

**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-18**' 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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An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

Exhibit 'MAK-18'

Product Ruling 2006/2



Product Ruling

Income tax: 2006 Timbercorp Almond Project – Post 30 June Growers

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1 This Ruling provides you with the following level of protection:

This publication (excluding appendices) 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 taxation provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any under-paid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state the law how the current law applies to you.

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

No guarantee of commercial success

The Tax Office **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 and how the product fits an existing portfolio. 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 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. Potential participants may wish to seek assurances from the promoter that the scheme will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office will be undertaking review activities to confirm the scheme has been implemented as described below and to ensure that the participants in the scheme 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 entities, 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 Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'taxation provision(s)' identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Ruling this scheme is referred to as the '2006 Timbercorp Almond Project' or simply as 'the Project'.

Relevant taxation provision(s)

2. The relevant taxation provisions dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 17-5 of the ITAA 1997;
- section 25-25 of the ITAA 1997;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Division 40 of the ITAA 1997;
- Subdivision 61-J of the ITAA 1997;
- Division 328 of the ITAA 1997;
- section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- sections 82KZME and 82KZMF of the ITAA 1936; and
- Part IVA of the ITAA 1936.

Goods and Services Tax

3. All fees and expenditure referred to in this 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 its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

Changes in the Law

4. Although this Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of 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 entities

7. The class of entities to whom this Ruling applies is the entities more specifically identified in the Ruling part of this Product Ruling and who enter into the scheme specified below on or after the date this Ruling is made. They will have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the scheme. In this Ruling, these entities are referred to as 'Growers'.

8. The class of entities to whom this Ruling applies does not include:

- entities who intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- entities who participate in the Project through offers made other than through the Product Disclosure Statement;
- entities who are accepted to participate in the Project before 1 July 2006 and after 15 June 2007;
- entities who finance their participation in the Project through loans with Timbercorp Finance Pty Ltd other than those described at paragraphs 63 to 69 of this Product Ruling; and
- Timbercorp Securities Limited and its associates.

Qualifications

9. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out, is carried out in accordance with the scheme described at paragraphs 15 to 68.

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

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

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Barton ACT 2600

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Date of effect

12. This Ruling applies prospectively from 15 February 2006, 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).

13. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the scheme 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

14. This Product Ruling is withdrawn and ceases to have effect after 30 June 2008. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all entities within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, who entered into

the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entity's involvement in the scheme.

Scheme

15. 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 28 September 2005 and additional correspondence and emails dated 3 and 18 November 2005, 23 December 2005, 3, 10, 27, 31 January 2006 and 27 March 2006;
- Draft Product Disclosure Statement for the 2006 Timbercorp Almond Project ('PDS'), undated, received 3 January 2006, prepared for Timbercorp Securities Limited ('TSL'), ('the Responsible Entity');
- The **Constitution** of the 2006 Timbercorp Almond Project, undated, received on 10 January 2006;
- Draft Compliance Plan of the 2006 Timbercorp Almond Project, received 28 September 2005;
- Tree Supply and Capital Works Agreement for the 2006 Timbercorp Almond Project between Almond Land Pty Ltd, Select Harvest Limited ('Select') and Timbercorp Limited, received on 28 September 2005;
- Tree Supply and Capital Works Agreement – Establishment Plan, for the 2006 Timbercorp Almond Project between Almond Land Pty Ltd, and Select received on 28 September 2005;
- Irrigation Supply Agreement, for the 2006 Timbercorp Almond Project, between Almond Management Pty Ltd and Almond Land Pty Ltd received on 18 November 2005;
- Draft Almond Orchard Management Plan for the 2006 Timbercorp Almond Project, received on 28 September 2005;
- Draft Management Agreement between TSL and Almond Management Pty Ltd, received on 23 December 2005;

- Draft Almond Orchard Management Agreement for the 2006 Timbercorp Almond Project between Almond Management, Select, TSL, Timbercorp Limited, and Almond Land Pty Ltd, received on 28 September 2005;
- Draft Lease Agreement between Almond Land Pty Ltd and TSL in relation to part of the Project land known as 'Narcooyia Property', received on 6 February 2006;
- Draft Lease Agreement between Almond Land Pty Ltd and TSL in relation to part of the Project land known as 'Mitchell Property', received on 28 September 2005;
- Draft Custody Agreement between TSL and the Trust Company of Australia Limited ('the Custodian'), received on 28 September 2005; and
- 2006 Timbercorp Projects Finance Package, which includes the **Loan Application Form**, and Loan Explanation and Loan Terms, received on 3 November 2005.
- Supplementary Product Disclosure Statement issued by TSL for the 2006 Timbercorp Almond Project, received 27 March 2006;
- **First Supplemental Deed to the Constitution of the 2006 Timbercorp Almond Project**, received 27 March 2006;
- **Almondlot Management Agreement** between each Grower and TSL, received 27 March 2006;
- **Deed of Variation to the Tree Supply and Capital Works Agreement for the 2006 Timbercorp Almond Project**, between Almond Land Pty Ltd, Select, Timbercorp Limited and Almond Investments Australia Limited, received 27 March 2006;
- **Deed of Variation of the Almond Orchard Management Agreement for the 2006 Timbercorp Almond Project**, between Almond Management, Select, TSL, Timbercorp Limited, and Almond Land Pty Ltd, received 27 March 2006;
- **Lease Agreement** between Almond Land Pty Ltd and TSL in relation to part of the Project land known as 'Westmore Property', received 27 March 2006;
- **Sub-lease Deed** between each Grower, Almond Land Pty Ltd and TSL in relation to [Narcooyia Property – Post Supplementary], received 27 March 2006;
- **Sub-lease Deed** between each Grower, Almond Land Pty Ltd and TSL in relation to [Mitchell Property – Post Supplementary], received 27 March 2006; and

