

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

Prepared by:
ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 21
333 Collins Street
MELBOURNE 3000

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: []

(Leon Zwier lwier@abl.com.au/
Lucy Kirwan lkirwan@abl.com.au)

This is the exhibit marked '**MAK-20**' now produced and shown to MARK ANTHONY
KORDA at the time of swearing this affidavit on 3 March 2010.

Before me: 

LUCY HANNAH KIRWAN
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000

An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

Exhibit 'MAK-20'

**Product Ruling
2006/146**



Product Ruling

Income tax: 2007 Timbercorp Almond Project – Post 30 June Growers

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	12
Withdrawal	16
Scheme	17
Ruling	73
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	83
Appendix 2:	
Detailed contents list	117

① This publication 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 relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

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

[**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 entity(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 Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant 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 '2007 Timbercorp Almond Project' or simply as 'the Project'.

Relevant provision(s)

2. The relevant 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.

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

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. Entities 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 entities in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that entities 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 are 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 2007 or after 15 June 2008;
- entities who enter into finance arrangements with Timbercorp Finance Pty Ltd other than those specified in paragraphs 67 to 69 of this 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 17 to 71 of this Ruling.

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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Date of effect

12. This Ruling applies prospectively from 11 October 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

13. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

16. This Product Ruling is withdrawn and ceases to have effect after 30 June 2010. The Ruling continues to apply, in respect of the relevant provision(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 entities' involvement in the scheme.

Scheme

17. 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 27 July 2006 and additional correspondence and emails dated 25 September 2006, 26 September 2006, 2 October 2006, 24 January 2008 and 8 February 2008;
- Draft Product Disclosure Statement for the 2007 Timbercorp Almond Project, undated, to be issued by the Responsible Entity, Timbercorp Securities Limited (TSL), received on 26 September 2006;
- Draft **Constitution** of the 2007 Timbercorp Almond Project between each Grower and TSL, received on 25 September 2006;
- Compliance Plan of the 2007 Timbercorp Almond Project, received on 27 July 2006;
- Draft Lease Agreement between Almond Land Pty Ltd and TSL in relation to part of the Project land known as the 'Menegazzo Property', received on 26 September 2006;
- Draft Lease Agreement between Almond Land Pty Ltd and TSL in relation to part of the Project land known as the 'Westmores Property', received on 28 August 2007;
- Draft **Sub-lease Deed** between each Grower, Almond Land Pty Ltd and TSL in relation to the Menegazzo Property, received on 26 September 2006;

- Draft **Sub-lease Deed** between each Grower, Almond Land Pty Ltd and TSL in relation to the Westmores Property, received on 24 January 2008;
- Draft **Almondlot Management Agreement** between each Grower and TSL, received on 26 September 2006;
- Draft Almond Orchard Management Plan for the 2007 Timbercorp Almond Project between Almond Management Pty Ltd and Select Harvests Limited (Select), received on 27 July 2006;
- Draft Management Agreement for the 2007 Timbercorp Almond Project between TSL and Almond Management Pty Ltd, received on 26 September 2006;
- Draft Almond Orchard Management Agreement for the 2007 Timbercorp Almond Project between Almond Management Pty Ltd, Select, TSL, Timbercorp Limited, and Almond Land Pty Ltd, received on 26 September 2006;
- Draft Tree Supply and Capital Works Agreement for the 2007 Timbercorp Almond Project between Almond Land Pty Ltd, Select and Timbercorp Limited, received on 25 September 2006;
- Tree Supply and Capital Works Agreement – Establishment Plan, for the 2007 Timbercorp Almond Project between Almond Land Pty Ltd and Select, received on 27 July 2006;
- Draft Custody Agreement for the 2007 Timbercorp Almond Project between TSL and the Trust Company of Australia Limited (the Custodian), received on 27 July 2006; and
- 2007 Timbercorp Projects Finance Package, which includes the **Loan Application Form**, and Loan Explanation and Loan Terms, received on 27 July 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.

