

## **PRODUCT RULING - BR Prd 04/05**

This is a product ruling made under section 91F of the Tax Administration Act 1994.

### **Name of the Person who applied for the Ruling**

This Ruling has been applied for by Brooklyn Park Olive Groves Limited (“BPOGL”).

### **Taxation Laws**

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections EP 1, BD 2(1)(b)(i) and BD 2(2)(e).

This Ruling does not consider or rule on the potential application (if any) of sections EF 1 and BG 1, or Determination E10.

This Ruling considers expense deductibility in relation to section BD 2(1)(b)(i) (incurred by the taxpayer in deriving the taxpayer’s gross income). Accordingly it has not been necessary for the purposes of this Ruling to consider or rule on whether investors are carrying on a business for the purposes of the Act.

This Ruling does not consider or rule on the taxation implications of financing arrangements (if any) entered into by Growers in order to invest in this Arrangement.

### **The Arrangement to which this Ruling applies**

The Arrangement (also referred to as “the Project”) is the purchase of 1,000 “A” shares (one interest) in BPOGL, and the opportunity to carry on the business of commercially growing olives for domestic and international sale on certain land situated at Brooklyn Park in Australia. Shareholders will own the capital asset, land, water, infrastructure and olive trees, by virtue of their shareholding in BPOGL. There is no minimum subscription for the Arrangement, however, there is a maximum subscription of 750 interests.

All amounts quoted in this Ruling are inclusive of Australian GST (if any).

Further details of the Arrangement are set out in the paragraphs below.

1. The Arrangement is governed by the terms of the Prospectus and Product Disclosure Statement for “Brooklyn Park Olive Groves Limited Stage 3” (“Stage 3”) as provided to the Inland Revenue Department on 9 February 2004 (“the prospectus”). Stage 3 is in no way dependent on Stages 1 and 2 of Brooklyn Park Olive Groves which are already established on Brooklyn Park.

2. Key aspects of the prospectus are as follows:
- (i) BPOGL owns the Brooklyn Park property (“the Property”) which is leased to Huntley’s Custodians Limited (“the Custodian”). The Custodian holds this interest as Head Lessee for the security of the Growers (also referred to as “members” or “investors”). The Property is sub-leased back to BPOGL for administration of the Project.
  - (ii) Growers will enter a Licence to Occupy Agreement with BPOGL in its capacity as lessee of the Property. A Grower acquiring a single interest in the Project will hold a licence over a separate and distinct area (called an “Allotment”) of 0.2 hectare on which the Grower can plant and maintain 80 olive trees. Each Allotment will be separately identifiable on a plan prepared by BPOGL for that purpose.
  - (iii) Growers may acquire more than one interest in the Project. However, for each interest acquired the Grower must first apply for and be allotted a parcel of 1,000 \$1 shares in BPOGL.
  - (iv) Growers will also have the option to enter into a Management Agreement with Australian Green & Gold Limited (“the Manager”) whereby the Manager will establish and maintain each Allotment during the term of the Project.
  - (v) Unless a Grower elects otherwise, the Manager will harvest the olives on their behalf and use its best endeavours to sell the produce at the best available price. The Manager holds a contract with Inglewood Olive Processors, to buy and market the produce.

#### *Scheme Constitution*

3. Upon entering into a Management Agreement, Growers will be bound by the provisions of the Brooklyn Park Olive Groves Scheme Constitution (“the Scheme Constitution”) which sets out the rights, powers, duties and obligations of the Manager. The Manager is responsible for the Project and will have the primary responsibility for managing the Project, ensuring compliance with the Australian Corporations Law, the Scheme Constitution and the Management Agreement.

#### *Compliance Plan*

4. The Compliance Plan for the Brooklyn Park Olive Groves Managed Investment Scheme describes how the Responsible Entity (the Manager) will ensure its compliance with the Australian Corporations Law and the Scheme Constitution. The compliance plan is designed to protect the rights of Growers.

