruning of the almond trees, vermin control, obtaining water licences and irrigating the orchards, soil testing, fertilising the trees, destruction of diseased trees, keeping improvements in good repair, maintaining fire breaks, soil management, weed control, keeping records of chemicals applied, inspection of stakes, fences and equipment, retying trees to stakes or trellising where required and replacement of trees where required.

29. The initial Management Plan for the period ending 30 June 2002 will be drafted within 30 days of the Commencement Date. An updated Management Plan will be prepared for each subsequent financial year.

30. The Grower must pay Almond Management Pty Ltd a management fee of \$5,198 per Almondlot fee for the period from the Commencement Date until 30 June 2002, and \$1548 for each of the financial years ended 30 June 2003 and 2004 payable on

31 October of the relevant financial year. If a Grower fails to pay an amount payable by the due date, Almond Management Pty Ltd can deduct the amount from any Proceeds of the Grower or offer that Grower's Almondlots for sale.

31. Within 4 months of the end of each financial year for the duration of the Agreement, Almond Management Pty Ltd will pay each Grower the Proceeds standing to the credit of that Grower and send an Annual Report to each Grower including the results of the harvest and the condition of the orchard and trees.

Fees

32. Under the terms of the Licence and Joint Venture Agreement and the Project and Management Agreement, a Grower will make the following payments per Almondlot:

- the initial management fee of \$5198 payable on application;
- management fees per Almondlot of \$1548 for the year ending 30 June 2003 payable on 31 October 2002 and \$1548 for the year ending 30 June 2004 payable on 31 October 2003;
- from the financial year ending 30 June 2005, ongoing management fees that will be estimated, in the first instance, by Almond Management Pty Ltd and adjusted once the actual costs of managing the Grower's Almondlots are determined, payable on 31 October each year;
- licence fees of \$852 per Almondlot payable on application, \$852 on 31 October 2002 and on 31 October 2003 and thereafter, indexed to CPI, on 31 October of each subsequent year;
- from the financial year ending 30 June 2004 an additional management fee of 2.5% of the proceeds of sale;
- from the financial year ending 30 June 2004, an incentive fee, being the Grower's proportion (i.e., 90%) of 25% of so much of the proceeds of sale (after deducting the fee referred to in the previous dot point) payable to a Grower in a financial year as exceeds the proceeds estimated in the prospectus, less any allowance for inflation arriving at such estimate, but indexed from the date of the Project and Management Agreement. This fee will be calculated on a 2 year

rolling basis to allow for variations in yields from year to year.

Finance

33. Growers can either fund their participation in the Project themselves, borrow from an independent lender, or may elect to use proposed financing packages through Timbercorp Finance Pty Ltd (a lender associated with the Responsible Entity).

34. Under the financing package offered through Timbercorp Finance Pty Ltd, Growers may enter into the following finance arrangement. The minimum loan is \$5,000. A maximum of \$4,840 is available per Almondlot for the period to 30 June 2002. Further finance will be available up to 80% of the management and licence fees payable in October 2002 and 2003. Interest rates offered are fixed for the loan term. They are 9% per annum for a 3 year term, 10% per annum for a 4 year term and 11% per annum for a 5 year term. In the event of default, a higher interest rate of 13.2% per annum will apply. For some Growers, Timbercorp Finance Pty Ltd may also offer finance of up to 100% of the fees payable in the first 3 years of the project at various terms not exceeding 7 years. In all instances, the loan is repayable by equal monthly instalments of principal and interest deducted from the borrower's bank account under a direct debit authority. The first monthly instalment will become due on 31 May 2002. All or part of a loan may be repaid at any time without penalty. Corporate borrowers are required to provide guarantees and indemnities. The provision of finance involves full recourse loans and the finance provider will pursue legal action against defaulting borrowers.

35. This Ruling does not apply if a Grower enters into a finance agreement that includes 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 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 may apply;
- the loan or rate of interest is non-arm's length;

- repayments of the 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;
- 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 Timbercorp Finance Pty Ltd, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

36. This Ruling applies only to Growers who are accepted to participate in the Project on or before 30 June 2002 and who have executed a Project and Management Agreement and a Licence and Joint Venture Agreement before that date. The Grower's participation in the Project must constitute the carrying on of a business of primary production.