18. The documents highlighted are those that a Grower may enter into. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are a part of the scheme.

19. 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

20. The main features of the 2007 Timbercorp Almond Project are as follows:

Location	North West Victoria
Type of business to be carried on by each entity	Commercial growing and cultivation of almond trees for the purpose of harvesting and selling the almonds
Number of hectares offered for cultivation	Up to 2,000 with capacity for oversubscription
Size of each interest (Almondlot)	0.25 hectares, on either the Menegazzo Property or the Westmores Property
Minimum allocation	2 Almondlots (TSL may allocate 1 Almondlot at its absolute discretion)
Minimum subscription	None
Number of plants per hectare	Approximately 250
Term of the Project	Approximately 23 years (may be extended)
Initial cost per Almondlot	\$9,000
Ongoing costs	<ul style="list-style-type: none"> • Annual rent • Annual management fees and charges
Other costs	<ul style="list-style-type: none"> • Operating costs • Incentive (performance) fees

21. The Project will be registered as a managed investment scheme under the *Corporations Act 2001*. TSL has been issued with an Australian Financial Services Licence and will be the Responsible Entity for the Project.

22. An offer to participate in the Project will be made through the 2007 Timbercorp Almond Project Product Disclosure Statement (PDS). The offer under the PDS is for 2,000 hectares in the Project, with capacity for oversubscription. Applicants will be invited to subscribe for at least two Almondlots comprising of 0.25 hectares per Almondlot. There is no minimum amount that must be raised under the PDS.

23. To participate in the Project Applicants must complete the Application and Power of Attorney Form Booklet attached to the PDS, lodge the completed Booklet together with the relevant Application Moneys on or before 15 June 2008. The Custodian will be appointed under the Custody Agreement to protect the interests of a Grower in their dealings with TSL.

24. Under the Power of Attorney, TSL will execute the 'Grower Agreements' on behalf of Applicants who are accepted to participate in the Project as Growers. TSL will also allocate Almondlots to the Grower and place the Grower's details in a Register.

25. A Grower accepted on or after 1 July 2007 and on or before 15 June 2008 will commence participation as a Post 30 June Grower.

This Ruling only applies to Post 30 June Growers. Note that a separate Product Ruling PR 2006/145 has issued for Growers accepted into the Project on or before 15 June 2007.

26. The land on which Growers will be growing and cultivating Almond Trees for the production of Almonds (the Project Land) consists of two properties known as Menegazzo and Westmores, located near Boundary Bend in North West Victoria. TSL will enter into 'Head Leases' with the Land Owner, Almond Land Pty Ltd, in respect of the Project Land and Water Licences owned or acquired by the Land Owner.

27. TSL will grant each Grower a sub-lease to use and occupy two or more identifiable Almondlots for the Term of the Project. However, TSL reserves the right to accept applications for less than two Almondlots.

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

29. 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 Deeds provide that two entities may participate in the Project as Joint Venture Growers on the terms specified in the Constitution.

Constitution

30. The Constitution establishes the Project and operates as a deed binding all of the Growers and TSL, 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.

31. The Responsible Entity must hold the Application Money as a bare trustee for the Applicant. The Application Money paid by any Applicant must be accounted for by the Responsible Entity in a special trust account and such amounts must be placed in one or more bank accounts solely for the purposes of depositing the Application Money for this Project (clause 4). Once the Responsible Entity 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 payable by the Applicant (clause 9.3).

32. Among other things, the Constitution also sets out provisions relating to:

- invitations and offers under the PDS (clause 2);
- the irrevocable appointment of the Responsible Entity as the Grower's 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 absolute discretion of the Responsible Entity to refuse applications (clause 7);
- the effect of an Applicant's application being accepted by the Responsible Entity (clause 8);
- the preparation and execution of the Sub-lease Deeds 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, 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);

- the Responsible Entity's 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 and the retention by the Responsible Entity of the Almondlot Management Agreement and Sub-lease Deeds. This includes the right of a Grower to obtain a copy of the above agreements by written request to the Responsible Entity (clauses 18.1 and 18.2);
- the termination of the Almondlot Management Agreement and Sub-lease Deeds, consequences of termination in the event of default, and procedures relating to the sale of a Defaulting Grower's Almondlots (clauses 18.3 and 18.4);
- the right of a Grower to inspect certain documents related to their participation in the Project and to offer and give opinions to the Responsible Entity (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);
- the resolution of complaints made by the Grower in relation to the Project or the Responsible Entity (clause 25); and
- the termination of the Project (clause 26).