#### *Licence to Occupy Agreement*

5. Growers enter into a Licence to Occupy Agreement (“the Agreement”) with the following rights:
- The Agreement is entered into until 30 June 2020. Under the Agreement BPOGL grants the Grower a Licence to Occupy an Allotment on the Project land for the purpose of conducting the “Business” (“Business” is defined as planting, growing, cultivating, harvesting and marketing olives for domestic and overseas sale).
  - Each Allotment is 0.2 hectare in size and will have 80 olive trees planted on it. Each Grower’s allotment will be a distinct area of the Project Land and will be identified on an Allotment Plan to be maintained by BPOGL. Each Allotment will be numbered and shown in relation to the boundaries of the Project Land. Growers will be able to identify their individual Allotment and tree holding and Growers will be advised by BPOGL of the location of their individual Allotment.
  - The Grower must maintain and use the Allotment in a certain manner under the Agreement. Growers will be permitted to use dams, irrigation systems, roads and other infrastructure which is located on the Project Land.
  - The Grower is required to pay an annual Licence Fee for each year of the Agreement. The Fee is \$22 per year for the first 3 years. From the fourth year onwards, the annual Fee will equal the Fee of the preceding year indexed by the All Groups Consumer Price Index for Brisbane (“CPI”) in accordance with the formula set out in the Agreement.
  - The Grower will pay all telephone, garbage, waste, electric light and power charges levied against the Land or the Allotment in respect of the Grower’s use of the Allotment to conduct the Business. BPOGL will pay all charges and assessments levied on the Allotment including water and municipal rates.
  - The Grower may delegate the conduct of all or part of the Business to the Manager or an approved contractor as defined in the Agreement. Delegates of the Grower will be entitled to enter the Allotment for the purpose of conducting the Grower’s business.
  - The Grower may terminate the Agreement prior to 30 June 2020, where either party defaults or does not fulfil its obligations under the Agreement. Growers are not entitled to assign the Licence except as set out in the Scheme Constitution.
  - Upon termination of the Agreement, Growers are not required to remove the trees or restore the Allotment to its original condition. However, the Grower must remove any item brought onto the Allotment or any improvement constructed on the Allotment.

- BPOGL will be legally entitled to any trees growing on the Allotment and things brought on to the Allotment by the Grower that are not removed within 14 days following the termination of the Agreement.
- The rights attaching to shares expire on 30 June 2020 when the Licence to Occupy terminates. At that time, each Grower will remain as a shareholder in BPOGL. As shareholders of BPOGL the Growers maintain their involvement in the Property and the Olive Grove. A shareholder may, at their option:
  - elect to continue operating Brooklyn Park under management of their choice; or
  - sell the Property.

In the event of sale of the Property each shareholder will be entitled to share in the capital proceeds of the sale of their capital asset, land, water, infrastructure and olive trees.

#### *Management Agreement*

6. Growers may elect to use the services of the Manager by entering into a Management Agreement. Growers that do not execute a Management Agreement with the Manager will be outside the scope of this Product Ruling and the taxation consequences of their participation in the Project are not dealt with in this Ruling. The Management Agreement provides for the following:
  - The parties to the Management Agreement are the Grower, the Manager and BPOGL. The Management Agreement will terminate on 30 June 2020, subject to the valid terminations as set out in clause 16 of the Management Agreement.
  - The Manager undertakes to establish the “Business” of the Grower, including the planting of trees as soon as is reasonably practicable. These services will begin to be performed and carried out by the Manager on behalf of the Grower immediately after the Grower enters into the relevant agreements. It is anticipated that planting will commence soon after the acceptance of the Grower into the Project. The olive trees are expected to be ready for the first commercial harvesting in Grower years 3 to 4 after acceptance into the Project.
  - The Manager must carry out its duties under the Management Agreement in a manner consistent with the best agricultural practice. Under clause 4.2 of the Management Agreement the manager will carry out the following duties:
    - properly prepare the Allotment, including the performance of soil conservation, irrigation and drainage work on the Land to the benefit of the Allotment;
    - cause at least 80 trees to be planted on the Allotment; and

- identify the Grower's trees with appropriate markings.

7. The Manager must also provide additional services to the Grower as provided for under clause 5.2 and 5.3 of the Management Agreement as follows:

5.2 Subject to the terms and conditions of this Agreement and subject to such instructions as it may from time to time receive from the Grower, the Manager shall provide the following services to the Grower in respect of the Grower's Business:

