PR 1999/46 - Income tax: Pineplan Managed Investment Scheme

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Product Ruling
Income tax: Pineplan Managed Investment Scheme

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Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 98/1 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law' identified below applies to the defined class of persons who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Pineplan Managed Investment Scheme, or just simply as 'the Project'.

Tax laws

2. The tax laws dealt with in this Ruling are sections 8-1 and 25-25 of the *Income Tax Assessment Act 1997* (ITAA 1997) and sections 82KL and 82KZM and Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936).

Class of persons

3. The class of persons to whom this Ruling applies is those who enter into the arrangement described below after the date this Ruling is made. They will have an intention at the time of incurring the expenditure of staying in the arrangement until it is completed (i.e., being a party to the relevant Agreements until their term expires) and deriving assessable income from this involvement as a result (as set out in the description of the arrangement). In this Ruling, these persons are referred to as 'Growers'.

4. The class of persons to whom this Ruling applies does not include Growers who, at the time of incurring the expenditure, intend to sell their shares prior to completion, or Growers who otherwise do not intend at that time to derive assessable income from the Project.

Qualifications

5. The Ruling provides this specified class of persons with a binding ruling as to the tax consequences of the Project. The Commissioner accepts no responsibility in relation to the commercial viability of the Project and gives no assurance the prices charged are reasonable, appropriate or represent industry norms. A financial (or other) adviser should be consulted for such information.

6. The Commissioner rules on the precise arrangement identified in the Ruling.

7. The class of persons defined in the Ruling may rely on its contents, provided the arrangement (described below at paragraphs 13 to 16) is carried out in accordance with the details described in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out:

- the Ruling has no binding effect on the Commissioner, as the arrangement entered into is not the arrangement ruled upon; and
- the Ruling will be withdrawn or modified.

Note: without limiting the generality of the term, a material difference may arise in relation to a variation in the facts of the arrangement described in the Ruling. It may also arise in circumstances where the person otherwise included in the class of persons enters into the arrangement as described, but also enters into transactions or arrangements (including financing arrangements) that, when viewed as a whole with the arrangement described in the Ruling, will produce a different taxation consequence for the arrangement. This might include, for example, where the Grower borrows to enter into the arrangement by way of a limited or non-recourse loan and the overall consequence might be that the arrangement is one that would have attracted the application of a tax avoidance provision.

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Date of effect

9. This Ruling applies from 2 June 1999, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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

Withdrawal

11. This Product Ruling is withdrawn and ceases to have effect after 30 June 2001. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

Arrangement

12. The arrangement that is subject to this Ruling is described below. This description incorporates information from the following documents:

- Draft Prospectus dated 28 April 1999 prepared for Rising Forests Ltd (the Responsible Entity);
- **Draft Constitution** dated 8 March 1999 between the Responsible Entity, Rising Forests Properties Ltd (the Land Owner) and each Grower, which is required in order to register the Project as a Managed Investment Scheme under the Corporations Law;

- **Draft Management Agreement** forwarded to the ATO under a covering letter dated 28 April 1999 between each Grower and the Responsible Entity;
- **Draft Forestry Agreement** forwarded to the ATO under a covering letter dated 28 April 1999 between the Responsible Entity, the Land Owner and State Forests;
- **Draft Supplementary Forestry Agreement** forwarded to the ATO under a covering letter dated 28 April 1999 between the Responsible Entity and State Forests;
- Draft Compliance Plan dated 12 April 1999 in relation to the Managed Investment Scheme, as required by the Corporations Law;
- Draft Custodian Agreement dated 10 March 1999 between the Responsible Entity and Australian Rural Group Ltd (the Custodian);
- Constitution of the Land Owner forwarded to the ATO under a covering letter dated 4 May 1999;
- Correspondence from Parry Carroll Kanjian, Solicitors, to the ATO dated 12 March 1999, 16 April 1999, 27 April 1999, 29 April 1999, 30 April 1999, 4 May 1999 and 24 May 1999; and
- Correspondence from the ATO to Parry Carroll Kanjian, Solicitors dated 13 April 1999 and 3 May 1999.

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

13. For the purposes of describing the arrangement 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. The documents highlighted in bold will be entered into by the Growers. The effect of these agreements is summarised as follows.

