



## Product Ruling

### Income tax: AIL Almond Grower Project – 2010 (on or before 15 June 2010)

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Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
What this Ruling is about	1
Date of effect	10
Ruling	16
Scheme	31
<b>NOT LEGALLY BINDING SECTION:</b>	
Appendix 1:	
Explanation	95
Appendix 2:	
Detailed contents list	122

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

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

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

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

### **No guarantee of commercial success**

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The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. The Commissioner recommends a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

### **Terms of use of this Product Ruling**

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This Product Ruling has been given on the basis that the entity(s) who applied for the Product Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

## What this Ruling is about

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Product Ruling this scheme is referred to as the AIL Almond Grower Project – 2010 or simply as 'the Project'.

2. All legislative references in this Product Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. Where used in this Product Ruling, the word 'associate' has the meaning given in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936). In this Product Ruling, terms defined in the Project agreements have been capitalised.

### Class of entities

3. This part of the Product Ruling specifies which entities:

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

set out in the Ruling section of this Product Ruling.

4. The class of entities who can rely on those tax benefits are referred to as Growers. Growers will be those entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and who have executed the relevant Project Agreements set out in paragraph 31 of this Ruling on or before 15 June 2010. They will stay in the scheme until its completion and derive assessable income from this involvement.

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

- terminate their involvement in the scheme prior to its completion or do not derive assessable income from it;
- are accepted into this Project before the date of this Ruling or after 15 June 2010;
- participate in the scheme through offers made other than through the Product Disclosure Statement, or who enter into an undisclosed arrangement with:
  - the promoter or a promoter associate, or
  - an independent adviserthat is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits or harvest returns) in any way; or
- elect to take and sell their produce.

**Superannuation Industry (Supervision) Act 1993**

6. This Product ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this product may contravene the provisions of SISA 1993.

**Qualifications**

7. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 31 to 94 of this Ruling.

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

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

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**Date of effect**

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10. This Product Ruling applies prospectively from 24 February 2010, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 24 February 2010 until 15 June 2010, being the closing date for entry into the scheme. Other than paragraphs 26 to 29 dealing with non-commercial losses, this Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to 30 June 2012. Paragraphs 26 to 29 of this Ruling provide advice on the application of the non-commercial losses provisions until 30 June 2015. This Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

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

## **Changes in the law**

12. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments to the law may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to the extent of those amendments this Product Ruling will be superseded.

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

## **Note to promoters and advisers**

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

## **Goods and Services Tax**

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

# **Ruling**

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## **Application of this Ruling**

16. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters into the scheme described at paragraphs 31 to 94 of this Ruling.

17. The Grower's participation in the Project must constitute the carrying on of business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Allotment Management Agreement and Allotment Sublease Agreement on or before 15 June 2010.

**Small business concessions**

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

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

**Assessable income****Section 6-5**

20. 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 and annual rent****Section 8-1 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the ITAA 1936**

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

<b>Fee Type</b>	<b>Year ending 30 June 2010</b>	<b>Year ending 30 June 2011</b>	<b>Year ending 30 June 2012</b>
<b>Management Fees</b>	\$4,600 See Notes (i), (ii) & (iii)	\$1,450 See Notes (i), (ii) & (iii)	\$1,450 See Notes (i), (ii) & (iii)
<b>Annual rent</b>	Nil	\$850 See Notes (i), (ii) & (iii)	\$950 See Notes (i), (ii) & (iii)

**Notes:**

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) The Management Fees and the annual rent are deductible under section 8-1 in the income year that the relevant fee is incurred.

- (iii) This Product Ruling does not apply to Growers who choose to prepay their Management Fees or their annual rent (see paragraphs 106 to 110 of this Ruling). Subject to certain exclusions, amounts that are prepaid for a period that extends beyond the income year in which the expenditure is incurred may be subject to the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936. Any Grower who prepays such amounts may request a private ruling on the taxation consequences of their participation in the Project.

### **Deductions for capital expenditure (Growers who are not ‘small business entities’)**

#### ***Division 40***

22. A Grower who is not a ‘small business entity’ will also be entitled to tax deductions relating to the Terms Payment administration fee, the Irrigation Charge, and the decline in value of the almond trees. All deductions shown in the following Table are determined under Division 40 and are on a per Allotment basis.

<b>Fee Type</b>	<b>Year ended 30 June 2010</b>	<b>Year ended 30 June 2011</b>	<b>Year ended 30 June 2012</b>
<b>Administration fee payable under a Terms Payment Agreement</b>	\$10 See Notes (i) & (iv)	\$10 See Notes (i) & (iv)	\$10 See Notes (i) & (iv)
<b>Irrigation Charge</b>	\$1,000 See Notes (i) & (v)	\$1,000 See Notes (i) & (v)	\$1,000 See Notes (i) & (v)
<b>Establishment of almond trees</b>	NIL See Note (vi)	NIL See Note (vi)	NIL See Note (vi)

#### **Notes:**

- (iv) The administration fee payable to Almond Investors Limited in respect of a Terms Payment Agreement of \$50 per Allotment is not tax deductible in full when it is incurred. Under section 40-880 it is deductible on a straight line basis over five income years (see paragraphs 101 to 102 of this Ruling).