33. Clause 6.4 of the Constitution provides that, in certain circumstances, Application Moneys may be paid by instalments. TSL have stated that clause 6.4 will not be invoked. However, for the sake of certainty, this Product Ruling will not apply to any Applicant who enters into an arrangement with TSL to pay their Application Moneys by instalments.

Joint Venture

34. The Constitution also provides for two entities to participate in the Project as Joint Venturers in an unincorporated joint venture (clause 29). 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 Proportions. The First Joint Venturer has a 51% Prescribed Proportion and the Second Joint Venturer has a 49% Prescribed Proportion. This Ruling will not apply to Joint Venturers comprised of more than two entities.

Compliance Plan

35. 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 TSL, as the Responsible Entity, manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of the Growers are protected.

Head Leases

36. The Project Land will consist of two properties, one known as Menegazzo and the other known as Westmores.

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

38. TSL must only use the Project Land in accordance with the Constitution, the Almondlot Management Agreement and the Sub-leases (clause 5.1). Almond Land Pty Ltd consents and authorises TSL to enter into Sub-leases with the Growers (clause 9.2).

Sub-lease Deeds

39. The Grower will enter into one or two Sub-lease(s) with TSL and Almond Land Pty Ltd, effective from the Commencement Date, to use and occupy their Almondlots for growing and cultivating the Almond Trees for the production of Almonds, Crop or Product for commercial gain. All references in this Ruling to 'Sub-lease', 'Sub-leases' or 'Sub-lease Deeds' may include one or two Sub-leases or Sub-lease Deeds. The Sub-leases will have a Term of approximately 23 years, but may be extended by TSL for a further 2 years on the same terms and conditions if certain threshold conditions are not met over the period from the Commencement Date until 29 June 2029 and if TSL is reasonably satisfied that it is in the best interests of the Grower to extend the Term (clauses 4.1 and 4.2).

40. An Almondlot consists of a separately identifiable area of the Orchard comprising approximately 0.25 hectares and may be located, at TSL's discretion, on either the Menegazzo Land or the Westmores Land. Each Almondlot grants the Grower an interest in and rights over the Almond Trees, the Capital Works and the Water Licences attributed to the Project. The Grower's interest in the Project is represented by and proportional to the number of their Almondlots.

41. As the Land Owner, Almond Land Pty Ltd warrants to the Growers that it, at its own cost and in accordance with Best

Horticultural Practice, established or procured the establishment of the Orchard, including installation of the irrigation infrastructure and all necessary capital works (clause 2.1).

42. Almond Land Pty Ltd further warrants to the Grower that planting of the Almond Trees was carried out and completed prior to 30 September 2007 (clause 2.1).

43. 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).

44. The Grower acknowledges that the Capital Works, Almond Trees and the Water Licences on and attaching to the Grower's Almondlot(s) will at all times remain the property of Almond Land Pty Ltd (clause 2.2).

45. The Sub-leases also set out provisions relating to:

- the requirement that the Grower enters into the Almondlot Management Agreement (clause 6.1);
- the rent payable by a Grower (clause 7);
- the 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 obligations of the Grower (clause 8), and the obligations and rights of the Land Owner (clause 9); and
- events which may trigger early termination of the Sub-leases by the Grower or TSL (clauses 10.1 and 10.2).

Almondlot Management Agreement

46. Each Grower separately engages TSL as an independent contractor for the Term of the Project to manage their Almondlots, conduct the Project Operations on their behalf and perform the Orchard Services in accordance with the Management Plan and Best Horticultural Practices.

