


PR 2000/60 - Income tax: Treecorp Clearwood Project 2000

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Product Ruling

Income tax: Treecorp Clearwood Project 2000

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Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

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 1999/95 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.*

No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product as an investment. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

Terms of Use of this Product Ruling

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

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply 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 Treecorp Clearwood Project 2000, or 'the Project' or the 'product'.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* (of the ITAA 1997);
 - section 8-1 (of the ITAA 1997);
 - section 27-5 (of the ITAA 1997);
 - section 27-30 (of the ITAA 1997);
 - section 82KL of the *Income Tax Assessment Act 1936* (of the ITAA 1936);
 - sections 82KZM and 82KZMA-82KZMD (of the ITAA 1936); and
 - Part IVA (of the ITAA 1936).

Class of persons

3. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose 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 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 persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from the Project. Specifically, the Ruling does not apply to persons who enter the arrangement and who exercise the buy-back election. So far as persons who exercise the buy-back election are concerned, circumstances surrounding the exercise of the election may be relevant to their entitlement to deductions. Those persons may seek a private binding ruling on the tax consequences of such action.

Qualifications

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

6. If the arrangement described in this 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.

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Date of effect

8. This Ruling applies prospectively from 17 May 2000, 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).

9. 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

10. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, in respect of the tax law(s) 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

11. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- Application for Product Ruling dated 15 March 2000;
- Prospectus for Treecorp Clearwood Project 2000, dated 20 April 2000;
- Constitution for Treecorp Clearwood Project 2000, dated 25 February 2000;
- Compliance Plan for Treecorp Clearwood Project 2000, dated 25 February 2000;
- **the Management Agreement between Treecorp Australia Limited ("TAL") and each Grower, undated;**
- Memorandum of Head Lease between Treecorp Pty Limited ("TPL") ('Lessor') and Treecorp Australia Limited ('Lessee'), undated;
- **Sublease between Treecorp Australia Limited and each Grower, undated;**
- Option Agreement between Treecorp Australia Limited and Treecorp Pty Limited, undated;
- Plantation Services Agreement between Treecorp Australia Limited and Treecorp Pty Limited, undated;
- Additional correspondence dated 27 April 2000 and 3 May 2000.

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

12. The documents highlighted are those the Growers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate¹ of the Grower, will be a party to, with the exception of finance

¹ In this Ruling 'associate' has the meaning as defined in section 318 of the ITAA 1936.

agreements, to which paragraphs 24 and 25 apply. The effect of these agreements is summarised as follows.

Overview

13. This arrangement is called the ‘Trecorp Clearwood Project 2000’.

Location	Kangaroo Island in South Australia.
Type of business each participant is carrying on	Commercial growing, and cultivation “Clearwood” Radiata Pine for the purpose of producing wood.
Number of hectares under cultivation	2000
Names used to describe the product	Trecorp Clearwood Project 2000
Size of each Woodlot	1 hectare
Number of trees per hectare	300 approximately
Expected production	218.4 cubic metres / hectare of Clearwood Pruned Log and 377.2 cubic metres / hectare of Unpruned Log
The term of the investment in years	20
Initial cost (2 woodlot minimum)	\$16,500
Initial cost per hectare	\$8,250
Minimum Subscription	Not applicable
Ongoing costs	Maintenance, marketing and lease fees (total 6% of net sales proceeds) paid when the Grower’s wood is sold.

14. TAL will offer investors the opportunity to participate as Growers in a 2000 hectare “Clearwood” Radiata Pine plantation on Kangaroo Island, South Australia. Growers enter into a Sublease of a minimum of two one hectare Woodlots from the Responsible Entity as lessee of the Woodlots and appoint TAL to establish, manage and maintain their Plantation to harvest. TAL then harvests and markets the wood. TAL has appointed TPL to provide these services.

15. There is an application cut off date of 15 June 2000, and all trees in relation to those applications will be planted prior to 30 June 2000. Applications received between 15 June 2000 and 30 June 2000 will not be processed until after 30 June 2000 and all trees in relation to those later applications will be planted before 30 June 2001.
16. The Application Fee per Woodlot will be \$8,250. This fee covers purchase of seedlings, plantation preparation and planting. The ongoing maintenance after planting is deducted on harvest and sale either at the time of purchase under the Sale Option or at maturity of the Project. Application Fees are either paid in full on application or a deposit of ten percent of the Application Fee is paid on making the application with the balance payable within thirty days.
17. Maintenance, marketing and lease fees (total 6% of net sales proceeds) are paid when the Grower's wood is sold.
18. Each Woodlot is projected to yield net proceeds of approximately \$104,000 at harvest in 26 years time. This represents a compound rate of return 10.06% per year.
19. Within two years of planting the trees, a forester will assess the survival rate of the trees. If the survival rate for any Woodlot is less than 90% of the trees planted, TPL will replant at its cost those trees which have failed to survive unless the reason they failed to survive was caused by an event of 'Force Majeure'.
20. A Grower will not be entitled to assign the Project Agreements to which it is a party unless the proposed assignee has entered into a covenant with the Responsible Entity in the form required by the Responsible Entity that the assignee will perform and observe the obligations of the Grower in the Constitution and the Project Agreements.