14. The Project is called the 'Pineplan Managed Investment Scheme' and will be registered as a Managed Investment Scheme under the Corporations Law. Growers entering into the Project will subscribe for 1,000 ordinary shares in the Land Owner in consideration of the payment of $1,000, which will entitle a Grower to the exclusive use and occupation of one hectare of land owned by the Land Owner ('the Woodlot'). The Growers will also enter into a Management Agreement with the Responsible Entity in consideration

of the payment of a $6,000 management fee per Woodlot for the preparation, care and maintenance of each Woodlot for the initial 13 months period.

15. Other than the payment of $7,000 for each Woodlot, referred to in the paragraph above, no further payment is required from the Growers. The care and maintenance of the plantation after the expiry of the initial 13 months period is in exchange for a percentage of the net proceeds of sale payable to the Responsible Entity and fixed amounts payable to State Forests. Both amounts are payable out of the proceeds of sale of the harvest. The Responsible Entity is also entitled to an incentive bonus of 35% of any amount where the net returns exceed certain forecasts.

16. The remaining net proceeds of the sale of the Growers' timber will be pooled with that of other Growers in the Project and distributed to Growers on a pro-rata basis, after the payment of all expenses. The projected returns for Growers are outlined under the heading 'Projected Returns' in the Draft Prospectus. A Grower could expect a return (after payment of fees to the Responsible Entity and State Forests) of approximately $933 per hectare in year 13, $5,477 in year 20 and $59,471 in year 28. The Responsible Entity's objective is to obtain an 11% internal rate of return for the Growers for the period of the Project.

Management Agreement

17. Growers contract with the Responsible Entity to arrange for State Forests during the first 13 months period to perform or cause to be performed the services set out in Part A of the Schedule. These services are to be performed in accordance with the principles of good silviculture and environmental practice (clause 4.1).

18. After the expiry of the first 13 months period, the Growers contract with the Responsible Entity to arrange for State Forests to perform or cause to be performed the services set out in Part B of the Schedule. These services are also to be performed in accordance with the principles of good silviculture and environmental practice (clause 4.2).

19. Growers are entitled to make recommendations to the Responsible Entity, which shall use its best endeavours to carry out those recommendations, with the Growers also having the right to terminate the Agreement in certain circumstances.

Fees

20. The management fee of $6,000 per Woodlot is for preparation, care and maintenance of the plantation for the initial 13 months

period. No further fee is payable by the Growers to the Responsible Entity. The Responsible Entity is entitled to 40% of the net proceeds on the sale of the harvest at year 13, 20% at year 20 and 5% at year 28.

21. The Responsible Entity is to appoint Australian Rural Group Ltd, ACN 002 635 501, to act as custodian for the Project to receive all application monies and ensure those monies are applied in accordance with the agreements. The Responsible Entity will pay the custodian fees.

Planting, maintenance and harvesting of trees

22. The Woodlots will be planted within 13 months of subscription. Rising Forests will contract with State Forests under the Forestry Agreement to provide for the planting and maintenance of the Woodlots. State Forests' services will be paid by the Responsible Entity. Rising Forests will also engage the services of a non-related entity, Forestry Technical Services Pty Ltd, as a consultant on overall plantation development, marketing trends and ongoing management who will also prepare annual reports for Growers.

23. State Forests, under the Forestry Agreement, also provides for the care and maintenance of the plantation from the expiry of the initial 13 months period until completion (clause 5.2) and agrees to purchase all of the plantation crop at a price determined by agreement or, in the event there is no agreement, at a price determined in accordance with clause 15.6 (clause 15). The involvement of State Forests and its interest in the Project is principally and primarily as a service provider in terms of the Forestry Agreement. State Forests will be entitled to recover agreed costs and expenses and a profit margin out of the proceeds of sale of the harvest. The present estimated percentage of the harvest proceeds payable to State Forests is 8.78%.

24. The Land Owner grants to State Forests the right to enter the land and establish, maintain and harvest the trees, together with the right to construct and use such buildings, works and facilities as may be necessary or convenient to enable State Forests to establish, maintain and harvest the trees (clause 1). These rights are intended to be sufficient to enable Sate Forests to register a Forestry Right over the plantation.