47. Commencing on the later of 1 July 2007 and completion of the planting of the Almond Trees on the Grower's Almondlots, and during each subsequent Financial Year during the Term of the Project, TSL will provide the Orchard Services listed in clause 5.2A, test the maturity of the Almonds and, where they are ready for harvesting, harvest the mature Almond Trees and deliver the harvested Almonds to a delivery point(s) for processing and sale (clause 6).

48. 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. TSL will market and sell the Grower's Participating Interest in the Product using its reasonable endeavours to seek to maximise returns (clauses 7.1 and 7.2).

49. 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)).

50. 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).

51. Among other things, the Almondlot Management Agreement also sets out details of the following:

- its Term (clause 2);
- certain administrative services to be provided to the Growers during the Term of the Project (clause 8);
- the fees and charges payable by a Grower (clause 11);
- the provision of a report to Growers each Financial Year which sets out the results of the harvest, the condition of the Orchard and the Grower's Almondlots and Almond Trees (clause 13.5);
- the provision of an annual statement of income and expenses relating to the Grower's Almondlots and the sale of the Product or Crop (clause 13.6); and
- the events that may trigger early termination of this Agreement (clause 15);

Tree Supply and Capital Works Agreement

52. Select agrees to sell to Almond Land Pty Ltd and Almond Land Pty Ltd agrees to buy from Select the Almond Trees on terms and conditions set out in this Agreement (clause 3.1). Timbercorp Limited acknowledges that Select may procure some of the Almond Trees it provides from nurseries other than its own (clause 3.2).

53. Almond Land Pty Ltd engages Select as an independent contractor to provide certain services in relation to the Capital Works on the Project Land associated with the establishment of the Orchard. The Capital Works include the preparation of the Project Land, the installation of the Internal Irrigation System and Irrigation Infrastructure, the planting of the Almond Trees, and staking.

54. Select will carry out the Capital Works having regard to the Establishment Plan, good workmanlike and commercially responsible standards, and Best Horticultural Practice (clause 5.1).

55. The Development Services referred to in clauses 5.1(a) to 5.1(e) will have already been performed by Select by 15 June 2007. Select will also have planted at least 15 percent of the Grower's

Almondlot(s) by 23 June 2007, subject to planting taking place in appropriate climatic and horticultural conditions. All remaining parts of the Almondlots will be planted by 30 September 2007 (clause 5.2(b)). This means that, depending upon when a Post 30 June 2007 Grower is accepted by TSL to participate in the Project, part or all of the Grower's Almond Trees will be already planted.

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

Management Agreement

57. 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

58. Almond Management Pty Ltd engages Select as an independent contractor to carry out the Services, including the Orchard Services (set out in clause 4), Processing Services (set out in clause 5) and Marketing Services (set out in clause 6). Select must carry out the provision of the Orchard Services in accordance with the Almond Orchard Management Plan, and guarantees to Almond Management Pty Ltd that all Almonds available from harvest for a particular Season will be sold by Select by 30 June in the Financial Year after the Financial Year in which the harvest for that particular Season commenced.

Pooling of amounts and distribution of Proceeds

59. Both the Constitution (clause 13) and the Almondlot Management Agreement (clauses 7.3 and 14.1) 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, Product or insurance proceeds to the pool making up the Proceeds is entitled to benefit from distributions of those Proceeds; and
- any pool of Almonds, Crop, Product or other Proceeds must consist only of Almonds, Crop, Product or other Proceeds contributed by a Grower in the 2007 Timbercorp Almond Project.