- **Sub-lease Deed** between each Grower, Almond Land Pty Ltd and TSL in relation to [Westmore Property – Post Supplementary], received 27 March 2006.

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

16. The documents highlighted are those that a 'Participant Grower' (referred to in this Ruling as 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.

17. 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

18. The main features of the 2006 Timbercorp Almond Project are as follows:

| | |
|---|---|
| Location | North West Victoria |
| Type of business to be carried on by each participant | Commercial growing and cultivation of almonds trees for the purpose of harvesting and selling the almonds |
| Number of hectares offered for cultivation | Up to 1,000 with capacity for oversubscription. |
| Size of each interest | 0.25 hectares, of which 0.15 hectares will be located on 'Narcooyia' and 0.10 hectares will be located on 'Mitchell' or Westmore. |
| Minimum allocation | 2 'Almondlots' (TSL may allocate less at its absolute discretion.) |
| Minimum subscription | None |
| Number of plants per hectare | Approximately 247 |
| Term of the Project | 22 years |
| Initial cost per 'Almondlot' | \$9,500 |
| Ongoing costs | Annual 'Rent'; 'Annual Management Fees'; and charges |
| Other costs | Deferred management fees; |

| | |
|--|-----------------------------------|
| | Incentive fees; and Insurance. |
|--|-----------------------------------|

19. The Project will be registered as a managed investment scheme under the *Corporations Act 2001*. Timbercorp Securities Limited ('TSL') has been issued with an Australian Financial Service Licence and will be the Responsible Entity for the Project.

20. An offer to participate in the Project will be made through a Product Disclosure Statement ('PDS'). The offer under the PDS is for 1,000 hectares in the Project, with capacity for oversubscription. Participants will be invited to subscribe for at least two 'Almondlots' comprising of 0.25 hectares per 'Almondlot'.

21. 'Applications' to participate in the Project must be made on the application form shown in the PDS. There is no minimum amount that must be raised under the PDS. A Custodian will be appointed under the Custody Agreement to protect the interests of a 'Grower' in their dealings with TSL.

22. For an 'Applicant', who is accepted as a 'Grower' in the Project, TSL will allocate 'Almondlots', place their details in a 'Register' and enter into 'Agreements' in relation to the 'Almondlots' allocated to the 'Grower' with TSL and its associates.

23. A 'Grower' accepted on or after 1 July 2006 and on or before 15 June 2007, will commence participation as a 'Post 30 June Grower'. **Note that a separate Product Ruling PR 2006/1 has issued for 'Growers' accepted into the Project from 15 February 2006 to 15 June 2006.**

24. The Project lands on which a 'Grower' will be growing and cultivating 'Almond Trees' for the production of 'Almonds' are on properties known as Narcooyia and either Mitchell or Westmore, which are situated near Boundary Bend, in North West Victoria. TSL will enter into a 'Head Lease' with the Land Owner for the 'Land' and the 'Water Licences'.

25. TSL will grant each 'Grower' a 'Sub-lease' to use and occupy two or more identifiable 'Almondlots' totalling 0.25 hectares for the Term of the Project. However, TSL reserves the right to accept 'Applications' for less than two 'Almondlots'.

26. A 'Grower' will also enter into an Almondlot Management Agreement with TSL to cultivate and maintain the 'Almond Trees' and be responsible for harvesting, procuring the processing of and selling the 'Grower's' 'Almonds', 'Crop' or 'Product'.

27. As an alternative to participation by a 'Grower' as a single entity, the terms of the Constitution, the Almondlot Management Agreement, and the Sub-lease Deed provide that two 'Growers' may enter into a 'Joint Venture'.

Constitution

28. The Constitution establishes the Project and operates as a deed binding all of the 'Growers' and Timbercorp Securities Limited as 'Responsible Entity' (clause 8.6). The Constitution sets out the terms and conditions under which the 'Responsible Entity' agrees to act and thereby manage the Project.