- (v) Any irrigation system, dam or bore is a 'water facility' as defined in subsection 40-520(1), being used primarily and principally for the purpose of conserving or conveying water. As the condition in subsection 40-525(1) is met, a deduction is available under Subdivision 40-F, paragraph 40-515(1)(a). The Irrigation Charge for this Project is \$3,000. The deduction is equal to one-third of the capital expenditure incurred by a Grower on the installation of the 'water facility' in the year in which it is incurred and one-third in each of the next 2 years of income (section 40-540).
- (vi) Almond trees are a 'horticultural plant' as defined in subsection 40-520(2). As Growers hold the land under a sublease, one of the conditions in subsection 40-525(2) is met and a deduction for 'horticultural plants' is available under paragraph 40-515(1)(b) for their decline in value. The deduction for the almond trees is determined using the formula in section 40-545 and is based on the capital expenditure incurred by the Grower that is attributable to their establishment. If the 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). Almond Investors Limited (AIL) as the Responsible Entity of the Project (the Responsible Entity) will inform Growers of when the almond trees enter their first commercial season and the amount incurred by the Responsible Entity of the AIL Almond Asset Trust – 2010 in establishing the almond trees.

**Deductions for capital expenditure (Growers who are 'small business entities')**

***Subdivision 328-D and Subdivision 40-F***

23. A Grower, who is a 'small business entity', will also be entitled to tax deductions relating to the Terms Payment administration fee, the Irrigation Charge, and the decline in value of the almond trees. A 'small business entity' may claim deductions in relation to water facilities under Subdivision 40-F but as the 'water facility' is a 'depreciating asset' used to carry on the business, they may choose instead to claim the deductions under Division 328.

24. The deductions shown in the following Table (on a per Allotment basis) assume, for representative purposes only, that a Grower has either chosen to or can only claim deductions for expenditure on water facilities under Subdivision 40-F rather than Division 328. Because the expenditure for the Irrigation Charge will be incurred on a 'depreciating asset' if it is claimed under Division 328, the deduction is determined as discussed in Notes (vii).

<b>Fee Type</b>	<b>Year ended 30 June 2010</b>	<b>Year ended 30 June 2011</b>	<b>Year ended 30 June 2012</b>
<b>Administration fee payable under a Terms Payment Agreement</b>	\$10 See Notes (i) and (iv)	\$10 See Notes (i) and (iv)	\$10 See Notes (i) and (iv)
<b>Irrigation Charge</b>	\$1,000 See Notes (i) & (vii)	\$1,000 See Notes (i) & (vii)	\$1,000 See Notes (i) & (vii)
<b>Establishment of almond trees</b>	NIL See Note (vi)	NIL See Note (vi)	NIL See Note (vi)

**Notes:**

- (vii) As the Irrigation Charge expenditure is for the acquisition of a 'depreciating asset' (the underlying asset), a Grower who is a 'small business entity' may choose to claim a deduction under either Division 328 or Subdivision 40-F. For Growers who choose to claim deductions under Subdivision 40-F, the deduction amounts are set out in the Table and are explained at note (v) to paragraph 22 of this Ruling. Alternatively, Growers who are 'small business entities' may choose to claim deductions under Division 328. However, as the Irrigation Charge expenditure of \$3,000 is greater than \$1,000 it therefore cannot be considered to be for a 'low-cost asset' and cannot be claimed as an immediate deduction when first used or 'installed ready for use'. The deduction allowable is instead determined by multiplying its 'cost' by half the relevant small business pool rate. At the end of the year, it is allocated to the relevant small business pool and in subsequent years the full pool rate will apply.

**Deductions for Growers who are Joint Venturers**

25. A Joint Venture Grower may claim deductions for the following expenditure per Allotment:

***First Joint Venture Grower***

- In the income year ending 30 June 2010, the Management Fee of \$4,600 (per notes (i), (ii) & (iii) of this Ruling).
- In the income years ending 30 June 2010, 30 June 2011, and 30 June 2012, the deduction amount for the Irrigation Charge is determined with reference to paragraph 22 and notes (i) and (v), (for non 'small business entities') or paragraphs 23 to 24 and notes (i) and (vii) of this Ruling (for 'small business entities').

***Second Joint Venture Grower***

- In the income year ending 30 June 2011, the Management Fee of \$1,450 (per notes (i), (ii) & (iii) of this Ruling).
- In the income year ending 30 June 2011, the Annual rent of \$850 (per notes (i), (ii) & (iii) of this Ruling).
- In the income year ending 30 June 2012, the Management Fee of \$1,450 (per notes (i), (ii) & (iii) of this Ruling).
- In the income year ending 30 June 2012, Annual rent of \$950 (per notes (i), (ii) & (iii) of this Ruling).