Fees

60. A Grower will pay the annual management fees and charges **per Almondlot** that are set out in clause 11 of the Almondlot Management Agreement and the rent that is set out in clause 7 of the Sub-leases. These are as follows:

Almondlot Management Agreement

- for Orchard Services and all other services to be provided in the period from the Commencement Date to 30 June 2008, a fee of **\$8,500** is payable upon Application;
- for services to be provided in the period from 1 July 2008 to 30 June 2009, a fee comprised of two components is payable. The first component of **\$1,500** is payable on 31 October 2008. The second component is a deferred fee calculated as **7.15% of the Gross Proceeds** of the sale of Crop and Product. The deferred component is payable in each Financial Year of the Project out of and at the time that Proceeds are received by TSL;
- for services to be provided in each subsequent Financial Year after 30 June 2009, a fee based on the **estimated costs** of operating the relevant Almondlot is payable on 31 October 2009 and 31 October each year thereafter (see paragraph 61 of this Ruling for further explanation); and
- an **incentive (performance) fee of 27.5% of the annual Net Proceeds** received by the Grower in excess of the Incentive Fee Threshold is payable prior to any distribution of Net Proceeds received by a Grower in each Financial Year.

Sub-lease Deeds

- for the period from the Commencement Date to 30 June 2008, **\$500** rent is payable upon Application;
- for the Financial Year ending 30 June 2009, **\$500** rent is payable on 31 October 2008;
- for the Financial Years ending 30 June 2010, 2011 and 2012, **\$770** rent is payable on 31 October 2009, 2010 and 2011 respectively;
- for the Financial Year ending 30 June 2013, **\$1,610** rent is payable on 31 October 2012; and
- for each subsequent Financial Year during the Term, an amount equal to the rent payable on the immediately proceeding 31 October, Indexed, is payable on 31 October of the relevant Financial Year.

61. As noted above, from the 2010 Financial Year the annual fee payable by a Grower 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 (clause 11.3(b)).

62. The PDS provides that the ultimate cost to the Grower will depend on the fees the Grower negotiates with TSL or a financial planner. This Product Ruling does not apply to any Grower who does not pay the fees set out in paragraph 60. Growers who negotiate fees that are different to those set out in paragraph 60 may request a *private ruling* on the tax consequences of their participation in the Project.

Constitution

63. The fees payable per Almondlot by a Grower who is in Joint Venture with another entity 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 60 of this Ruling.

64. The First Joint Venturer will be solely responsible for paying the following fees and other amounts:

- i. 100% of the management fees payable under the Almondlot Management Agreement for the year ended 30 June 2008;
- ii. 100% of the rent payable under the Sub-lease Deeds in respect of leasehold rights granted for the year ended 30 June 2008;
- iii. 51% of the management fees payable under the Almondlot Management Agreement in respect of management services provided in all Financial Years commencing on and from the 2013 Financial Year;
- iv. 51% of the rent payable under the Sub-lease Deeds in respect of leasehold rights granted in all Financial Years commencing on and from the 2013 Financial Year;
- v. 51% of all of the deferred management fees payable under the Almondlot Management Agreement; and
- vi. 51% of any incentive (performance) fee payable under the Almondlot Management Agreement.

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

- vii. 100% of the management fees (other than the deferred management fees) payable under the Almondlot

Management Agreement in respect of management services provided in the Financial Years from 2009 to 2012;

- viii. 100% of the rent payable under the Sub-lease Deeds in respect of leasehold rights granted in the Financial Years from 2009 to 2012;
- ix. 49% of the management fees payable under the Almondlot Management Agreement in respect of management services provided in all Financial Years commencing on and from the 2013 Financial Year;
- x. 49% of the rent payable under the Sub-lease Deeds in respect of leasehold rights granted in all Financial Years commencing on and from the 2013 Financial Year;
- xi. 49% of all of the deferred management fees payable under the Almondlot Management Agreement; and
- xii. 49% of any incentive (performance) fee payable under the Almondlot Management Agreement.

Finance

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

67. The Financier will offer Loan Terms on a commercial basis and approve Loan Amounts up to 90 percent of the Application Money, as well as 90 percent of the management fees and rent payable by the Grower in the Financial Year ending 30 June 2009. A Grower is required to complete a separate Loan Application Form for each year in which they wish to borrow from the Financier. The Financier will provide a Grower with the loan(s) 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.