37. 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.

The Simplified Tax System ('STS') - Division 328

38. For a Grower participating in the Project, the recognition of income and the timing of tax deductions, including those related to capital allowances, is different depending on whether the Grower is an 'STS taxpayer'. To be an 'STS taxpayer' a Grower:

- must be eligible to be an 'STS taxpayer'; and
- must have elected to be an 'STS taxpayer'.

Qualification

39. This Product Ruling assumes that a Grower who is an 'STS taxpayer' is so for the income year in which their participation in the Project commences. A Grower may become an 'STS taxpayer' at a later point in time. Also, a Grower who is an 'STS taxpayer' may

choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer', during the term of the Project. These are contingencies relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

Tax outcomes for Growers who are not 'STS taxpayers'

Assessable Income

Section 6-5

40. That part of the gross sales proceeds from the Project attributable to the Grower's share of the gross proceeds from the sale of the product of the joint venture Project, less any GST payable on the Grower's share of those proceeds (section 17-5), will be assessable income of the Grower under section 6-5. Note that the term 'joint venture' is used in this Product Ruling in a general accounting and legal sense, and **not** as a reference to entities that are entitled to apply to the Commissioner to be treated as an approved GST joint venture within the meaning of Division 51 of *A New Tax System (Goods and Services Tax) Act 1999*.

41. The Grower recognises ordinary income from carrying on the business of growing almonds for processing and sale at the time that income is derived.

Deductions for Management fees, Licence fees, and Interest

Section 8-1

42. A Grower who is not an 'STS taxpayer' may claim tax deductions for the following revenue expenses:

Fee Type	ITAA 1997 Section	Year ended 30 June 2002	Year ended 30 June 2003	Year ended 30 June 2004
Management Fee	8-1	\$5198– See Notes (i) & (ii) (below)	\$1548 – See Notes (i) & (ii) (below)	\$1548 – See Note (i) & (ii) (below)
Licence Fee	8-1	\$852 – See Notes (i) & (ii) (below)	\$852 – See Notes (i) & (ii) (below)	\$852 – See Notes (i) & (ii) (below)
Interest	8-1	As incurred See Note (iii) (below)	As incurred See Note (iii) (below)	As incurred See Note (iii) (below)

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 (e.g., input tax credits): Division 27. See example at paragraph 114;
- (ii) The Management Fees and the Licence Fees shown in the Project and Management Agreement and the Licence and Joint Venture Agreement are deductible in full in the year that they are incurred. However, if a Grower **chooses** to prepay fees for the doing of a thing (e.g., the provision of management services or the leasing of land) that will not be wholly done in the income year the fees are incurred, the prepayment rules of the ITAA 1936 may apply to apportion those fees. In such cases, the tax deduction for the prepaid fee must be determined using the formula shown in paragraph 90 unless the expenditure is 'excluded expenditure'. 'Excluded expenditure' is an 'exception' to the prepayment rules and is deductible in full in the year in which it is incurred. For the purpose of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000;
- (iii) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd, the internal financier, is outside the scope of this Ruling. However all Growers, including those who finance their participation in the Project other than with Timbercorp Finance Pty Ltd, should read the discussion of the prepayment rules in paragraphs 84 to 98 (below) as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.

Tax outcomes for Growers who are 'STS taxpayers'**Assessable Income****Section 6-5**

43. That part of the gross sales proceeds from the Project attributable to the Grower's share of the gross proceeds from the sale of the product of the joint venture Project, less any GST payable on the Grower's share of those proceeds (section 17-5), will be assessable income of the Grower under section 6-5. Note that the term 'joint venture' is used in this Product Ruling in a general accounting and

legal sense, and **not** as a reference to entities that are entitled to apply to the Commissioner to be treated as an approved GST joint venture within the meaning of Division 51 of *A New Tax System (Goods and Services Tax) Act 1999*.