- (a) procure, plant and tend to the Trees in the Allotment in a proper and workmanlike manner;
- (b) use its best endeavours to minimise soil erosion and maintain soil quality on the Olive Grove;
- (c) use its best endeavours to keep the Olive Grove free from vermin and vegetation;
- (d) use its best endeavours to keep the Trees free from insects and diseases, which might damage or inhibit the growth of the Trees;
- (e) use its best endeavours to destroy, abandon or leave to rot any Trees which a reasonable agriculturalist would destroy, abandon or leave to rot;
- (f) maintenance and cultivation of the Trees including growing, watering, weeding, selecting, procuring and applying appropriate fertilisers, nutrients and herbicides and doing all other things reasonably necessary for the purpose of maintaining and cultivating the Trees in accordance with good and proper agricultural practices;
- (g) procuring the use of all necessary plant, equipment, machinery goods and materials for the purposes of performing the Management Services and procuring the use at the Allotment of suitable irrigation, fencing, drainage and shelter for the Trees and any other necessary fixtures or improvements required for the purposes of performing such services;
- (h) subject to the Grower's rights pursuant to clause 6, harvest the Trees in the Allotment in such manner and at such time as will maximise the yield from the Trees;
- (i) if the Grower directs pursuant to clause 6, make the Allotment available to the Grower to harvest on his/her own behalf for the period ending at the commencement of Grower Year 4;
- (j) subject to the Grower's rights pursuant to clause 6, market and sell the Olives (including the Olives harvested from the Allotment) in such manner so as to achieve the maximum price therefore, and account to the Grower pursuant to clause 7;
- (k) if the Grower directs pursuant to clause 6, make the Olives harvested from the Allotment available to the Grower for his/her own benefit;
- (l) obtaining professional services and advice which the Manager may consider necessary or desirable in connection with the maintenance and cultivation of the Trees or the harvesting and marketing of the Olives;

- (m) the Manager shall diligently carry out quality control and other best practice procedures to ensure the production of high quality Olives and thereafter will use its best endeavours to market the Olives effectively and manage the Business efficiently to increase revenues and returns to the Grower; and
- (n) do all other acts or things which the Growers may reasonably instruct the Manager to do or which are or may be necessary or desirable, to cultivate, maintain and manage the Trees, the Olives and the Olive Grove in a condition consistent with best agricultural practice.

5.3 The Manager must also:

- (a) use its best endeavours to maintain any windbreaks, access roads or tracks on the Land in good repair; and
- (b) prepare accurate records of all fertilisers, nutrients and other chemicals applied to the Land, the Olives or the Trees and make those records available to the Grower.

8. Further features of the Management Agreement are as follows:

- The Manager guarantees survival of the Grower's trees to the commencement of the fourth year of the term of the Agreement. Thereafter, the Manager does not guarantee survival of the Grower's trees or that they will produce olives as outlined in clause 4.4.
- Growers may elect not to use all the services provided by the Manager. Growers may elect to have the Manager harvest the trees on their Allotment separately or they may elect to harvest the trees on their Allotment themselves. Growers may also elect to retain the olives harvested from their Allotment and market, sell or otherwise deal with as they see fit under clauses 6.1 to 6.3. This Ruling does not apply to any Grower who makes an election under clauses 6.1 to 6.3.
- The Manager is entitled to delegate all or any of the functions to be performed by it under the Management Agreement under clause 20.
- The Manager will pool the olives produced by the Grower's trees with those of each other Grower, and market and sell all such olives under clause 7.1. The proceeds of the sale of all olives will be paid to the Custodian, to be divided and credited among all Growers with the intent that the Grower shall be entitled to receive the Grower's proceeds without reference to the quality, volume, prices or any other factor in relation to the Grower's olives or those of any other Grower under clause 7.3.
- The Custodian will establish an account for each Grower, to which the Grower's share of sale proceeds will be credited under clause 7.3. The Manager will account for the gross sale proceeds received and Management Fees payable and must provide each Grower with certain financial information in respect of the Grower's olives under clause 7.5. The Manager is also required to provide the Grower with various reports,

including half yearly reports on the Management Services provided and the progress and condition of the Allotment under clause 14.

- Growers are not entitled to assign their rights or obligations under the Management Agreement, except in certain limited circumstances.

*Grower Fees*

9. For a Grower accepted into the Project the table below sets out the amounts payable, per interest, upon application.

<b>Amount Payable</b>	<b>Amount of Fee</b>
Part payment of shares	\$200
Licence Fee	\$22
Management Fee (part Management Fee for month 1)	\$1,118.50
Landcare operations	\$2,049.50
<b>Total payable on application</b>	<b>\$3,390.00</b>

10. Other than the amount payable upon application, during the first 36 months of the Project, Management Fees for each year are payable by 30 June of that year.
11. These Management Fees accrue on a monthly basis (referred to as a “Grower Month”) and relate wholly to services provided by the Manager and completed during the month. For each interest held in the Project Growers incur the amounts set out in the table below. The amount payable for Management Fees on 30 June of a particular year will vary according to the month that a Grower is accepted to participate in the Project.