25. The rights of State Forests to deal with the trees are limited by the terms of the Forestry Agreement. The Forestry Right does not confer on State Forests any rights (either expressly, implied or by operation of law) other than those rights expressly set out by the Forestry Covenants in the Forestry Agreement. The Growers retain a relevant identifiable interest in specific growing trees. The right of

State Forests to establish, maintain and harvest the trees is on behalf of the Responsible Entity for the benefit of the Growers. The Plantation Produce is sold by the Growers to State Forests at or around the time of harvest pursuant to the express sale and purchase clause contained in the Forestry Agreement.

The proceeds of sale of the Growers' timber are paid into the Proceeds Fund, which is under the control of the Custodian. A Grower has a proportionate interest in the pooled funds with the Grower being entitled to the proportionate interest in surplus (after deduction of expenses) each year during the term of the Project. Practically, that entitlement will arise in years 13, 20 and 28.

Finance

26. No finance is offered by the Responsible Entity or an associate of the Responsible Entity. If finance is required, the Growers will need to make their own arrangements.

27. The Custodian will be custodian of the application monies and will ensure those monies are applied in accordance with the agreements.

Ruling

Section 8-1

28. Section 8-1 will allow as a deduction:

- for the year ended 30 June 1999, the management fee of $6,000 per Woodlot incurred by a Grower on execution of the Management Agreement on or before 30 June 1999;
- for the year ended 30 June 2000, the management fee of $6,000 per Woodlot where a Grower incurs the management fee after 30 June 1999 but on or before 30 June 2000.
- for the year ended 30 June 2001, the management fee of $6,000 per Woodlot where a Grower incurs the management fee after 30 June 2000 but on or before 30 June 2001.

Section 82KZM

29. The expenditure of $6,000 for management fees incurred by the Growers per Woodlot does not fall within the scope of section 82KZM.

Section 82KL

30. Section 82KL does not apply to deny the deduction for management fees otherwise allowable under section 8-1.

Part IVA

31. Part IVA will not be applied to the arrangement described in this Ruling to deny a deduction for the management fees of $6,000 per Woodlot incurred by the Growers.

Explanations

Section 8-1

32. The issues that arise in terms of the deductibility of the management fees under section 8-1 include:

- are the Growers carrying on business;
- if they will be carrying on business, is the expenditure incurred too soon;
- is there a nexus between the expenditure and the gaining or producing of income; \ and
- can the expenditure be characterised as excessive or on capital account.

Are the Growers carrying on business?

33. As indicated in paragraph 12 of Taxation Ruling TR 97/11, while each case turns on its own particular facts, the determination of the question of whether a taxpayer is carrying on a business is generally the result of a process of weighing all the relevant indicators. It is not possible to lay down any conclusive test of whether a business of primary production is or is not being carried on. However, where the taxpayer enters into an arrangement with an overall profit motive and the activities carried out on behalf of the taxpayer have a reasonable probability of producing a profit, then the taxpayer can be said to be carrying on a business.

34. In paragraph 8 of Taxation Ruling TR 97/D17, it is stated that it is accepted that the activities of an investor will amount to the carrying on of a business if:

- the investor has an identifiable interest in specific growing trees and a right to harvest and sell the timber;

- the afforestation activities are carried on by, or on behalf of, the investor; and
- the weight and influence of the general indicators of a business, as discussed by the Courts, point to the carrying on of a business.

35. Under the Constitution of the Land Owner, the Growers have exclusive use and occupation of one hectare of land owned by the Land Owner for each 1,000 ordinary shares held. The Growers have more than a chattel interest in the timber on harvest. They have an ongoing interest in the growing trees - the trees are on the Growers' property to which they have the exclusive use and occupation. The Growers have the entitlement to the proceeds of sale of the harvest by virtue of their interest in the Land Owner.

36. Under the Management Agreement between the Responsible Entity and the Growers, the Responsible Entity arranges for State Forests to provides the required services such as planting, cultivating, tending, culling, pruning, fertilising, replanting, spraying, maintaining and otherwise caring for the trees. The services are performed by State Forests on behalf of the Responsible Entity under the Forestry Agreement.

37. Growers have the right to use the land in question for afforestation purposes and to have the Responsible Entity (through State Forests) come onto the land to carry out its obligations under the Management Agreement. The Growers' degree of control over the Responsible Entity, as evidenced by the agreements and supplemented by the Corporations Law, is sufficient. Under the Project, Growers are entitled to receive regular progress reports from the independent consultant. The Growers are able to terminate arrangements with the Responsible Entity in certain circumstances. The afforestation activities described in the Management Agreement are carried out on the Growers' behalf and not by State Forests on its own behalf (see paragraph 6).