**Division 35 – deferral of losses from non-commercial business activities*****Section 35-55 – annual exercise of Commissioner’s discretion during the period beginning with the income year ended 30 June 2010 and concluding with the income year ended 30 June 2015***

26. For each of the income years from 30 June 2010 to 30 June 2015, the Commissioner will exercise the discretion in subsection 35-55(1) once the following conditions are satisfied for the year concerned:

- the Grower carried on their business of horticulture during the income year; and
- the business activity that is carried on is not materially different to that in the scheme described in this Product Ruling; and
- the Grower has incurred a taxation loss for the income year from carrying on that business activity.

27. If these conditions are met for a given year, the Commissioner will exercise the discretion for that year under:

- paragraph 35-55(1)(b) for a Grower in the Project who satisfies the income requirement in subsection 35-10(2E); and;
- paragraph 35-55(1)(c) for a Grower in the Project who does not satisfy the income requirement in subsection 35-10(2E).

28. If the Commissioner determines that the discretion will not be exercised for a particular year or years the Grower will be informed of that decision and the reasons. In any year where the discretion is not exercised losses incurred by a Grower will be subject to the loss deferral rule in section 35-10 and the Grower will not be able to offset the losses from the Project against other assessable income.

29. The issue of this Product Ruling of itself does not constitute the exercise of the Commissioner's discretion in subsection 35-55(1) for any income year.

## **Prepayment provisions and anti-avoidance provisions**

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

30. For a Grower who commences participation in the Project and incurs expenditure as required by the Allotment Management Agreement and the Allotment Sublease Agreement, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 106 to 110 of this Ruling);
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

## **Scheme**

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

- Application for a Product Ruling, received on 29 January 2010;

- Correspondence and amended agreements, received on 16 September 2009, 9 November 2009, 18 December 2009, 7 January 2010, 11 January 2010, 14 January 2010, 19 January 2010; 28 January 2010, and 29 January 2010;
- Draft **Product Disclosure Statement** (PDS) for the AIL Almond Grower Project – 2010, received on 29 January 2010;
- Draft **Allotment Management Agreement** between Almond Investors Ltd (as Responsible Entity of the Project) and each Grower, dated 31 August 2009;
- Draft **Allotment Sublease** between Almond Investors Ltd (as Responsible Entity of the Project), Sandhurst Nominees (Victoria) Limited and each Grower, dated 11 September 2009;
- Draft **Constitution for the AIL Almond Grower Project – 2010** between Almond Investors Ltd (as the Responsible Entity of the Project) and each Grower, received 29 January 2010;
- Draft Orchard Management Agreement between Rmonpro Developments Pty Ltd and Almond Investors Ltd (as the Responsible Entity of the Project), dated 31 August 2009;
- Amendment Deed between certain named landholders and Almond Investors Land Pty Ltd, dated 10 June 2008;
- Draft Sub-Lease between Almond Investors Land Pty Ltd and Sandhurst Trustees Limited, dated 31 August 2009;
- Draft Sub-Sub-Lease between Sandhurst Trustees Limited and Sandhurst Nominees (Victoria) Limited, dated 31 August 2009;
- Draft Constitution of the AIL Almond Asset Trust – 2010 between Almond Investors Ltd (as Responsible Entity of the AIL Almond Asset Trust – 2010) and the unit holders, received 29 January 2010;
- Draft Orchard Establishment Agreement between Horticultural Development Services Pty Ltd and Almond Investors Ltd (as the Responsible Entity of the AIL Almond Asset Trust – 2010) and Rmonpro Developments Pty Ltd, dated 31 August 2009;
- Almond Crop Supply Agreement between Almond Investors Ltd and Almondco Australia Ltd, dated 8 November 2002;

- Draft Compliance Plan for the AIL Almond Grower Project – 2010, dated 31 August 2009;
- Custodian Agreement between Almond Investors Ltd and Sandhurst Trustees Ltd, dated 18 January 2006;
- Draft Grower Representative Service Agreement dated 31 August 2009;
- Draft Loan Facility Agreement between Almond Investors Ltd and Almond Investors Ltd as responsible entity for the AIL Almond Asset Trust – 2010, provided 16 September 2009;
- Draft **Terms Payment Agreement** between Almond Investors Ltd and Growers, dated 31 August 2009;
- Lease between certain named landholders and Almond Investors Land Pty Ltd, dated 22 November 2007; and
- Variation of lease between certain named landholders and Almond Investors Land Pty Ltd (undated), provided 19 November 2009.