68. 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;
- a Loan Application Fee of \$250 will comprise part of the Loan Amount;
- the Grower is entitled to repay the whole or 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; and

- for the purpose of securing payment of the Total Amount Owed, the Grower will assign to the Financier all its rights, title, and interest in any debt or other monetary obligations owed to the Grower by TSL under or in relation to the Grower's Almondlot(s).

69. The terms specific to the Loan Terms offered by the Financier are summarised below. Rates shown are indicative.

- 1 year term with an interest rate of 0.00% p.a.
- 3 year term with an interest rate of 9.00% 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 10.50% p.a.
- 8 year term with an interest rate of 10.50% p.a.
- 9 year term with an interest rate of 10.50% p.a.
- 10 year term with an interest rate of 10.50% p.a.

70. 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.

71. A Grower also cannot rely on this Product Ruling if the full amount of Application Monies, including all loan monies, are not provided to TSL by the Grower or by the Financier on the Grower's behalf by 15 June 2008. Where an application is accepted subject to finance approval by any lending institution other than the Financier, Growers cannot rely on this Ruling if written evidence of that approval has not been given to TSL by the lending institution by 15 June 2008.

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

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

- 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 the Financier, are involved or become involved in the provision of finance to a Grower for the Project.

Ruling

Application of this Ruling

73. Subject to paragraph 8 of this Ruling and the specific exclusions set out in paragraphs 33, 62, 70, 71 and 72, this Ruling applies only to a Grower who is accepted to participate in the Project and who has executed an Almondlot Management Agreement and the Sub-lease Deeds on or after 1 July 2007 and on or before 15 June 2008.

74. 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

75. To be an 'STS taxpayer' a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328). 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 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method') – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

76. 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**

77. Subdivision 61-J 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**

78. 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, borrowing costs and capital expenditure**Section 8-1, section 25-25 and Division 40**

79. A Grower who is accepted to participate in the Project on or after 1 July 2007 and on or before 15 June 2008 and whose Application Moneys are paid in full on or before 15 June 2008, may claim deductions, on a per Almondlot basis, for the following expenditure set out in the Table below.

Fee Type	Year ended 30 June 2008	Year ended 30 June 2009	Year ended 30 June 2010
Management fee	\$8,500 See Notes (i), (ii) & (iii)	\$1,500 See Notes (i), (ii) & (iii)	Amount incurred See Notes (i), (ii), (iii) & (iv)
Rent	Must be calculated - See Notes (i), (ii), (iii) & (v)	\$500 See Notes (i), (ii) & (iii)	\$770 See Notes (i), (ii) & (iii)
Interest on loans with the Financier	As incurred See Notes (iii) & (vi)	As incurred See Notes (iii) & (vi)	As incurred See Notes (iii) & (vi)
Loan Application Fee for loans with the Financier	Must be calculated - See Note (vii)	Must be calculated - See Note (vii)	Must be calculated - See Note (vii)
Establishment of Almond Trees			See Note (viii)

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) Subject to Note (v) below, the management fees and the rent payable under the Almondlot Management Agreement and the Sub-lease Deeds respectively are deductible in full in the year that they are incurred.
- (iii) This Ruling does not apply to a Grower who chooses to prepay the management fees or rent, or who is required to prepay interest under a loan agreement (see paragraphs 106 to 109 of this Ruling). 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 binding ruling on the taxation consequences of their participation in the Project.
- (iv) TSL will inform Growers of the amount and composition of the costs payable for the 2010 Financial Year. It will consist of operating costs and contingent amounts which are based on a percentage of 'Gross Almond Sales' or Net Proceeds.
- (v) The deduction for rent is \$41.67 per month for each month or part month that the Grower is granted the sub-lease to use the Almondlot. This means that the full \$500 rent payable for the 2008 Financial Year will not be deductible if the Grower is accepted on or after 1 August 2007 (see paragraphs 101 and 102 of this Ruling).
- (vi) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than the Financier, is outside the scope of this Ruling. A Grower who borrows from a lender other than the Financier may request a private binding ruling on the deductibility of the interest incurred.
- (vii) The Loan Application Fee payable to the Financier 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 the Financier is outside the scope of this Ruling.