38. 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 arrangements described above for all the indicators. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections contained in the Draft Prospectus that suggests the Project should return a 'before-tax' profit to the Growers, i.e., a 'profit' in cash terms that does not depend, in its calculation, on the management fees in question being allowed as a deduction.

39. Growers engage the Responsible Entity to manage the Project on their behalf. The directors of the Responsible Entity have the required experience to manage an afforestation project. In turn, the

Responsible Entity engages the services of State Forests (under the Forestry Agreement) and the services of Forestry Technical Services Pty Ltd to act as a forestry consultant. The services provided are based on accepted silvicultural practices and are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses.

40. Growers have a continuing interest in the trees from the time they are acquired until harvest. The afforestation 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. The Growers' afforestation activities will constitute the carrying on of a business.

Incurring expenditure too soon

41. Another issue that arises in the section 8-1 context is whether the expenditure is incurred 'too soon' (*FC of T v. Brand* (1995) 31 ATR 326 at 340; 95 ATC 4633 at 4646). In paragraph 76 of TR 97/D17, it is accepted that expenditure is not incurred 'too soon' to deny it the character of an expenditure incurred 'in' gaining or producing assessable income where a management fee is paid to a manager to undertake, on behalf of the investor, the actual income earning activities of planting and maintaining of trees and there is no reason to think that the expenditure was paid for anything other than the right obtained under the relevant agreement. Paragraph 76 of TR 97/D17 goes on to state that the legal obligations of the parties may amount to an irrevocable commitment by the investor to carry on a business of afforestation, so that the expenditure incurred prior to the actual commencement of the income producing operations is incidental and relevant to the gaining of assessable income. Apportionment in respect of management fees does not arise where the 'thing' obtained by the expenditure is an inherent part of the income producing operations (paragraph 77 of TR 97/D17).

42. In the present case, the management fees are not incurred 'too soon'. The expenditure is incurred for the services of the Responsible Entity for the initial 13 months period under the Management Agreement.

Nexus to gaining or producing income

43. Deductibility of expenditure under the first limb of section 8-1 is dependent on whether the expenditure has 'sufficient connection' with the operations that directly gain or produce assessable income (*Ronpibon Tin NL v. FC of T* (1949) 78 CLR 47). The existence of a sufficient connection is determined by looking at the scope of the income producing operations and the relevance of the expenditure to

those operations (see Dixon J in *Amalgamated Zinc (de Bavay's) Ltd v. FC of T* (1935) 54 CLR 295). Where the advantage gained, or sought to be gained, by the expenditure is found in the income producing operations, a sufficient connection exists (see paragraph 73 of TR 97/D17).

44. In the context of an afforestation scheme, management fees have a sufficient connection with the income producing operations where the expenditure is incidental and relevant to those operations. As indicated in clause 4.1 of the Management Agreement, the Responsible Entity for the first 13 months period (being the period to which the $6,000 management fee relates) will perform or cause to be performed a number of services in accordance with the principles of good silviculture. These activities clearly have a sufficient connection with the income producing operations of the Grower so that the $6,000 management fee is incidental and relevant to the Grower's operations.

Character of the expenditure (excessive fees/capital)

45. The question arises when the management fee 'grossly exceeds a commercially realistic rate' (paragraph 83 of TR 97/D17). As noted in TR 97/D17, such a fee may exceed a 'commercially realistic rate' where fees are financed by a non-recourse loan. In the present case, non-recourse loans are not being offered as part of the Project; rather, each Grower is responsible for their own finance. The management fee is comparable to fees charged by other managers for rendering similar services.

46. A deduction is not allowable under section 8-1 if the expenditure is on capital account. Paragraph 90 of TR 97/D17 states 'an apportionment of management fees may take place if, on the facts, some portion can be identified as capital expenditure'. The land that is to form part of the plantation is clear of all trees, shrubs and vegetation (recital G of the Management Agreement), negating any inference that the expenditure is on capital account. In the present case, the expenditure is on revenue account ,being for the services in terms of clause 4.1 of the Management Agreement.

Section 82KZM

47. Section 82KZM spreads over more than one year a deduction for prepaid expenditure that would otherwise be immediately deductible under section 8-1. The section applies if certain expenditure incurred under an agreement is regarded as the doing of the thing under the agreement that is not to be wholly done within 13 months after the day on which the expenditure is incurred.