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

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

33. 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

34. The main features of the AIL Almond Grower Project – 2010 are as follows:

Location	Swan Hill district of Victoria, approximately 5 km south-east of the town of Piangil
Type of business to be carried on by each Grower	Cultivating almond trees for the purpose of harvest, processing and sale of almonds
Term of the Project	17 years
Number of hectares offered for cultivation	209.75 hectares

Size of each Allotment	0.125 hectares
Minimum allocation per Grower	1 Allotment
Minimum subscription	No minimum subscription
Number of almond trees per Allotment	40
Initial cost	\$7,600 per Allotment, comprising a Management Fee of \$4,600 and an Irrigation Charge of \$3,000
Ongoing costs	Annual rent Management Fees (payable annually) Deferred Management Fees (payable from the seventh Financial Year) Performance Fee Processing and Marketing Fees
Other costs	Terms Payment Administration Fee Interest on overdue terms payments Optional insurance

35. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. AIL has been issued with an Australian Financial Service Licence number 224314 and will be the Responsible Entity for the Project.

36. The Project will involve the establishment of an almond orchard near Piangil in Victoria, adjacent to Miralie-Cocamba Road, Algie Road, and Hayward Road. Specifically, the land is described as Certificate of Title Volume 8060 folio 660.

37. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer under the PDS is for 209.75 hectares, which corresponds to 1,678 Allotments in the Project.

38. A Grower who participates in the Project will do so by acquiring an interest in the Project which will consist of a minimum of one Allotment of 0.125 hectares in size.

39. Applicants execute a Power of Attorney contained in the PDS which irrevocably appoints the Responsible Entity to enter into, on behalf of the Grower, an Allotment Management Agreement and an Allotment Sublease Agreement.

40. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and who execute the Allotment Management Agreement and an Allotment Sublease Agreement on or before 15 June 2010 will become 2010 Growers.

41. For every Allotment that a Grower acquires in the Project, Growers or their nominees must also acquire a unit in the AIL Almond Asset Trust – 2010. **The taxation outcomes related to acquisition of units in the AIL Almond Asset Trust – 2010 are not covered by this Ruling.** The AIL Almond Asset Trust – 2010 will acquire the land for the Project, the Responsible Entity of the Project will lease the land from that trust, and Growers will sub-lease their Allotments from the Responsible Entity.

42. Almond trees will be planted on each Grower's Allotment in two stages, with 40% planted by 23 June 2010 and the balance by 30 September 2010.

43. The AIL Almond Asset Trust – 2010 will acquire the water that is necessary for the Project and make that water available to Growers under the Allotment Sub-lease. Ultimately, the AIL Almond Asset Trust – 2010 intends to acquire permanent Water Rights equal to the required 1.56 mega litres per Allotment per annum. However, due to the current cost of Water Shares it initially intends to only acquire Temporary Water Allocations to satisfy its obligations to make Water Rights available to Growers in the Project. No time frame is given for the acquisition of sufficient permanent Water Rights other than a statement in the PDS that this will be 'no later than Project Year 17' (that is, by the end of the Grower Project).

44. Each Grower will use their Allotments for the purpose of carrying on a business of cultivating almond trees and harvesting almonds and the sale of the harvested produce.

## Constitution

45. The Constitution establishes the Project and operates as a deed binding all Growers and the Responsible Entity of the Project (clause 2). The Constitution sets out the terms and conditions under which AIL agrees to act as Responsible Entity and thereby manage the Project (clause 3). Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

46. In order to acquire an interest in the Project, the Grower must make an Application for an Allotment in accordance with clauses 6 and 7. Among other things, the application must be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant, and accompanied by payment of the application money in a form acceptable to the Responsible Entity.

47. The application money is held on bare trust by the Responsible Entity or Custodian (clause 6.2), and will be deposited in the Growers' Application Account (clause 7.7).

48. Once the Responsible Entity has accepted the application and the Allotment Sublease Agreement and the Allotment Management Agreement have been executed under a power of attorney (clause 7.6) and the Grower's Allotment has been issued, the application money

may be transferred from the application account and applied against the fees due to the Responsible Entity (clause 8.1).

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

- acceptance at the Responsible Entity's discretion that payment of a Grower's Contribution (that is, the application amount) may be made by instalments under a Terms Payment Arrangement (clause 7);
- composition of a Grower's Allotment (clause 11);
- requirement that Project Assets be held on trust and the appointment of a Custodian to hold the Project Assets on behalf of the Growers (clauses 12 and 19);
- keeping and maintenance of a Register of Growers (clause 13);
- transfer of a Growers Allotment (clause 14);
- powers, rights and liabilities of the Responsible Entity of the Project (clauses 19 and 20);
- opening of a Growers Proceeds Account at an Australian bank, the payment of proceeds into the Growers Proceeds Account, deductions that may be made from the Growers Proceeds Account and distributions to Growers from the Growers Proceeds Account, including dealing with proceeds from insurance (clauses 24 through 27); and
- termination and winding up of the Project (clauses 29 and 30).

### **Compliance Plan**

50. As required by the *Corporations Act 2001*, AIL 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 interests of the Growers are protected.

### **Lease, Sub-Lease, Sub-Sub-Lease, and Amendment Deed**

51. Almond Investors Land Pty Ltd holds a Lease over the land on which the Project will be carried out (called the Interim Head Lease) and an option to buy the same land under the Amendment Deed.