<b>Amount Payable</b>	<b>Grower Month</b>	<b>Amount of Fee</b>
Supply and plant olive trees	1	\$412.50
Irrigation establishment costs	1	\$1,464.00
Management Fee (balance of initial Management Fee - see note below).	1	\$5,575.50
Management Fee	2 to 12	\$308.00
Management Fee	13 to 36	\$80.00

**Note:** total Management Fee for month 1 is \$6,694, being \$1,118.50 payable on application plus \$5,575.50 payable by 30 June.

12. In the event that an applicant is accepted as a Grower after the 1<sup>st</sup> of the month (referred to as a “Part Grower Month”), the Management Fees payable shall be calculated according to the following formula:

$$A = \frac{(B \times C) - E}{D}$$

Where:

- A** = the amount payable for Management Fees for the Part Grower Month
- B** = number of days of the Part Grower Month up to 30 June
- C** = Management Fee payable for month 1
- D** = 30
- E** = If the Part Grower Month is June – \$1,118.50, otherwise NIL

13. It is the intention of the Manager that in all months, other than June, applications will be accepted and work will only be commenced on the 1<sup>st</sup> of the month following the application.
14. For year 4 and subsequent years, the annual Management Fee will be calculated using the percentages (set out in the table below) of “gross sale proceeds” of the “olives” harvested in the immediately preceding financial year:

Year	Percentage
4	88%
5	77%
6	66%
7	55%
8 -termination	44%

**Examples of fees payable by 30 June in year of application.**

**Example 1:** Grower joins the Project on 1 June 2003:

Shares	\$200.00
Licence Fee	\$22.00
Landcare operation	\$2,049.50
Irrigation establishment	\$1,464.00
Purchase and planting trees	\$412.50
Management Fee	\$6,694.00
<b>Total amount payable for year ended 30 June 2003</b>	<b>\$10,842.00</b>

**Example 2:** Grower joins the Project on 15 June 2003:

Shares	\$200.00
Licence Fee	\$22.00
Landcare operation	\$2,049.50
Irrigation establishment	\$1,464.00
Purchase and planting trees	\$412.50
Management Fee	\$2,228.50
<b>Total amount payable for year ended 30 June 2003</b>	<b>\$6,376.50</b>

**Note:** as the Grower has joined the Project part way through the month the Management Fee is calculated as follows:

$$\begin{aligned}
 A &= \frac{(B \times C) - E}{D} \\
 &= \frac{(15 \times 6,694) - 1,118.50}{30} \\
 &= \$2,228.50
 \end{aligned}$$

Where:

- A** = the amount payable for Management Fees for the Part Grower Month.
- B** = 15, that is the number of days of the Part Grower Month up to 30 June.
- C** = \$6,694, that is the total Management Fee payable for month 1
- D** = 30
- E** = \$1,118.50 – as the Part Grower Month is June.

**Example 3:** Grower joins the Project on 1<sup>st</sup> September 2004:

Shares	\$200.00
Licence Fee	\$22.00
Landcare operation	\$2,049.50
Irrigation establishment	\$1,464.00
Purchase and planting trees	\$412.50
Management Fee	\$9,466.00
<b>Total amount payable for year ended 30 June 2004</b>	<b>\$13,614.00</b>

**Note:** the Management Fee consists of the following amounts:

**On application**  
\$1,118.50

**By 30 June 2004**

September (balance of month 1 fees)

\$5,575.50

October to June (month 2 to month 9 @ \$308)

\$2,772.00

**Total Management Fee**

\$9,466.00

*Licence Fee*

15. In addition to the Management fee a Grower is required to pay a \$22 Licence Fee each year. From Year 4 onwards the Licence Fee will be increased annually by the amount of the Brisbane CPI for the year.

*Shares in BPOGL*

16. For each Interest acquired in the Project a Grower must first apply for and be allotted shares in BPOGL, the landowning company. The minimum subscription for an investor is 1,000 shares of \$1 each, with further applications to be made in parcels of 1,000 shares. For each Interest a part payment of \$200 is payable on application. A further \$400 will be payable on or before 30 June in the financial year following the Application. The remaining \$400 is payable on or before 30 June in the next financial year.