44. The Grower recognises ordinary income from carrying on the business of growing almonds for processing and sale at the time the income is received (paragraph 328-105(1)(a)).

Deductions for Management fees, Licence fees, and Interest

Section 8-1 and section 328-105

45. A Grower who is an 'STS taxpayer' may claim tax deductions for the following revenue expenses:

Fee Type	ITAA 1997 Sections	Year ended 30 June 2002	Year ended 30 June 2003	Year ended 30 June 2004
Management Fee	8-1 & 328-105	\$5198 – See Notes (iv), (v) & (vi) (below)	\$1548 – See Notes (iv), (v) & (vi) (below)	\$1548 – See Notes (iv), (v) & (vi) (below)
Licence Fee	8-1 & 328-105	\$852 – See Notes (iv), (v) & (vi) (below)	\$852 – See Notes (iv), (v) & (vi) (below)	\$852 – See Notes (iv), (v) & (vi) (below)
Interest	8-1 & 328-105	When paid - See Notes (v) & (vii) (below)	When paid - See Notes (v) & (vii) (below)	When paid - See Notes (v) & (vii) (below)

Notes:

- (iv) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (e.g., input tax credits): Division 27. See example at paragraph 114;
- (v) If, for any reason, an amount shown in the Table above is not fully paid in the year in which it is incurred by a Grower who is an 'STS taxpayer' then the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower. Any amount or part of an amount shown in the Table above which is not paid in the year in which it is incurred will be deductible in the year in which it is actually paid;

- (vi) Where a Member who is an 'STS taxpayer', pays the Management fees and the Licence fees shown in the Project and Management Agreement and the Licence and Joint Venture Agreement, those fees are deductible in full in the year that they are paid. However, if a Grower **chooses** to prepay fees for the doing of a thing (e.g. the provision of management services or the leasing of land) that will not be wholly done in the income year the fees are incurred, the prepayment rules of the ITAA may apply to apportion those fees (see paragraphs 84 to 98). In such cases, the tax deduction for the prepaid fee must be determined using the formula shown in paragraph 90, unless the expenditure is 'excluded expenditure'. 'Excluded expenditure' is an 'exception' to the prepayment rules, and is deductible in full in the year in which it is incurred. For the purpose of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000;
- (vii) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd, the internal financier, is outside the scope of this Ruling. However all Growers, including those who finance their participation in the Project other than with than Timbercorp Finance Pty Ltd., should read the discussion of the prepayment rules in paragraph 84 to 98 (below) as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.

Tax outcomes that apply to all Growers

Division 35 – Deferral of losses from non-commercial business activities

Section 35-55 – Commissioner's discretion

46. For a Grower who is an individual and who enters the Project during the year ended 30 June 2002 the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner will decide for the income years ending 30 June 2002 to 30 June 2006 that the rule in section 35-10 does not apply to this activity provided that the Project is carried out in the manner described in this Ruling.

47. This exercise of the discretion in subsection 35-55(1) will not be required where, for any year in question:

- the 'exception' in subsection 35-10(4) applies (see paragraph 102 in the Explanations part of this ruling, below);
- a Grower's business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45;
- the Grower's business activity produces assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsection 35-10(2)); or
- the Commissioner is precluded from exercising the discretion under paragraph 35-55(1)(b) because of subsection 35-55(2).

48. Where, the exception in subsection 35-10(4) applies, the Grower's business activity satisfies one of the tests, or the discretion in subsection 35-55(1) is exercised, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of deductions attributable to their business activity in excess of any assessable income from that activity, i.e., any 'loss' from that activity, to a later year. Instead, this 'loss' can be offset against other assessable income for the year in which it arises.

49. Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner's decision to exercise the discretion in paragraph 35-55(1)(b) as an indication that the Tax Office sanctions or guarantees the Project or the product to be commercially viable. An assessment of the Project or the product from this perspective has not been made.

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

50. For a Grower who participates in the Project and incurs expenditure as required by the Management Agreement and the Lease 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 - 82KZMF (but see paragraphs 86 to 98);
- 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.