52. A Sub-Lease (called the Interim Sub-Lease) between Almond Investors Land Pty Ltd and Sandhurst Trustees Ltd (as Custodian for the AIL Almond Asset Trust – 2010) will be executed prior to acceptance of any applications to the Project.

53. The lessors under the Interim Head Lease and the Interim Sub-Lease consent to the works to be carried out on the land in accordance with the Sub-Sub-Lease (also called the Trust Lease) between Sandhurst Trustees Limited as Custodian of the AIL Almond Asset Trust – 2010 and Sandhurst Nominees (Victoria) Limited as Custodian of the Project: this lease is also to be executed prior to acceptance of Applicants.

54. If Almond Investors Land Pty Ltd exercises the option to acquire the land, then that part of the Lease attributed to the land acquired will terminate, as will the Sub-Lease – leaving the Sub-Sub-Lease in place.

## **Allotment Sublease**

55. Each Grower and Sandhurst Nominees (Victoria) Ltd (as Custodian of the Project) and the Responsible Entity of the Project will enter into an Allotment Sublease.

56. Under the Allotment Sublease, each Grower is granted a sublease of their Grower's Allotment and the Trees, and the right to use the Project Water Rights, for the purpose of growing, maintaining and harvesting the Trees on the Allotment (clause 2).

57. The term of the Sublease commences on the Grower Commencement Date and ends 15 June 2027, unless terminated earlier under the Constitution for the Project (clause 3).

58. The Responsible Entity will ensure that the Trustee of the AIL Almond Asset Trust – 2010 properly and skilfully prepares each Grower's Allotment, plants and establishes the Trees, and acquires sufficient Project Water Rights for the life of the Project. A minimum of 40% of the Trees are to be planted on each Grower's Allotment by no later than 23 June 2010, with the remaining Trees to be planted on each Grower's Allotment by no later than 30 September 2010 (clause 4).

59. The Allotment Sublease also sets out the:

- Grower's obligations (clause 6);
- obligations of the Responsible Entity (clause 7);
- annual rent payable by a Grower for the sublease of the Allotment and the Trees, and for the right to use the Project Water Rights (clause 8 and Schedule 3); and
- termination of the Allotment Sublease by the Grower or Responsible Entity (clause 9).

## **Allotment Management Agreement**

60. Each Grower will enter into an Allotment Management Agreement with the Responsible Entity whereby the Grower engages the Responsible Entity as a contractor to manage the Grower's Allotment (clause 2).

61. The Term of the Allotment Management Agreement begins on the Grower Commencement Date and ends on the earlier of the termination of the Grower's Interest or 15 June 2027 (clause 3).
62. The Responsible Entity will carry out the services under the Allotment Management Agreement in accordance with sound horticultural, environmental and industry practices. The Initial Services are set out in Part 1 of Schedule 3 of the Allotment Management Agreement, and include Orchard Management Services, Orchard Maintenance Services, and Administration and Management Services.
63. The services to be carried out in the second and subsequent Financial Years are set out in Part 2 of Schedule 3 of the Allotment Management Agreement, and include Farming Services, and Administration and Management Services (clause 4).
64. The Responsible Entity also agrees to carry out processing duties relating to the almonds harvested from the Grower's Allotment and, will be responsible for the marketing and sale of the almonds attributable to the Grower's Allotment, unless the Grower elects to sell their own almonds (clause 4.3). The processing duties are set out in Part 3 of Schedule 3 to the Allotment management Agreement.
65. The Allotment Management Agreement also:
- provides that the Responsible Entity will install the Grower Irrigation and each Grower will own their proportion of the Irrigation System (clause 4);
  - sets out the fees payable by the Grower to the Responsible Entity (clause 5 and Schedule 4); and
  - sets out when the Allotment Management Agreement may be terminated (clause 10).

### **Orchard Management Agreement**

66. The Responsible Entity will appoint Rmonpro Developments Pty Ltd as the Orchard Manager for the Project. The Orchard Manager is engaged as a contractor to provide the Orchard Services, and if requested by the Responsible Entity, will oversee the hulling and cracking operation, processing, and relationship with the marketing entity (clause 3).
67. The Orchard Management Agreement commences on the date of its execution and continues until the end of the Project in accordance with the Constitution of the Project (clause 2).
68. Rmonpro Developments Pty Ltd as the Orchard Manager must ensure that the Initial Services are provided to each Grower as required by the Allotment Management Agreement. The Orchard Manager must cultivate, maintain, irrigate, and manage the almond trees and the Orchard in a manner consistent with the Management Plan in a good workmanlike and commercially responsible manner and to a standard consistent with Best Horticultural Practice (clause 5).

69. The Orchard Management Agreement also sets out:
- the fees payable by the Responsible Entity of the Project (clause 7 and parts 1 and 2 of Schedule 2); and
  - when the Orchard Management Agreement may be terminated (clause 8).