*Water and Services Agreement*

17. Upon application, the Grower becomes a party to a Water and Services Agreement. The other parties to the Agreement are the owner of the property adjoining the Project Land ("the Supplier"), and the Manager. The effect of this Agreement will be to supplement the water supply and infrastructure available for the Project. Infrastructure refers to accommodation and the administration buildings, machinery service sheds and storage sheds located on the adjoining property. Under this Agreement all fees are the responsibility of the Manager. No fees are payable by the Grower. The term of the Agreement is 20 years.
18. The projected cashflows for Growers holding one interest in BPOGL, are as follows:

<b>Year</b>	<b>Net Project income</b>
2003 – 2004	-10,842.00
2004 – 2005	-3,868.00
2005 – 2006	-1,360.00
2006 – 2007	-427.68
2007 – 2008	394.37
2008 – 2009	947.29
2009 – 2010	1,567.91
2010 – 2011	2,262.93
2011 – 2012	2,263.97
2012 – 2013	2,265.02
2013 – 2014	2,266.10
2014 – 2015	2,267.21
2015 – 2016	2,268.35
2016 – 2017	2,269.50
2017 – 2018	2,270.69
2018 – 2019	2,271.91
2019 – 2020	2,273.16
2020 – 2021	2,274.46
<b>TOTAL</b>	<b>11,365.19</b>

### **Conditions stipulated by the Commissioner**

This Ruling is made subject to the following conditions:

- (a) Any foreign source income and foreign expenditure that arises in respect of any Grower’s investment in BPOGL has been included in the Grower’s annual returns of income in Australia.
- (b) No foreign source income, nor foreign expenditure arising from the investment in BPOGL, has been included in the Grower’s income tax return for the base year.
- (c) Any dividends received from BPOGL are to be returned when derived and not in accordance with section EP 1.
- (d) The total net foreign source income (derived from all foreign activities) of the Grower is less than \$100,000.
- (e) The income derived and expenditure incurred by the Grower from the sale of raw olives and processed olive products is not income derived or expenditure incurred under the “accrual rules”.

- (f) The shares in BPOGL do not give rise to any “attributed foreign income” as defined in section OB 1.
- (g) The shares in BPOGL do not give rise to “foreign investment fund income” as defined in section CG 16.
- (h) BPOGL is not a “controlled foreign company” as defined in section CG 4.
- (i) The Licence Fees and Management Fees are all set at an arm’s length basis.
- (j) The “year one” Management Fees and Licence Fees are payable in respect of the year ended 30 June in the year the Grower is accepted into the Scheme.
- (k) With the exception of any part of the Management Fees that relate to the following matters:
  - (a) Supply and plant olive trees;
  - (b) Irrigation establishment cost;
  - (c) Landcare operations;
  - (d) Any fixtures that are owned by the Grower pursuant to clause 5.2(a) and (g) of the Management Agreement;

the Management Fees are paid by the Growers in consideration for the provision of the services set out in clause 5.2 of the Management Agreement.

- (l) The Ruling applies only to Growers who enter into the Management Agreement.
- (m) The Grower treats all revenue expenditures in their financial statements as expensed in the year paid.
- (n) Growers will participate in the Project until 2020 and have an intention to make a profit from investing in the Arrangement.
- (o) The balance date of any Grower for the purposes of Australian income tax, is 30 June.
- (p) This ruling applies only to New Zealand resident taxpayers.

### **How the Taxation Laws apply to the Arrangement**

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

- Growers may make an election under section EP 1 to use a foreign tax balance date.
- The cost of acquiring shares in BPOGL is a capital expense and not deductible by virtue of section BD 2(2)(e).

- The Management Fees paid by the Grower for services provided by the Manager pursuant to clause 5.2 of the Management Agreement are deductible under section BD 2(1)(b)(i) with the exception of any part of the fees that relate to the following matters:
  - (a) Supply and plant olive trees;
  - (b) Irrigation establishment cost;
  - (c) Landcare operations;
  - (d) Any fixtures that are owned by the Grower pursuant to clause 5.2(a) and (g) of the Management Agreement.
  
- Section DB 1 does not preclude Growers who are not registered or liable to be registered for Australian GST from claiming a deduction in New Zealand for the GST inclusive amount.
  
- The Licence Fees payable are deductible under section BD 2(1)(b)(i).

**The period or income year for which this Ruling applies**

This Ruling will apply for the period 1 July 2003 until 30 June 2006.

This Ruling is signed by me on the 25<sup>th</sup> day of March 2004.

**Martin Smith**

General Manager (Adjudication & Rulings)