Explanations

Section 708 of the *Corporations Act 2001*

51. For this Ruling to apply, an offer for an interest in the project must have been made to, and accepted by the Grower under one of four categories in subsections 708(8)-(12) of the *Corporations Act 2001*. These provisions set out situations where a prospectus or similar disclosure document is not required.

52. A Grower who is a 'sophisticated investor' may accept an offer for interests in the project under subsections 708(8)-(10). Under subsection 708(8), an investor in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will be a 'sophisticated investor' where:

- the minimum amount payable for the interests in the project on acceptance of the offer by the person to whom the offer is made is at least \$500,000;
- the amount payable for the interests in the project on acceptance by the person to whom the offer is made and the amounts previously paid by the person for interests in the project of the same class that are held by the person add up to at least \$500,000; or
- it appears from a certificate given by a qualified accountant no more than 6 months before the offer is made that the person to whom the offer is made:
 - (i) has net assets of at least \$2.5 million; or
 - (ii) has a gross income for each of the last 2 financial years of at least \$250,000 a year.

53. A Grower may also participate in the project where the offer is made by a licensed dealer under subsection 708(10). Under this provision the dealer must be satisfied that the person to whom the offer is made has previous experience in investing which allows them to assess the merits of the offer, the value of the interests in the project, the risks involved in accepting the offer, their own information needs and the adequacy of the information provided.

54. The licensed dealer must provide a written statement of reasons for being so satisfied. Where a Grower is accepted into the project under this provision he or she must sign an acknowledgment that they did not receive a prospectus in relation to the offer.

55. Under subsection 708(11) an offer may be made to and accepted by a person who is considered to be a professional investor. Growers who participate in the project under this provision will be, at the time the offer is made:

- a person who is a licensed or exempt dealer and who is acting as a principal;
- a person who is a licensed or exempt investment adviser and who is acting as a principal; or
- a person who controls at least \$10 million for the purposes of investment in securities.

56. Under subsection 708(12) an offer may be made to and accepted by a person who is associated with Almond Management Pty Ltd. A Grower who participates in the project under this provision will be, at the time the offer is made, an executive officer of Almond Management Pty Ltd or a related body or their spouse, parent, child, brother or sister or a body corporate controlled by such a person.

Is the Grower carrying on a business?

57. For the amounts set out in the Tables above to constitute allowable deductions the Grower's almond growing activities as a participant in the 2002 Timbercorp Almond Project (Private Offer No. 1) must amount to the carrying on of a business of primary production. These almond growing activities will fall within the definitions of 'horticulture' and 'commercial horticulture' in section 40-535 of the ITAA 1997.

58. For projects such as that of the 2002 Timbercorp Almond Project (Private Offer No. 1), Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As Taxation Ruling TR 2000/8 sets out, these circumstances have been established in court decisions such as *FCT v. Lau* 84 ATC 4929.

59. Generally, a Grower will be carrying on a business of cultivating almond trees and harvesting the almonds for processing and sale and hence primary production, if:

- the Grower has an identifiable interest (by lease or by licence) in the land on which the Grower's almond trees are established;
- the Grower has a right to harvest and sell the almonds each year from those almond trees;
- the almond growing activities are carried out on the Grower's behalf;
- the almond growing activities of the Grower are typical of those associated with a horticultural business; and
- the weight and influence of general indicators point to the carrying on of a business.

60. In this Project, each Grower enters into the Project and Management Agreement and the Licence and Joint Venture Agreement.

61. Under the Licence and Joint Venture Agreement each individual Grower will have rights over a specific and identifiable area of land. The Licence and Joint Venture Agreement provides the Grower with an ongoing interest in the specific almond trees on the licensed area for the term of the Project. Under the licence the Grower must use the land in question for the purpose of carrying out almond growing activities and for no other purpose. The licence allows the Project Manager to come onto the land to carry out its obligations under the Project and Management Agreement.

62. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the Project's description for all the indicators.

63. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of its almonds that will return a before-tax profit, i.e., a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

64. The pooling of almonds grown on the Grower's Almondlots with the almonds of other Growers is consistent with general horticultural practices. Each Grower's proportionate share of the sale proceeds of the pooled almonds will reflect the proportion of the almonds contributed from their Almondlots.

65. The Project Manager's services are also consistent with horticultural practices. While the size of an Almondlot is relatively small, it is of a size and scale to allow it to be commercially viable. (see Taxation Ruling IT 360).

66. The Grower's degree of control over the Project Manager as evidenced by the Project and Management Agreement, and supplemented by the Corporations Act, is sufficient. During the term of the Project, the Manager will provide the Grower with regular progress reports on the Grower's Almondlots and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Project Manager in certain instances, such as cases of default or neglect.

67. The almond growing 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. For the purposes of this Ruling, the Growers' almond growing activities in the 2002 Timbercorp Almond Project (Private Offer No. 1) will constitute the carrying on of a business.

The Simplified Tax System**Division 328**

68. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

69. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductibility of management fees and licence fees**Section 8-1**

70. Consideration of whether the initial management fees and licence fees are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing 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 the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer is contractually committed 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 the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

71. The management fees and licence fees associated with the almond growing activities will relate to the gaining of income from the Grower's business of almond growing (see above), and hence have a sufficient connection to the operations by which income (from the regular sale of almonds) is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. There is no capital component of the management fee. The tests of deductibility

under the first limb of section 8-1 are met. The exclusions do not apply.

Possible application of prepayment provisions

72. Under the Project and Management Agreement and the Licence and Joint Venture Agreement neither the management fees nor the licence fees are for things to be done beyond 30 June in the year in which the relevant amounts are incurred. In these circumstances, the prepayment provisions in sections 82KZME and 82KZMF have no application to these fees.

73. However, where a Grower chooses to prepay these fees for a period beyond the income year in which the expenditure is incurred, the prepayment provisions (see paragraphs 84 to 98) will apply to determine the amount and timing of the deductions regardless of whether the Grower is an 'STS taxpayer' or not. These provisions apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF. This is subject to the 'excluded expenditure' exception. For the purpose of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000.

Timing of deductions

74. In the absence of any application of the prepayment provisions, the timing of deductions for the management fees or the licence fees will depend upon whether a Grower is an 'STS taxpayer' or is not an 'STS taxpayer'.

75. If the Grower is not an 'STS taxpayer', the management fees and the licence fees are deductible in the year in which they are incurred.

76. If the Grower is an 'STS taxpayer' the management fees and the licence fees are deductible in the income year in which they are paid, or are paid for the Grower (paragraph 328-105(1)(b)). If any amount that is properly incurred in an income year remains unpaid at the end of that income year, the unpaid amount is deductible in the income year in which it is actually paid or is paid for the Grower.

Interest deductibility**Section 8-1***(i) Growers who use Timbercorp Finance Pty Ltd as the finance provider*

77. Some Growers may finance their participation in the Project through a loan facility with Timbercorp Finance Pty Ltd. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of lease and management fees.

78. The interest incurred for the year ended 30 June 2002 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations - the cultivation and growing almonds and the licence of the land on which the almond trees have been planted - that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

79. As with the management fees and the licence fees, in the absence of any application of the prepayment provisions (see paragraphs 84 to 98), the timing of deductions for interest will again depend upon whether a Grower is an 'STS taxpayer' or is not an 'STS taxpayer'.

80. If the Grower is not an 'STS taxpayer', interest is deductible in the year in which it is incurred.

81. If the Grower is an 'STS taxpayer' interest is not deductible until it has been both incurred and paid, or is paid for the Grower. If interest that is properly incurred in an income year remains unpaid at the end of that income year, the unpaid amount is deductible in the income year in which it is actually paid, or is paid for the Grower.

(ii) Growers who DO NOT use Timbercorp Finance Pty Ltd as the finance provider

82. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

83. While the terms of any finance agreement entered into between relevant Growers and such financiers are subject to commercial negotiation, those agreements may require interest to be prepaid. Alternatively, a Grower may choose to prepay such interest.