## **Almond Crop Supply Agreement**

70. AIL has entered into an agreement with Almondco Australia Ltd (Almondco) where AIL agrees to supply all its almonds to Almondco except for 200 kilograms which it may retain for domestic use (clauses 1 and 2).

71. Under the agreement, Almondco agrees to prepare the almonds for market and to use its best endeavours to sell the almonds at the best price available at the time of sale. Almondco will pool the almonds and the proceeds of sale categorised by variety, grade and quality (clause 3).

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

72. Each Grower has an interest in the Growers' Proceeds Account equal to the proportion the Almonds Attributable to the Grower's Allotment bears to the total (clause 25.2(a) of the Constitution).

73. However, a Grower's entitlement to a proportion of the Growers' Proceeds Account is reduced where a Grower's Allotment is partially or totally destroyed or in the case of inadequate production on the Grower's Allotment (clause 4.4 of the Allotment Management Agreement and clause 25.1(b) of the Constitution).

74. The Responsible Entity must deposit moneys generated from the Project into the Growers' Proceeds Account (clause 24.1(b) of the Constitution).

75. Where the Responsible Entity is responsible for the marketing and sale of the Growers' almonds, it may aggregate the almonds with those from other Growers' Allotments (clause 4.4 of the Allotment Management Agreement).

76. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed almonds to the sales pool are entitled to benefit from distributions of proceeds of sale from the pooled almonds; and
- any pooled almonds must consist only of almonds contributed by Growers to which this Product Ruling applies (see clause 4).

**Joint Venturers**

77. Part 9 of the Constitution allows two entities to enter into the Project as an unincorporated joint venture. The First Joint Venturer and the Second Joint Venturer share the obligations and entitlements of a Grower, but have differing payment obligations as set out in clause 33.6 of the Constitution, and accordingly they are entitled to different income tax deductions as discussed at paragraph 25 of this Ruling. The First Joint Venturer is entitled to 39% and the Second Joint Venturer is entitled to 61% of the net proceeds of sale generated from their Allotment (clauses 33.5 and 33.7 of the Constitution).

**Fees**

78. The Fees payable by Growers who are not participating in the Project as Joint Venturers are set out in:

- clause 7 and Schedule 3 of the Constitution;
- clause 5 and Schedule 4 of the Allotment Management Agreement; and
- clause 8 and Schedule 3 of the Allotment Sublease Agreement.

79. The fees for Growers who participate in the Project as Joint Venturers are set out in clause 33.6 of the Constitution.

***Fees payable under the Allotment Management Agreement***

80. On application a Grower who is not participating in the Project as a Joint Venturer must pay the Management Fee of \$4,600 (for the performance of the Initial Services) and pay the Irrigation Charge of \$3,000 (for ownership of the Grower Irrigation).

81. Following the application year, ongoing Management Fees, Deferred Management Fees (7.7% of Gross Proceeds), Growing Fees, Performance Fees (22% of the Net Proceeds that exceed Hurdle Net Proceeds), and Processing and Marketing Fees are payable to the Responsible Entity.

82. A Grower participating in the Project in a joint venture as the First Joint Venturer pays:

- the \$4,600 Management Fee and \$3,000 Irrigation Charge on application;
- no Management Fees for the second through sixth Financial Years;
- 39% of the Management Fees for the seventh Financial Year and for each subsequent Financial Year through to the end of the Project; and
- 39% of the Performance Fees, Processing and Marketing fees and Deferred Management Fees.

83. A Grower participating in the Project in a joint venture as the Second Joint Venturer pays:

- no initial application fees;
- 100% of the Management Fees for the second through to the sixth Financial Years;
- 61% of the Management Fees for the seventh Financial Year and for each subsequent Financial Year through to the end of the Project; and
- 61% of the Performance Fees, the Processing and Marketing fees and the Deferred Management Fees.

### ***Fees payable under the Allotment Sublease Agreement***

84. Under this agreement, a Grower who is not a Joint Venturer pays no lease fee or rent for the initial 2009-10 income year. After the first year, the annual rent is payable \$850 on 1 November 2011, \$950 on 1 November 2012, \$1,050 on 1 November 2013 and \$1,200 on 1 November 2014. The annual rent payable on 1 November 2015 through 1 November 2026 is based on a formula that includes indexing the amount of \$1,200 and incorporating the cost of providing 1.56 mega litres of water.

85. A Grower participating in the Project in a joint venture as the First Joint Venturer pays:

- no rent in the first Financial Year; and
- 39% of the rent in the seventh and each subsequent Financial Year until the end of the Project.

86. A Grower participating in the Project in a joint venture as the Second Joint Venturer pays:

- no rent in the first Financial Year;
- 100% of the rent in the second through to the sixth Financial Years; and
- 61% of the rent in the seventh and each subsequent Financial Year until the end of the Project.

### **Finance**

87. To finance the application amount for their Allotment(s) a Grower, including a Grower who is a Joint Venturer, can enter into a Terms Payment Agreement with AIL or, alternatively, borrow from an independent lender external to the Project. The Terms Payment Agreement with AIL is the only financing arrangement covered by this Product Ruling.