- (viii) Almond trees are a 'horticultural plant' as defined in subsection 40-520(2). As a Grower holds the Almondlot under a lease, the condition in item 2 of subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for 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.

80. A Joint Venture Grower who is in Joint Venture with another entity may claim deductions, on a per Almondlot basis, for the following expenditure set out in the Table and Notes in paragraph 79 of this Ruling.

First Joint Venturer

- 100% of the management fees and rent (subject to paragraph 79 Note (v) of this Ruling) as set out in subparagraphs 64(i) and (ii) payable for the Financial Year ended 30 June 2008;
- 51% of the management fees and rent as set out in subparagraphs 64(iii) and (iv) of this Ruling commencing on and from the 2013 Financial Year;
- 51% of all of the deferred management fees and any incentive (performance) fee as set out in subparagraphs 64(v) and (vi) of this Ruling;
- interest and the Loan Application Fee incurred on and payable in respect of funds borrowed from the Financier; and
- 51% of the horticultural plant write-off.

Second Joint Venturer

- 100% of the management fees and rent as set out in subparagraphs 65(vii) and (viii) of this Ruling during the 2009-2012 Financial Years;
- 49% of the management fees and rent as set out in subparagraphs 65(ix) and (x) of this Ruling commencing on and from the 2013 Financial Year;

- 49% of all of the deferred management fees and any incentive (performance) fee as set out in subparagraphs 65(xi) and (xii) of this Ruling;
- interest and the Loan Application Fee incurred on and payable in respect of funds borrowed from the Financier; and
- 49% of the horticultural plant write-off.

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

81. A Grower who is an individual accepted into the Project on or after 1 July 2007 and on or before 15 June 2008 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 2008 to 30 June 2013**. 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

82. For a Grower who participates in the Project and incurs expenditure as required by the Almondlot Management Agreement and the Sub-lease Deeds, 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 106 of this Ruling);
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Commissioner of Taxation11 October 2006

Appendix 1 – Explanation

1 *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?

83. For the amounts set out in the Table above to constitute allowable deductions the Grower's horticultural activities as a participant in the 2007 Timbercorp Almond Project must amount to the carrying on of a business of primary production.

84. 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.

85. For schemes such as that of the 2007 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.

86. 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.

87. In this Project, each Grower enters into an Almondlot Management Agreement and the Sub-lease Deeds.

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

89. Under the Almondlot Management Agreement TSL 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. TSL 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.

90. TSL is also engaged to harvest and sell, on the Grower's behalf, the Almonds grown on the Grower's Almond Trees.

91. 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.

92. 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.

93. 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.

94. TSL's services, as Responsible Entity, 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.

95. The Grower's degree of control over TSL as evidenced by the Almondlot Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the Term of the Project, TSL 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 TSL in certain instances, such as cases of default or neglect.

96. 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 2007 Timbercorp Almond Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

97. 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.

98. 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 and rent

Section 8-1

99. 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.

100. 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.

101. One of the exclusions under section 8-1 relates to expenditure that is capital, or is capital in nature. Any part of the expenditure of a Grower entering into a horticulture business which is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and hence will not be deductible under section 8-1. The Commissioner is of the view that depending upon when they are accepted to participate in the Project, a portion of the initial rent payable by a Grower will be capital expenditure. Therefore, the amount allowed as a deduction for rent under section 8-1 will be allowed as follows.

102. If a Grower enters the Project on or before 31 July 2007 the rent of \$500 payable on application for the period from the Commencement Date to 30 June 2008 will be deductible in full. However, Growers accepted to participate in the Project on or after 1 August 2007 and on or before 15 June 2008, will not be entitled to the full deduction. The deduction will be calculated on a pro-rata monthly basis of \$41.67 for each month or part month that the Grower is granted the sub-leases to use the Almondlots from TSL.