29. The Responsible Entity must hold the 'Application Money' as a bare trustee for the 'Applicant' (clause 4). The 'Application Money' paid by any 'Applicant' must be accounted for by the 'Responsible Entity' in a special trust account and such amounts placed in one or more bank accounts solely for the purposes of depositing the 'Application Money' for the Project. Once TSL is satisfied that all documents have been executed and the required finance has been approved for an 'Applicant', the 'Application Money' is released and applied against the fees due to the 'Responsible Entity' (clause 9.3).

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

- invitations and offers under the PDS (clause 2);
- appointment of the 'Responsible Entity' as the 'Grower's' irrevocable agent, representative and attorney (clause 3);
- how the 'Responsible Entity' is to hold property of the 'Grower' (clause 5);
- procedures relating to 'Applications' (clause 6);
- the discretion of the 'Responsible Entity' to refuse an 'Application' (clause 7);
- the effect of an 'Applicant's' 'Application' being accepted by the 'Responsible Entity' (clause 8);
- preparation and execution of the Sub-lease Deed, and Almondlot Management Agreement by the 'Responsible Entity' and release of the 'Application Moneys' (clause 9);
- preparation and issuing of 'Almondlot' Statements' to a 'Grower' and the setting up and maintenance of a 'Register' of 'Growers' (clause 10);
- the 'Responsible Entity's' powers (clause 11);
- the keeping of a separate 'Agency Account' for the holding of 'Proceeds and any other money', apart from 'Application Money' and interest thereon, that the 'Responsible Entity' may hold for the 'Grower' (clause 12);
- procedures relating to processing and the sale of 'Crop' and distributions from the 'Agency Account' of 'Proceeds' and pooling of amounts (clause 13);

- the right of the 'Responsible Entity' to be paid fees and other expenses (clause 14);
- authority to use money in the 'Agency Account' and powers of investment of the money standing in the 'Agency Account' (clauses 15 and 16);
- the status, the retention by the 'Responsible Entity', and termination by the 'Responsible Entity' or the 'Grower', of the Almondlot Management Agreement, or Sub-lease Deed. This includes the right of 'Grower' to obtain a copy of the above agreements by written request to the 'Responsible Entity' (clause 18.2);
- the right of a 'Grower' to inspect certain documents related to their participation in the Project and to offer and give opinions to TSL (clause 19.1);
- the assignment and transmission of 'Almondlots' (clause 20) and restrictions on such assignments and transmissions (clause 21);
- procedures for calling a meeting of 'Growers' (clause 22);
- resolution of complaints made by the 'Grower' in relation to the Project or the 'Responsible Entity' (clause 25); and
- termination of the Project (clause 26).

Joint Venture

31. Clause 29 of the Constitution also provides for two entities to participate in the Project as 'Joint Venturers'. Each of the 'Joint Venturers' will be entitled to a 'Prescribed Proportion' of the 'Joint Venture Assets' and any losses realised will be as tenants in common in their 'Prescribed Portions'. The 'First Joint Venturer' has a 52% 'Prescribed Proportion', and the 'Second Joint Venturer' has a 48% 'Prescribed Proportion'.

32. Clause 29.5 of the Constitution sets out certain obligations and rights of the 'Joint Venturers'.

Compliance Plan

33. 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 the 'Responsible Entity' manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interest of a 'Grower' is protected.

Head Lease

34. The Project will be conducted on properties, known as Narcooyia, Mitchell and Westmore ('Project Land').

35. The 'Project Land' and 'Water Licences' for the Project are owned or will be owned by Almond Land Pty Ltd (the 'Lessor') and will be leased to TSL (as 'Lessee') under leases referred to as the 'Narcooyia Head Lease', the 'Mitchell Head Lease' and the 'Westmore Head Lease'. Each 'Head Lease' sets out the terms and conditions under which the Lessor will lease the 'Land' and 'Water Licences' to TSL to use and exploit during the 'Term' of the Project.

36. The Lessee must only use the 'Project Land' in accordance with the Constitution, the Almondlot Management Agreement and the Sub-lease. The Lessor consents and authorised the Lessee to enter into Sub-leases with the Growers.

Sub-lease Deed

37. The Grower will enter into two interdependent Sub-leases with TSL and the Land Owner, effective from the 'Commencement Date', to use and occupy the 'Almondlot' for growing and cultivating the 'Almond Trees' for the production of 'Almonds', 'Crop' or 'Product' for commercial gain.

38. An 'Almondlot' is a stapled lot consisting of separately identifiable parts of the orchard on two separate properties. The Grower's interest in the Project includes their interests in and rights in relation to each stapled, separately identifiable area of approximately 0.25 hectares of land consisting of approximately 0.15 hectares of 'Narcooyia Land' and approximately 0.10 hectares of either 'Mitchell Land' or 'Westmore Land'. Each Grower's 'Almondlot' also includes their interest in and rights to the 'Almond Trees', the 'Capital Works' and the 'Water Licences'.