Unless such prepaid interest is 'excluded expenditure' any tax deduction that is allowable will be subject to the prepayment provisions of the ITAA 1936 (see paragraphs 84 to 98).

Prepayment provisions

Sections 82KZL to 82KZMF

84. 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 (e.g., 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.

85. For this Project only section 82KZL (an interpretive provision) and sections 82KZME and 82KZMF are relevant. Where the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for prepaid expenditure under section 82KZMF using the formula in subsection 82KZMF(1). These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF.

Sections 82KZME and 82KZMF

86. Where the requirements of subsections 82KZME(2) and (3) are met, the formula in subsection 82KZMF(1) (see below) will apply to apportion expenditure that is otherwise deductible under section 8-1 of the ITAA 1997. The requirements of subsection 82KZME(2) will be met if expenditure is incurred by a taxpayer in return for the doing of a thing that is not to be wholly done within the year the expenditure is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1)).

87. The requirements of subsection 82KZME(3) will be met where the agreement (or arrangement) has the following characteristics:

- the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year; and
- the taxpayer does not have effective day to day control over the operation of the agreement. That is, the

significant aspects of the arrangement are managed by someone other than the taxpayer; and

- either:
 - a) there is more than one participant in the agreement in the same capacity as the taxpayer; or
 - b) the person who promotes, arranges or manages the agreement (or an associate of that person) promotes similar agreements for other taxpayers.

88. For the purpose of these provisions, the agreement includes all activities that relate to the agreement (subsection 82KZME(4)). This has particular relevance for a Grower in this Project who, in order to participate in the Project may borrow funds from a financier other than Timbercorp Finance Pty Ltd. Although undertaken with an unrelated party, that financing would be an element of the arrangement. The funds borrowed and the interest deduction are directly related to the activities under the arrangement. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF.

89. There are a number of exceptions to these rules, but for Growers participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1). However, for the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the arrangement that is less than \$1,000. Such expenditure is immediately deductible.

90. Where the requirements of section 82KZME are met, section 82KZMF applies to apportion relevant prepaid expenditure. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

91. In the formula 'eligible service period' (defined in subsection 82KZL(1)) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

Application of the prepayment provisions to this Project

92. In this Project, an initial management fee of \$5198 and an initial licence fee of \$852 per Almondlot will be incurred on execution of the Project and Management Agreement and the Licence and Joint Venture Agreement. The management fee and the licence fee are charged for providing management services or leasing land to a Grower by 30 June of the year of execution of the Agreements. Under the Agreements, further annual expenditure is required each year during the term of the Project for the provision of management services and land until 30 June in those years.

93. In particular, the management fee is expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the description of the arrangement that the initial management fee has been inflated to result in reduced fees being payable for management fees in subsequent years.

94. There is also no evidence that might suggest the management services covered by the fee could not be provided within the relevant expenditure year. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial management fee and the fees for subsequent years, is for the Manager doing 'things' that are not to be wholly done within the expenditure year. Under the Licence and Joint Venture Agreement, licence fees are payable annually on 31 October for the licence to use and occupy the land from 1 July to 30 June during the expenditure year. Similarly, under the loan agreements to be executed between Growers and Timbercorp Finance Pty Ltd interest is payable monthly in arrears.

95. On this basis, provided a Grower incurs expenditure as required under the Project agreements, as set out in paragraph 14, then the basic precondition in subsection 82KZME(2) is not satisfied and, in these circumstances, section 82KZMF will have no application.

Growers who choose to pay fees for a period in excess of that required by the Project's agreements

96. Although not required under either the Project and Management Agreement, the Licence and Joint Venture Agreement, or the Loan Agreement with Timbercorp Finance Pty Ltd, a Grower participating in the Project may choose to prepay fees/interest for a period beyond the 'expenditure year'. Similarly, Growers who use financiers other than Timbercorp Finance Pty Ltd may either choose, or be required to prepay interest. Where this occurs, contrary to the conclusion reached in paragraph 95 above, section 82KZMF will apply to apportion the expenditure and allow a deduction over the period in which the prepaid benefits are provided.