88. A Grower, including a Grower who is a Joint Venturer, cannot rely on any part of this Ruling if:

- the Grower has not paid the full \$7,600 per Allotment to AIL, on application (this must be on or before 15 June 2010); or
- the Grower has not executed a Terms Payment Agreement with AIL on or before 15 June 2010 under which the \$7,600 per Allotment will be paid to AIL in 12 equal instalments (see below); or
- the Grower is borrowing all or part of the \$7,600 per Allotment from an independent external lending institution and that institution has not paid the full amount of the loan monies to AIL on behalf of the Grower (see paragraph 89 of this Ruling).

89. Where all or part of the application amount of \$7,600 per Allotment is being financed by an external lending institution, written evidence showing that the finance has been approved must be provided to AIL by the lending institution on or before 15 June 2010. In such cases, for this Product Ruling to apply, the Grower must have provided AIL with the non-financed part of the application monies (if any) with the application and the lending institution must provide the balance, being the full amount of the loan monies, to AIL on behalf of the Grower no later than 30 June 2010.

90. As this Ruling does not rule on the deductibility of interest on any loans used to finance a Grower's participation in the scheme to which this Ruling applies, Growers who incur such interest with any lending institution may request a private ruling on the deductibility or otherwise of the interest incurred or, alternatively, may self assess the deductibility of the interest.

### ***Terms Payment Agreement***

91. AIL may in its absolute discretion agree in writing to accept applications without the full application monies if the Grower first enters into a Terms Payment Agreement with AIL.

92. Under a Terms Payment Agreement:

- the Grower is required to pay a terms administration fee of \$50 per Allotment on Application (clause 2.1(a));
- the \$7,600 per Allotment is payable by 12 equal monthly instalments, with the first instalment due on 15 July 2010 (clause 2.1(b) and the Schedule);
- all payments must be made by direct debit (clause 2.2);
- the Grower may repay the balance of the Principal Amount at any time without penalty;

- interest on overdue amounts may be charged (clause 3); and
- the Responsible Entity has security over the Growers' rights, title, interest and assets in the Project (clause 4).

93. The full amount of the \$7,600 per Allotment must be paid no later than 12 months from the date the Grower is accepted to participate in the Project.

### ***Other qualifications relating to finance***

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

## **Appendix 1 – Explanation**

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**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?**

95. For the amounts set out in paragraphs 21 to 25 of this Ruling to constitute allowable deductions the Grower's horticultural activities as a participant in the Project must amount to the carrying on of a business of primary production.

96. The general indicators used by the Courts in determining whether an entity is carrying on a business are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

97. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Ruling, the Full Federal Court in *Hance v. FC of T; Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 applied these principles to conclude that 'Growers' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

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

### **Deductibility of the Management Fees and Annual rent**

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

99. The Management Fees and the annual rent are deductible under section 8-1. A 'non-income producing' purpose is not identifiable in the arrangement and there is no capital component evident in either the Management Fees or the annual rent.

100. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Provided that the prepayment provisions do not apply (see paragraphs 106 to 110 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred. (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7.)

## **Administration fee payable under a Terms Payment Agreement**

### ***Section 40-880***

101. Growers who elect to pay their Grower's contribution under the Terms Payment Agreement must pay an administration fee of \$50. This expenditure does not constitute a borrowing expense and is therefore not deductible under section 25-25. As it is capital in nature it is also not deductible under section 8-1.

102. However, section 40-880 will allow the administration fee to be deducted on a straight line basis over five income years. Section 40-880 applies to capital expenditure that is incurred in relation to a business and which is not taken into account elsewhere or denied deductibility under another provision of income tax law.

## **Expenditure of a capital nature**

### ***Division 40 and Division 328***

103. 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 water facilities and the establishment of the almond trees are of a capital nature. This expenditure falls for consideration under Division 40 or Division 328.

104. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is a 'small business entity' (the meaning of 'small business entity' is set out in sections 328-110 to 328-130).

105. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 22 to 24 of this Ruling in the Table(s) and the accompanying notes.

## **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.

107. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 (operative provisions).

***Application of the prepayment provisions to this Project***

108. Under the scheme to which this Product Ruling applies Management Fees, annual rent and other fees are incurred annually. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

109. 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 Allotment Management Agreement and/or the Allotment Sublease Agreement. Where such a prepayment is made these prepayment provisions will also apply to 'small business entities' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

110. As noted in the Ruling section above, Growers who prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

**Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion**

111. Based on information provided with the application for this Product Ruling, a Grower accepted into the Project in the year ended 30 June 2010 who carries on a business of horticulture individually (alone or in partnership) is expected to incur losses from their participation in the Project which will be subject to Division 35.<sup>1</sup> These losses will be subject to the loss deferral rule in section 35-10 unless an exception applies or, for each income year in which losses are incurred, the Commissioner exercises the discretion in subsection 35-55(1) on 30 June of that specific income year.