39. The Land Owner agrees with the Grower that it must, at its own cost, establish or procure the establishment of the Orchard and construct necessary infrastructure and carry out the necessary capital works including the irrigation infrastructure.

40. The Land Owner will endeavour to complete the 'Pre-plant Capital Works', as identified in clause 2.1(a)(i) to (v), on the Almondlots by 15 June 2006, (clause 2.1(b)).

41. The Land Owner must also have 15 percent of the 'Almondlots' fully planted by 23 June 2006 and all other parts of the 'Almondlots' planted by 31 August 2006, (clause 2.1(a)(vii)(i) & (ii)). In accordance with the provisions of the Almondlot Management Agreement the Land Owner must also fully exploit its 'Water Licences' to enable water to be supplied to the 'Almondlots' by TSL for the benefit of all the 'Growers' during the 'Term' of the Project (clause 3.2).

42. Under clause 2.2 the 'Grower' acknowledges that the 'Capital Works', 'Almond Trees' and the 'Water Licences' on and attaching to, the Grower's Almondlot, are the property of the Land Owner.

43. In summary, the Sub-lease also sets out provisions relating to:

- its 'Term' (clause 4.1);
- a requirement that the 'Grower' enters into the Almondlot Management Agreement (clause 6.1);
- the 'Rent' payable by a 'Grower' (clause 7);
- damage to or reduction of the viability of the 'Grower's' 'Almondlots' (clauses 10.3 and 10.4);
- the obligations and rights of TSL (clause 5) the 'Grower' (clause 8), and the Land Owner (clause 9); and
- events which may trigger early termination of the 'Sub-lease' by the 'Grower' or TSL (clause 10 and 12).

Almondlot Management Agreement

44. A 'Grower' engages TSL as an independent contractor to manage the Project, conduct the 'Project Operations' on behalf of the 'Grower' and perform the 'Orchard Services' in accordance with the 'Management Plan' and best horticultural and environmental practices during the 'Term' of the Project.

45. Commencing on the later of 1 July 2006 and completion of the planting of the 'Almond Trees' on the 'Grower's' 'Almondlot' and for the Term of the Project, TSL will provide the 'Orchard Services', listed in clause 5.2A(a) to (ff), also test the 'Almonds' and, where they are ready for harvesting, harvest the mature 'Almond Trees' and deliver the harvested 'Almonds' to delivery point(s) for processing and sale.

46. TSL will procure the processing of the Grower's 'Participating Interest' in the 'Crop', into 'Product' and will enter into a 'Project Document' as agent and attorney for the 'Grower' (clause 7). TSL will market and sell the 'Growers' 'Participating Interest' in the 'Product' using its reasonable endeavours to seek to maximise returns.

47. The Grower agrees that the 'Almonds' and 'Crop' and the proceeds of sale of the 'Product' or 'Crop' will be divided pro rata according to the 'Participating Interest' of each of the Growers in the Project in the 'Product or 'Crop' (clause 7.3(a)).

48. TSL will be responsible for obtaining and keeping policies of insurance on behalf of the 'Growers' in the Project with a reputable insurer against damage to the 'Orchard' provided that the cost of any such insurance is economically justified. Insurance over the 'Orchard' does not include crop insurance unless specifically agreed between TSL and the Grower from year to year (clause 12).

Tree Supply and Capital Works Agreement

49. Under the Tree Supply and Capital Works Agreement, the Land Owner engages Select as an independent contractor. Select agrees to sell to the Land Owner and the Land Owner agrees to buy from Select the Almond Trees on terms and conditions set out in the Agreement. TSL acknowledges that Select may procure some of the Almond Trees it provides from nurseries other than its own.

50. Select will provide certain services in relation to the 'Capital Works' on the 'Land' associated with the establishment of an almond 'Orchard'. The 'Capital Works' include the preparation of the 'Land', the installation of the 'Internal Irrigation System' and the 'Primary Irrigation Infrastructure', the planting of the 'Almond Trees', and staking.

51. Select will conduct the 'Capital Works' having regard to the 'Establishment Plan' good workmanlike and commercially responsible standards and 'Best Horticultural Practice' (clause 5.1). A draft 'Establishment Plan' for the Narcooyia, Mitchell and Westmore properties prepared by Select forms part of the application for this Product Ruling.

52. The 'Development Works' referred to in clauses 5.1(a) to 5.1(e) other than the planting of the 'Almond Trees' will be performed by 15 June 2006. Select will plant part of the Grower's 'Almondlot' representing no less than 15 percent of the 'Grower's' 'Almondlot' by 23 June 2006 subject to planting taking place in appropriate climatic and horticultural conditions. All remaining parts of the 'Almondlots' will be planted by 31 August 2006.