48. In the present case, the $6,000 management fee to be incurred by the Growers is in relation to services to be provided by Rising Forests over the 13 months period in terms of clause 4.1 of the Management Agreement. The services to be provided by Rising Forests at the expiry of the 13 months period, in terms of clause 4.2 of the Management Agreement, is for remuneration as provided in clause 12 of that Agreement. As that fee reflects a commercial return for the work done, there is no inference that the management fee for the first 13 months has been inflated so as to cover a period after that period. Both Rising Forests and State Forests are entitled to either a percentage share or a fixed amount out of the harvest, which entitlement provides remuneration for the services to be rendered by them after the 13 months period.

49. For the purposes of this Ruling, it can be accepted that no part of the fee of $6,000 per Woodlot is for the Responsible Entity doing 'things' that are not to be wholly done within 13 months of the fee of $6,000 being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditure by the Growers of $6,000 per Woodlot.

Section 82KL

50. Under sub section 82KL(1), a deduction for certain expenditure is disallowed where the sum of the 'additional benefit' plus the 'expected tax saving' in relation to that expenditure equals or exceeds the 'eligible relevant expenditure'. TR 97/D17 describes an 'additional benefit' as involving, in essence, 'non-recourse' finance provided to the participants. As no such loans are proposed in the present case, there is no 'additional benefit' to which section 82KL can apply.

Part IVA

51. For Part IVA to apply there must be a 'scheme' (section 177A); a 'tax benefit' (section 177C); and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D). The Project will be a 'scheme' commencing when the Prospectus is issued. The Growers will obtain a 'tax benefit' from the scheme in the form of the deduction for the amount of $6,000 per Woodlot, allowable under section 8-1 that would not be obtained but for the scheme. However, it is not possible to conclude the scheme was entered into or carried out with the dominant purpose of obtaining the tax benefit.

52. Growers to whom this Ruling applies intend to derive assessable income from the eventual harvesting and purchase of the trees. Further, there are no features of the Project, for example, such as the management fee of $6,000 per Woodlot being 'excessive' and

uncommercial and being financed by a non-recourse loan, that might suggest the Project was so 'tax driven' and so designed to produce a tax deduction of a certain magnitude that it would attract the operation of Part IVA.

Interest and borrowing expenses

53. As the Growers enter into their own arrangements as to finance (and those arrangements will vary), no ruling can be given as to the deductibility of interest (under section 8-1) and borrowing costs (under section 25-25). However, the criteria for deductibility of interest and borrowing costs are described below.

Interest

54. Whether interest is deductible under section 8-1 depends on the same reasoning as that applied to whether the management fees of $6,000 are deductible. If interest is incurred for the purpose of financing the payment of the management fees for the operations - the planting, tending and maintenance of the trees - and there are no features of the loans to negate that purpose, the interest should have a sufficient connection with the gaining of the Growers' assessable income so as to be allowable as a deduction under section 8-1.

Borrowing expenses

55. Borrowing expenses incurred to finance payment of the management fees are likely to be incurred for the purpose of producing the Growers' assessable income and, hence, are likely to be allowable as deductions in accordance with section 25-25.

Detailed contents list

56. Below is a detailed contents list for this Ruling:

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Commissioner of Taxation
2 June 1999

Previous draft:
No draft issued

Related Rulings/Determinations:
PR 98/1; TD 93/34; TR 92/1; TR 92/20; TR 97/11; TR 97/16; TR 97/D17

Subject references:
- afforestation expenses
- carrying on a business
- commencement of business
- fee expenses
- forestry
- interest expenses
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- plantation forestry
- product rulings
- public rulings
- primary production
- primary production expenses
- producing assessable income
- tax avoidance

- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

Legislative references:

- ITAA1936 82KL
- ITAA1936 82KL(1)
- ITAA1936 82KZM
- ITAA1936 Pt IVA
- ITAA1936 177A
- ITAA1936 177C
- ITAA1936 177D
- ITAA1997 8-1
- ITAA1997 25-25

Case references:

- Amalgamated Zinc (de Bavay's) Ltd v. FC of T (1935) 54 CLR 295
- FC of T v. Brand (1995) 31 ATR 326; 95 ATC 4633
- Ronpibon Tin NL v. FC of T (1949) 78 CLR 47

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