112. The exceptions to the loss deferral rule depend upon the circumstances of individual Growers and are outside the scope of this Ruling.

113. The Commissioner will apply the principles set out in Taxation Ruling TR 2007/6 Income tax: non-commercial business losses: Commissioner's discretion when exercising the discretion.

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<sup>1</sup> Division 35 does not apply to Growers who do not carry on a business or who carry on a business other than as individuals (alone or in partnership).

114. Where a Grower with income for non-commercial loss purposes of less than \$250,000 (that is, the Grower satisfies the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(b) is exercised for that year, the Commissioner will be satisfied that:

- it is because of its nature that the business activity of the Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the almond industry, the Grower's business activity will satisfy one of the four tests set out in Division 35 or produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C).

115. Where a Grower with income for non-commercial loss purposes of \$250,000 or more (that is, the Grower does not satisfy the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(c) is exercised for that year, the Commissioner will be satisfied that:

- it is because of its nature that the business activity of the Grower will not produce assessable income greater than the deductions attributable to it; and
- there is an objective expectation that within a period that is commercially viable for the almond industry, the Grower's business activity will produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C).

116. A Grower will satisfy the income requirement in subsection 35-10(2E) where the sum of the following amounts is less than \$250,000:

- taxable income for that year (ignoring any loss arising from participation in the Project or any other business activity);
- total reportable fringe benefits for that year;
- reportable superannuation contributions for that year; and
- total net investment losses for that year.

117. In each individual year where the Commissioner's discretion is exercised a Grower within either paragraphs 114 or 115 of this Ruling who would otherwise be required to defer a loss arising from their participation in the Project under section 35-10 until a later income year is able to offset that loss against their other assessable income.

### **Section 82KL – recouped expenditure**

118. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefits(s)'. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL of the ITAA 1936. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

### **Part IVA – general tax avoidance provisions**

119. 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).

120. The AIL Almond Grower Project – 2010 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 21 to 25 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.

121. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the almonds. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

**Appendix 2 – Detailed contents list**

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

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Class of entities	3
Superannuation Industry (Supervision) Act 1993	6
Qualifications	7
<b>Date of effect</b>	<b>10</b>
Changes in the law	12
Note to promoters and advisers	14
Goods and Services Tax	15
<b>Ruling</b>	<b>16</b>
Application of this Ruling	16
Small business concessions	18
Assessable income	20
<i>Section 6-5</i>	20
Deductions for Management Fees and annual rent	21
<i>Section 8-1 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the ITAA 1936</i>	21
Deductions for capital expenditure (Growers who are not 'small business entities')	22
<i>Division 40</i>	22
Deductions for capital expenditure (Growers who are 'small business entities')	23
<i>Subdivision 328-D and Subdivision 40-F</i>	23
Deductions for Growers who are Joint Venturers	25
Division 35 – deferral of losses from non-commercial business activities	26
<i>Section 35-55 – annual exercise of Commissioner's discretion during the period beginning with the income year ended 30 June 2010 and concluding with the income year ended 30 June 2015</i>	26
Prepayment provisions and anti-avoidance provisions	30
<i>Sections 82KZME, 82KZMF, 82KL and Part IVA</i>	30
<b>Scheme</b>	<b>31</b>
Overview	34

Constitution	45
Compliance Plan	50
Lease, Sub-Lease, Sub-Sub-Lease, and Amendment Deed	51
Allotment Sublease	55
Allotment Management Agreement	60
Orchard Management Agreement	66
Almond Crop Supply Agreement	70
Pooling of crops and a Grower's entitlement to Net Proceeds	72
Joint Venturers	77
Fees	78
<i>Fees payable under the Allotment Management Agreement</i>	80
<i>Fees payable under the Allotment Sublease Agreement</i>	84
Finance	87
<i>Terms Payment Agreement</i>	91
<i>Other qualifications relating to finance</i>	94
<b>Appendix 1 – Explanation</b>	<b>95</b>
Is the Grower carrying on a business?	99
Deductibility of the Management Fees and Annual rent	99
<i>Section 8-1</i>	99
Administration fee payable under a Terms Payment Agreement	101
<i>Section 40-880</i>	101
Expenditure of a capital nature	103
<i>Division 40 and Division 328</i>	103
Prepayment provisions	106
<i>Sections 82KZL to 82KZMF</i>	106
<i>Application of the prepayment provisions to this Project</i>	108
Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion	111
Section 82KL – recouped expenditure	118
Part IVA – general tax avoidance provisions	119
<b>Appendix 2 – Detailed contents list</b>	<b>122</b>

## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 97/7; TR 97/11; TR 98/22;  
TR 2007/6

*Subject references:*

- carrying on a business
- management fee expenses
- non-commercial losses
- primary production
- producing assessable income
- product rulings
- public rulings
- scheme

*Legislative references:*

- ITAA 1936
- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
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- ITAA 1936 82KZMB
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- ITAA 1936 Pt IVA
- ITAA 1936 177A
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