53. Select will replace and replant 'Almond Trees' which fail in the first 6 months after planting due to or caused by any breach or default of Select, clause 5.2(c).

Management Agreement

54. Under the Management Agreement TSL engages Almond Management Pty Ltd as Almond Manager to manage and administer the Project, to manage, direct and conduct the 'Project Operations' on behalf of the 'Grower' and to perform the 'Orchard Services' (clauses 4 and 5).

Almond Orchard Management Agreement

55. Under the Almond Orchard Management Agreement, Almond Management Pty Ltd engages Select as an independent contractor to carry out the 'Services' and include the 'Orchard Services' (clause 4), 'Processing Services' (clause 5) and 'Marketing Services' (clause 6). Select must carry out the provision of these services in accordance with an 'Almond Orchard Management Plan'. A draft 'Almond Orchard Management Plan' prepared by Select for the 'Financial Year' ending 30 June 2006 forms part of the application for this Product Ruling.

Pooling of amounts and distribution of 'Proceeds'

56. Both the Constitution (clause 13) and the Almondlot Management Agreement (clause 7.3) set out provisions relating to the pooling of amounts from the sale of the 'Grower's 'Almonds', 'Crop' or 'Product' and the distribution of 'Proceeds' from that sale or from insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only a 'Grower' who has contributed 'Almonds', 'Crop' or 'Product' or insurance proceeds to the pool making up the 'Proceeds' is entitled to benefit from distribution from those 'Proceeds'; and
- any pool of 'Almonds', 'Crop' or 'Product' or other 'Proceeds' must consist only of 'Almonds', 'Crop' or 'Product' or other 'Proceeds' contributed by a 'Grower' in the 2006 Timbercorp Almond Project.

Fees

57. A 'Grower' will pay the annual fees and charges **per Almondlot**, set out in clause 11 of the Almondlot Management Agreement and the 'Rent', set out in clause 7 of the Sub-lease. These are as follows:

Almondlot Management Agreement

- **\$9,000** is payable upon 'Application' for 'Orchard Services' and all other services to be provided in the period from the Commencement Date to 30 June 2007;
- **\$1,500** is payable on 31 October 2007 for 'Orchard Services' and all other services in the period from 1 July 2007 to 30 June 2008, **plus 5.5%** of the 'Gross Proceeds' of the sale of 'Crop' and 'Product' payable in each 'Financial Year' of the Project that 'Proceeds' are paid;
- the **estimated costs** of operating the 'Almondlot' is payable on 31 October 2008 and 31 October each year thereafter for 'Orchard Services' and all other services in each subsequent 'Financial Year' after 30 June 2008; and
- an **incentive fee of 27.5%** of 'Net Proceeds' in excess of the 'Incentive Fee Threshold' in each 'Financial Year'.

Sub-lease Deed

- **\$500** 'Rent' from the 'Commencement Date' until 30 June 2007;

- **\$500** 'Rent' payable on 31 October for 'Financial Year' ending 30 June 2008;
- **\$770** 'Rent' payable on 31 October for 'Financial Year' ending 30 June 2009, 2010 and 2011;
- **\$1,608** 'Rent' for 'Financial Year' ending 30 June 2012, payable on 31 October 2011; and
- an amount equal to the 'Rent' payable on the immediately proceeding 31 October, 'Indexed' and payable on 31 October of each subsequent 'Financial Year' during the Term.

58. As noted above, from the 2009 'Financial Year', the annual fee will consist of an amount for the estimated costs of operating the 'Almondlot'. The estimated costs of operating the 'Almondlot' for a 'Financial Year' will include an adjustment for the difference between the actual costs and the estimated costs of managing the 'Almondlot' during the preceding 'Financial Year'.

Constitution

59. Fees payable per 'Almondlot' by a 2006 Grower who is in 'Joint Venture' are stipulated in clause 29.5 of the Constitution. Under this clause, the amount of fees to which a Joint Venture Grower will be solely responsible for are expressed as percentages of the fees outlined in paragraph 57 which are as follows.

60. The **'First Joint Venture Grower'** will be solely responsible for paying the following fees and other amounts:

- i. 100% of the 'Management Fees' and Rent payable under the Almondlot Management Agreement and Sub-lease Agreement for the year ended 30 June 2007;
- ii. 52% of the 'Management Fee' and 'Rent' payable under the Almondlot Management Agreement and Sub-lease Deed in respect of management services and all leasehold rights granted in all 'Financial Years' commencing on and from the 2012 'Financial Year'; and
- iii. 52% of all of the deferred Management Fees.