Interest deductibility

Section 8-1

(i) A Grower who uses the Financier as the finance provider

103. A Grower may finance their participation in the Project through a loan facility with the Financier. 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.

104. The interest incurred for the year ended 30 June 2008 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations – the cultivation and growing of Almond Trees and the sub-lease of the land on which the Almond Trees will or 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 the Financier as the finance provider

105. The deductibility of interest incurred by a Grower who finances their participation in the Project through a loan facility with a bank or financier other than the Financier 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

106. 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

107. Under the Scheme to which this Product Ruling applies management fees and rent are incurred annually and interest payable to the Financier is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this Scheme.

108. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project prepays all or some of the expenditure payable under the Almondlot Management Agreement and/or the Sub-lease Deeds, or prepays interest under a loan agreement (including loan agreements with lenders other than the Financier). 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.

109. As noted in the Ruling section above, a Grower who prepays fees or interest is 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

110. 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.

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

111. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2008 to 30 June 2013** 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 2008 up to and including 30 June 2013:

- 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.

112. 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

113. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefits(s)'. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1.

Part IVA – general tax avoidance provisions

114. For Part IVA of the ITAA 1936 to apply there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

115. The 2007 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 paragraph 79 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

116. 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) of the ITAA 1936 it cannot be concluded, on the information available, that Growers will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Appendix 2 - Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Goods and Services Tax	3
Changes in the Law	4
Note to promoters and advisers	6
Class of entities	7
Qualifications	9
Date of effect	12
Withdrawal	16
Scheme	17
Overview	20
Constitution	30
Joint Venture	34
Compliance Plan	35
Head Leases	36
Sub-lease Deeds	39
Almondlot Management Agreement	46
Tree Supply and Capital Works Agreement	52
Management Agreement	57
Almond Orchard Management Agreement	58
Pooling of amounts and distribution of Proceeds	59
Fees	60
Constitution	63
Finance	66
Ruling	73
Application of this Ruling	73
The Simplified Tax System (STS)	75
<i>Division 328</i>	75
25% entrepreneurs' tax offset	77
<i>Subdivision 61-J</i>	77
Assessable income	78

<i>Sections 6-5</i>	78
Deductions for management fees, rent, interest, borrowing costs and capital expenditure	79
<i>Section 8-1, section 25-25 and Division 40</i>	79
Division 35 – deferral of losses from non-commercial business activities	81
<i>Section 35-55 – exercise of Commissioner’s discretion</i>	81
Sections 82KZME - 82KZMF and 82KL and Part IVA	82
Appendix 1 – Explanation	83
Is the Grower carrying on a business?	83
The Simplified Tax System	97
<i>Division 328</i>	97
Deductibility of management fees and rent	99
<i>Section 8-1</i>	99
Interest deductibility	103
<i>Section 8-1</i>	103
<i>(i) A Grower who uses the Financier as the finance provider</i>	103
<i>(ii) A Grower who does NOT use the Financier as the finance provider</i>	105
Prepayment provisions	106
<i>Sections 82KZL to 82KZMF</i>	106
<i>Application of the prepayment provisions to this Project</i>	107
Expenditure of a capital nature	110
<i>Division 40</i>	110
Division 35 – deferral of losses from non-commercial business activities	111
<i>Section 35-55 – exercise of Commissioner’s discretion</i>	111
Section 82KL recouped expenditure	113
Part IVA – general tax avoidance provisions	114
Appendix 2 – Detailed contents list	117

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/11; TR 98/22; TR 2000/8;
TR 2001/14; TR 2002/6;
TR 2002/11; PR 2006/145

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:

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- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
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- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
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- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 Pt IVA
- ITAA 1936 177A

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- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 Div 27
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- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
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- ITAA 1997 40-515(1)(b)
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Case references:

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ATO references

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ATOlaw topic: Income Tax ~ Product ~ crops - other