97. For these Growers, the amount and timing of deductions for any relevant prepaid management fees, prepaid licence fees or prepaid interest will depend upon when the respective amounts are incurred and what the 'eligible service period' is in relation to these amounts.

98. However, as noted above, prepaid fees of less than \$1,000 incurred in an expenditure year will be 'excluded expenditure' and will be not subject to apportionment under section 82KZMF.

Deferral of losses from non-commercial business activities

Division 35

99. Division 35 applies to losses from certain business activities for the income year ended 30 June 2001 and subsequent years. Under the rule in subsection 35-10(2), a deduction for a loss made by an individual from certain business activities will not be taken into account in an income year unless:

- the exception in subsection 35-10(4) applies;
- one of four tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or
- if one of the tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

100. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

101. Losses that cannot be taken into account in a particular year of income, because of subsection 35-10(2), can be applied to the extent of future profits from the business activity, or are deferred until one of the tests is passed, the discretion is exercised, or the exception applies.

102. For the purposes of applying Division 35, subsection 35-10(3) allows taxpayers to group business activities 'of a similar kind'. Under subsection 35-10(4), there is an 'exception' to the general rule in subsection 35-10(2) where the loss is from a 'primary production business' activity and the individual taxpayer has other assessable income for the income year from sources not related to that activity, of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

103. In broad terms, the tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);

PR 2002/15

- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year)(section 35-35);
- (c) at least \$500,000 of real property, or an interest in real property, (excluding any private dwelling) is used on a continuing basis in carrying on the business activity in that year (section 35-40); or
- (d) at least \$100,000 of certain other assets (excluding cars, motor cycles and similar vehicles) are used on a continuing basis in carrying on the business activity in that year (section 35-45).

104. A Grower who participates in the Project will be carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling indicates that a Grower who acquires the minimum allocation of 10 Almondlots in the Project is unlikely to have their activity pass one of the tests until the income year ended 30 June 2007. Growers who acquire more than the minimum allocation in the Project may however, find that their activity meets one of the tests in an earlier income year.

105. Therefore, prior to this time, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

106. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, the second arm of the discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where:

- (i) the business activity has started to be carried on;
- (ii) because of its nature, it has not yet met one of the tests set out in Division 35; and
- (iii) there is an expectation that the business activity of an individual taxpayer will either pass one of the tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

107. Information provided with this Product Ruling indicates that a Grower who acquires the minimum participation of 10 Almondlots in the Project is expected to be carrying on a business activity that will either pass one of the tests, or produce a taxation profit, for the year ended 30 June 2007. The Commissioner will decide for such a Grower that it would be reasonable to exercise the second arm of the discretion until the year ended 30 June 2006. Subsection 35-55(2) prevents the Commissioner exercising the discretion beyond this year.

108. This Product Ruling is issued on a prospective basis (i.e., before an individual Grower's business activity starts to be carried on). The Project, however, may fail to be carried on during the income years specified above (see paragraph 42), in the manner described in the Arrangement (see paragraphs 14 to 35). If so, this Ruling, and specifically the decision in relation to paragraph 35-55(1)(b), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) not apply, may be affected, because the Ruling no longer applies (see paragraph 9). Growers may need to apply for private rulings on how paragraph 35-55(1)(b) will apply in such changed circumstances.

109. In deciding that the second arm of the discretion in paragraph 35-55(1)(b) will be exercised on this conditional basis, the Commissioner has relied upon:

- the report of the independent horticultural expert provided with the application by the Responsible Entity;
- the binding Almond Orchard Management Agreement with Select Harvests Limited for the sale of the almonds at prices that realistically reflect the existing market and/or the projected market in the geographical region where the almonds are grown;
- independent and objective information relating to the almond industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity.

Section 82KL - recouped expenditure

110. The operation of section 82KL 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. It will not apply to deny the deduction otherwise allowable under section 8-1.

Part IVA - general tax avoidance provisions

111. 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).

112. The 2002 Timbercorp Almond Project (Private Offer No. 1) 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 42 and 45 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.