61. The **'Second Joint Venturer'** will be solely responsible for paying the following fees and other amounts:

- iv. 100% of the 'Management Fees' and 100% of the 'Rent' payable under the Almondlot Management Agreement and Sub-lease Deed in respect of management services and leasehold rights provided in the 'Financial Years' from 2008 to 2011;
- v. 48% of the 'Management Fee' and the 'Rent' payable under the Almondlot Management Agreement and

Sub-lease Deed in respect of management services and leasehold rights provided in all 'Financial Years', commencing on and from the 2012 'Financial Year'; and

- vi. 48% of all of the deferred Management Fees.

62. Each 'Joint Venturer' is liable for paying their 'Prescribed Portion' of any incentive fees (clause 29.5(e)) and each will be entitled to the 'Prescribed Proportion' of the 'Joint Venture's' 'Almonds', 'Crop' and the 'Product', and the 'Joint Venture Proceeds' (clause 29.6).

Finance

63. A 'Grower' can fund their involvement in the Project by borrowing from independent sources or from Timbercorp Finance Pty Ltd ('the Financier'), a lender associated with the Responsible Entity.

64. The Financier will offer 'Loan Terms' on a commercial basis and approve 'Loan Amounts' up to 90% of the 'Application Money'. The Financier will provide a 'Grower' with loans on a full recourse basis and will pursue legal action against any defaulting borrowers. Details of the loans that will be offered to a 'Grower' by the 'Financier' are set out in the 'Loan Application Form' and 'Loan Explanation and Loan Terms'.

65. Common features contained in the 'Loan Terms' are:

- the Financier will lend to the Grower the 'Loan Amount' by paying it to TSL as payment of the Grower's balance of the 'Application Money' for 'Almondlots' and the 'Loan Application Fee' as described in the 'Application Form';
- the Grower will only be able to borrow if the Financier receives all documents including 'Securities' and information and neither the Grower nor the 'Guarantor' is in default under this 'Agreement';
- the 'Grower' is entitled to repay the whole or any part of the 'Total Amount Owing' without penalty for early repayment;
- in the event that any amount is overdue, the Financier may charge interest at the 'Higher Interest Rate';
- during the 'Loan Term' the 'Grower' will assign all its rights, title, and interest in any debt or other monetary obligations owed to TSL in relation to the 'Grower's' 'Almondlot'; and
- a 'Loan Application Fee' of \$250 which will comprise part of the 'Loan Amount'.

66. The terms specific to the 'Loan Term' offered by the Financier are summarised below: The rates shown are indicative.

- 1 year term with an interest rate of 0.0%p.a.
- 3 year term with an interest rate of 9.0%p.a.
- 4 year term with an interest rate of 9.95%p.a.
- 5 year term with an interest rate of 10.50%p.a.
- 7 year term with an interest rate of 10.95%p.a.
- 8 year term with an interest rate of 11.00%p.a.
- 9 year term with an interest rate of 11.25%p.a.
- 10 year term with an interest rate of 11.50%p.a.

67. A 'Grower' cannot rely on this Product Ruling if they enter into a finance arrangement with the 'Financier' that materially differs from that set out in the 'Loan Application Form' and 'Loan Explanation and Loan Terms' provided to the Tax Office by TSL with the application for this Product Ruling.

68. Where an application is accepted subject to finance approval by any lending institution, a 'Grower' cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by 15 June 2007. A 'Grower' also cannot rely on this Product Ruling if 'Application Money's otherwise remain unpaid by 15 June 2007.

69. 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 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 payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Timbercorp Finance Pty Ltd, are involved or become

involved in the provision of finance to a 'Grower' for the Project.

Ruling

Application of this Ruling

70. Subject to paragraph 8, this Ruling applies only to a 'Grower' who is accepted to participate in the Project and who has executed an Almondlot Management Agreement and a Sub-lease Deed on or after 1 July 2006 and on or before 15 June 2007.

71. The 'Grower's' participation in the Project must constitute the carrying on of a business of primary production. 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

72. To be an 'STS taxpayer' a 'Grower' must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer'. For a 'Grower' participating in the Project, the recognition of income and the timing of tax deductions is different under the STS where a 'Grower' who was an 'STS taxpayer' prior to the 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method' – see section 328-115).

73. For such a 'Grower', a reference in this Ruling to an amount being deductible when 'incurred' will mean that amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

25% entrepreneurs tax offset

Subdivision 61-J

74. For the first income year starting on or after 1 July 2005, Subdivision 61-J of the ITAA 1997 provides for a tax offset of up to 25% of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

Assessable Income

Section 6-5

75. 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.

Deductions for 'Management Fees', 'Rent', interest and borrowing costs

Section 8-1, section 328-105, section 25-25 and Division 40

76. A 'Grower' who is accepted to participate in the Project on or after 1 July 2006 and on or before 15 June 2007 may claim deductions, on a per Almondlot basis, for the following expenditure set out in the Table below.

77. A 'Grower' will also be entitled to a tax deduction relating to Almond Trees, as set out in the Table below.

| Fee Type | Year ended 30 June 2007 | Year ended 30 June 2008 |
|---|---|---|
| 'Management Fee' | \$9,000 See Notes (i), (ii) & (iii) | \$1,500 See Notes (i), (ii) & (iii) |
| 'Rent' | \$500 | \$500 See Notes (i), (ii) & (iii) |
| Interest on loans with Timbercorp Finance Pty Ltd | As incurred See Notes (iii) & (iv) | As incurred See Notes (iii) & (iv) |
| 'Loan Application Fee' for loans with Timbercorp Finance Pty Ltd | Must be calculated – See Note (v) | Must be calculated – See Note (v) |
| Establishment of Almond Trees | | |

Notes:

- (i) If the 'Grower' is registered or required to be registered for GST, amounts of outgoing would need to be adjusted for GST (for example, input tax credits): Division 27.
- (ii) The 'Management Fees' and the 'Rent' shown in the Almondlot Management Agreement and the Sub-lease Deed are deductible in full in the year that they are incurred.
- (iii) This Ruling does not apply to a 'Grower' who chooses to prepay 'Management Fees' or 'Rent' or who chooses, or who is required to prepay interest under a loan agreement (see paragraphs 103 to 106). Amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the

prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936. Any 'Grower' who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.

- (iv) 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. A 'Grower' who borrows from a lender other than Timbercorp Finance Pty Ltd may request a private binding ruling on the deductibility of the interest incurred.
- (v) The 'Loan Application Fee' payable to Timbercorp Finance Pty Ltd is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling.
- (vi) The deduction for 'Almond Trees' is determined using the formula in section 40-545 and is based on the capital expenditure incurred that is attributable to their establishment. If the 'Almond Trees' have an 'effective life' of greater than 13 but fewer than 30 years, for the purposes of section 40-545, this results in a straight-line write-off at a rate of 13%. The deduction is allowable when the 'Almond Trees' enter their first commercial season (section 40-530, item 2). TSL will notify the 'Grower' when their 'Almond Trees' enter their first commercial season and the amount that may be claimed.

78. A 'Joint Venture Grower' may claim deductions, on a per Almondlot basis, for the following expenditure set out in the Table and Notes above in paragraph 76 and 77:

First Joint Venture Grower

- in the year ending 30 June 2007, \$9,000 for Management Fees as set out in subparagraph 60(i);
- 52% of the 'Management Fee' and 'Rent' as set out in subparagraph 60(ii) commencing on and from the 2012 'Financial Year';
- 52% of all of the deferred Management Fees as set out in subparagraph 60(iii); and

- in the years ending 30 June 2007, 2008 and 2009, any interest incurred on funds borrowed from Timbercorp Finance Pty Ltd.

Second Joint Venture Grower

- 100% of the 'Management Fee' and 'Rent' of for the 'Financial Years' ending 30 June 2008 to 30 June 2011, as set out in subparagraph 61(iv);
- 48% of the 'Management Fee' and 'Rent' as set out in subparagraph 61(v) commencing on and from the 2012 'Financial Year'; and
- 48% of all of the deferred Management Fees as set out in subparagraph 61(vi).

79. A 'First Joint Venture Grower' can also claim under subsection 25-25(1), in the income years ending 30 June 2007, 2008 and 2009, the 'Loan Application Fee' payable to Timbercorp Finance Pty Ltd. Each 'Joint Venturer' can also claim deductions for its proportional share of the horticultural plant write-off explained below.

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

80. A 'Grower' who is an individual accepted into the Project on or after 1 July 2006 and on or before 15 June 2007 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for a 'Grower' for the income years ending **30 June 2007 to 30 June 2012**. This conditional exercise of the discretion will allow those losses to be offset against the 'Grower's' other assessable income in the income year in which the losses arise.

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

81. For a 'Grower' who participates in the Project and incurs expenditure as required by the Almondlot Management Agreement and the Sub-lease Deed, 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 paragraph 104);
- 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.

Commissioner of Taxation

15 February 2006

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?

82. For the amounts set out in the Tables above to constitute allowable deductions the Grower's horticultural activities as a participant in the 2006 Timbercorp Almond Project must amount to the carrying on of a business of primary production.

83. Where there is a business, or a future business, the gross proceeds from the sale of the 'Almond' will constitute gross assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income.

84. For schemes such as that of the 2006 Timbercorp Almond Project, 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 *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

85. Generally, a 'Grower' will be carrying on a business of horticulture, and hence primary production, if:

- the 'Grower' has an identifiable interest in land (by lease) or rights over the land (by licence) on which the 'Grower's' 'Almond Trees' are established;
- the 'Grower' has a right to harvest and sell the 'Almonds' from those 'Almond Trees';
- the horticultural activities are carried out on the Grower's behalf;
- the horticultural activities of the 'Grower' are typical of those associated with a horticulture business; and
- the weight and influence of general indicators point to the carrying on of a business.