113. 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 their 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) it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Example

Example 1 – Entitlement to GST input tax credits

114. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her viticulture business. Her manager is registered for GST and charges her a management fee payable every six months in advance. On 1 December 2001 Susan receives a valid tax invoice from her manager requesting payment of a management fee in advance, and also requesting payment for an improvement in the connection of electricity for her vineyard that she contracted him to carry out. The tax invoice includes the following details:

Management fee for period 1/1/2002 to 30/6/2002	\$4 400*
Carrying out of upgrade of power for your vineyard as quoted	<u>\$2 200*</u>
Total due and payable by 1 January 2002 (includes GST of \$600)	<u>\$6 600</u>

*Taxable supply

Susan pays the invoice by the due date and calculates her input tax credit on the management fee (to be claimed through her Business Activity Statement) as:

$$1/11 \times \$4400 = \$400.$$

Hence her outgoing for the management fee is effectively \$4400 less \$400, or \$4000.

Similarly, Susan calculates her input tax credit on the connection of electricity as:

$$1/11 \times \$2200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2200 *less* \$200, or \$2000.

In preparing her income tax return for the year ended 30 June 2002, Susan is aware that the management fee is deductible in the year incurred. She calculates her management fee deduction as \$4000 (not \$4400).

Susan is aware that the electricity upgrade is deductible 10% per year over a 10 year period. She calculates her deduction for the power upgrade as \$200 (one tenth of \$2000 only, not one tenth of \$2200).

Detailed contents list

115. Below is a detailed contents list for this Product Ruling:

	Paragraph
What this Ruling is about	1
Tax laws	2
Goods and Services Tax	3
Changes in the Law	4
Note to promoters and advisers	6
Class of persons	7
Qualifications	9
Date of effect	11
Withdrawal	13
Arrangement	14
Overview	18
Licence and Joint Venture Agreement	24
Project and Management Agreement	28
Fees	32
Finance	33
Ruling	36
Application of this Ruling	36
The Simplified Tax System ('STS') - Division 328	38
Qualification	39

Tax outcomes for Growers who are not ‘STS taxpayers’	40
Assessable Income	40
Section 6-5	40
Deductions for Management fees, Licence fees, and Interest	42
Section 8-1	42
Tax outcomes for Growers who are ‘STS taxpayers’	43
Assessable Income	43
Section 6-5	43
● Deductions for Management fees, Licence fees, and Interest	45
Sections 8-1 and 328-105	45
Tax outcomes that apply to all Growers	46
Section 35-55 – Deferral of losses from non-commercial business activities	46
Section 35-55 – Commissioner’s discretion	46
Sections 82KZME – 82KZMF, 82KL and Part IVA	50
Explanations	51
Section 708 of the <i>Corporations Act 2001</i>	51
Is the Grower carrying on a business?	57
The Simplified Tax System	68
● Division 328	68
Deductibility of management fees and licence fees	70
Section 8-1	70
<i>Possible application of the prepayment provisions</i>	72
<i>Timing of deductions</i>	74
Interest deductibility	77
Section 8-1	77
(i) <i>Growers who use Timbercorp Finance Pty Ltd as the finance provider</i>	77
(ii) <i>Growers who DO NOT use Timbercorp Finance Pty Ltd as the finance provider</i>	82
Prepayment provisions	84
Sections 82KZL – 82KZMF	84
<i>Sections 82KZME and 82KZMF</i>	86

<i>Application of the prepayment provisions to this Project</i>	92
<i>Growers who <u>choose</u> to pay fees for a period in excess of that required by the Project's agreements</i>	96
Deferral of losses from non-commercial business activities	99
Division 35	99
Section 82KL - recouped expenditure	110
Part IVA - general anti-avoidance provisions	111
Example	114
Example 1 – Entitlement to GST input tax credits	114
Detailed contents list	115

Commissioner of Taxation
20 February 2002

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- public rulings	- ITAA 1997 35-10(2)
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- taxation administration	- ITAA 1997 35-10(4)
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PR 2002/15

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