86. In this Project, each 'Grower' enters into an Almondlot Management Agreement and a Sub-lease Deed.

87. Under the Sub-lease Deed each individual 'Grower' will have rights over a specific and identifiable area of 0.25 hectares of land. The Sub-lease Deed provides the 'Grower' with an ongoing interest in the specific 'Almond Trees' on the leased area for the 'Term' of the Project. Under the 'Sub-lease' the 'Grower' must use the land in question for the purpose of carrying out horticulture activities, and for no other purpose. The 'Sub-lease' allows the Manager to come onto the land to carry out its obligations under the Almondlot Management Agreement.

88. Under the Almondlot Management Agreement the Responsible Entity is engaged by the 'Grower' to cultivate and maintain the 'Almond Trees' on the 'Grower's' identifiable area of land during the 'Term' of the Project. The Responsible Entity has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to cultivate and maintain the 'Almond Trees' on the 'Grower's' behalf.

89. The Responsible Entity is also engaged to harvest and sell, on the 'Grower's' behalf, the 'Almonds' grown on the 'Grower's' 'Almond Trees'.

90. 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.

91. 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 the 'Almonds' that will return a before-tax profit, that is, a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

92. The pooling of 'Almonds' from 'Almond Trees' grown on the 'Grower's' 'Almondlot' 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 'Almond Trees' contributed from their 'Almondlot'.

93. The Responsible Entity's services are also consistent with general horticultural practices. They are of the type ordinarily found in horticulture ventures that would commonly be said to be businesses. While the size of an 'Almondlot' is relatively small, it is of a size and scale to allow it to be commercially viable.

94. The 'Grower's' degree of control over the Manager as evidenced by the Almondlot Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the 'Term' of the Project, the Manager will provide the 'Grower' with regular progress reports on the 'Grower's' 'Almondlot' and the activities carried out on the 'Grower's' behalf. A 'Grower' is able to terminate arrangements with the Manager in certain instances, such as cases of default or neglect.

95. The horticulture activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. For the purposes of this Ruling, the 'Grower's' horticultural activities in the 2006 Almond Timbercorp Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

96. 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.

97. The question of whether a 'Grower' is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). 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', 'Rent' and Interest

Section 8-1

98. Consideration of whether the 'Management Fees' and 'Rent' 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.

99. The 'Management Fees' and 'Rent' associated with the horticulture activities will relate to the gaining of income from the Grower's business of horticulture (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and 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 scheme. 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.

Interest deductibility

Section 8-1

(i) A 'Grower' who uses Timbercorp Finance Pty Ltd as the finance provider

100. A 'Grower' 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 'Management Fees' and 'Rent'.

101. The interest incurred for the year ended 30 June 2007 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations – the cultivation and growing 'Almond Trees' and the sub-lease of the land on which the 'Almond Trees' will 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.

(ii) A 'Grower' who does NOT use Timbercorp Finance Pty Ltd as the finance provider

102. The deductibility of interest incurred by a Grower 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 schemes where all details and documentation have been provided to, and examined by the Tax Office.

Prepayment provisions***Sections 82KZL to 82KZMF***

103. 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.

Application of the prepayment provisions to this Project

104. Under the Scheme to which this Product Ruling applies 'Management Fees' and 'Rent' are incurred annually and interest payable to Timbercorp Finance Pty Ltd is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF have no application to this Scheme.

105. However, sections 82KZME and 82KZMF may have relevance if a 'Grower' in this Project prepays all or some of the expenditure payable under the Almondlot Management Agreement and/or the Sub-lease Deed or prepays interest under a loan agreement (including loan agreements with lenders other than Timbercorp Finance Pty Ltd). Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

106. As noted in the Ruling section above, a 'Grower' 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.

Expenditure of a capital nature***Division 40***

107. 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 the establishment of the 'Almond Trees' is of a capital nature. This expenditure falls for consideration under Division 40 of the ITAA 1997.

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

Section 35-55 – exercise of Commissioner’s discretion

108. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2006 to 30 June 2012** the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years ended 30 June 2007 up to and including 30 June 2012:

- it is because of its nature the business activity of a ‘Grower’ will not satisfy one of the four tests in Division 35;
- there is an objective expectation that within a period that is commercially viable for the almond industry, a ‘Grower’s’ business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit; and
- 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.

109. The exercise of the Commissioner’s discretion under paragraph 35-55(1)(b) 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

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 2006 Timbercorp Almond 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 76 to 81 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. A 'Grower' to whom this Ruling applies intends to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the 'Almonds'. There are no facts that would suggest that a 'Grower' has 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.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 93/34; TR 92/20; TR 97/11;
TR 98/22; TR 2000/8;
TR 2001/14; TR 2002/6;
TR 2002/11

Subject references:

- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees
- non commercial losses
- producing assessable income
- product rulings
- public rulings
- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

Legislative references:

- ITAA 1936 82KL
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