Management

21. TAL is the Responsible Entity for the Project. TAL has the legal responsibility to Growers for managing all aspects of the Project in accordance with the Constitution, the Management Agreement and the Sublease. TAL holds a Dealer's Licence issued by the Australian Securities and Investments Commission authorising them to operate the Project. TAL has the power to appoint agents to carry out anything that they are authorised to do in the Project, but remains responsible for what is done. TAL has appointed TPL to manage the Project.
22. TAL, as the Responsible Entity, will:
- (i) set up an Application Fund and a Proceeds Fund on behalf of the Growers by lodging the first Application

Moneys and the first moneys received in respect of the relevant Project in the Funds. The money is to be held by the Responsible Entity upon the trusts constituted. Growers will then have an interest in the relevant Application Fund and Proceeds Fund equal to its Proportional Interest but shall not have any interest in any particular part of the Funds;

- (ii) cause one or more Bank accounts to be opened for the Application Fund and the Proceeds Fund for each Project. It will only open one account if it can separately identify money which is attributable to the process of receiving and dealing with Applications and the proceeds generated from the Project separately;
- (iii) manage the business, investments and affairs of the Project and the arrangements that relate to each Project;
- (iv) ensure that all services which are reasonably required by a Grower under its Management Agreement are performed in a proper and efficient manner; and
- (v) be responsible for payment of all other expenses in relation to the Project except where entitled to a reimbursement under clause 44 of the Constitution.

Finance

23. The Growers can fund their investment in the Project themselves, borrow from an independent lender, or borrow through finance arrangements organised by TAL. TAL has sought to arrange various finance packages to the Growers from major trading Banks, for amounts up to 100% of the Application Fee.

24. Applications for finance will be capable of acceptance by the Responsible Entity subject to the condition that a lending institution (which may include the Responsible Entity or its Associate) agrees to lend that amount of money for which finance is requested to the Applicant.

25. This Ruling does not apply if a Grower enters into a finance agreement that 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 purposes of section 82KL, or the

funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;

- terms or conditions are 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; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

Ruling

Goods and Services Tax

26. For a Grower who invests in the Project, sections 27-5 or 27-30 of the ITAA 1997 will apply to reduce the amount of any deduction allowable by any GST input tax credit to which the Grower is entitled or, in the case of section 27-5, a decreasing adjustment that a Grower has.

Section 6-5: Assessable Income

27. Gross sale proceeds derived from the timber produce harvested from the Project will be assessable income of the Growers, under section 6-5.

Section 8-1

28. For the year ending 30 June 2000 section 8-1 of the ITAA 1997 will apply to Growers entering into this Project as follows:

- the Application Fee of \$8,250 per Woodlot, incurred by a Grower on execution of both the Sublease and Management Agreements on or before 15 June 2000 will be an allowable deduction under section 8-1 of the ITAA 1997;
- where a Grower borrows funds in order to fund their obligation to pay the Application Fee and incurs interest on such borrowings on or before 30 June 2000, that interest will be an allowable deduction under section 8-1 of the ITAA 1997.

29. For Growers entering the Project after 30 June 2000 and before 15 June 2001 section 8-1 of the ITAA 1997 will apply as follows:

- the Application Fee of \$8,250 per Woodlot, incurred by a Grower on execution of the Sublease and Management Agreements on or before 15 June 2001 will be an allowable deduction under section 8-1 of the ITAA 1997;
- where a Grower borrows funds in order to fund their obligation to pay the Application Fee and incurs interest on such borrowings on or before 30 June 2001, that interest will be an allowable deduction under section 8-1 of the ITAA 1997.

Section 82KZM and Sections 82KZMA - 82KZMD

30. The expenditure by Growers does not fall within the scope of sections 82KZM or 82KZMA to 82KZMD of the ITAA 1936.

Section 82KL

31. Section 82KL does not apply to deny the deductions otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA

32. Part IVA of the ITAA 1936 does not apply to deny deductions for the expenditure by Growers or interest on any loans taken out to fund payment of their expenditure.

Explanations

Section 6-5: Assessable income

33. Gross sale proceeds derived from the timber produce harvested from the Project will be assessable income of the Growers, under section 6-5.

Section 8-1 and sections 27-5 and 27-30

34. Consideration of whether fees payable under the Lease and Management Agreement are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoings in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced and, hence, whether the second limb applies. However, that does not preclude the application of the first limb and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

35. An afforestation scheme can constitute the carrying on of a business. Where there is a business, or a future business, the gross sale proceeds from the timber's sale from the scheme will constitute gross assessable income under section 6-5. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income. These operations will be the planting, tending, maintaining and harvesting of the trees.

36. Generally, an investor will be carrying on a business of afforestation where:

- the investor has an identifiable interest in specific growing trees coupled with a right to harvest and sell the timber;
- the afforestation activities are carried out on the investor's behalf; and
- the weight and influence of the general indicators of a business, as used by the Courts, point to the carrying on of a business.

37. For this Project Growers have, under the Sublease Agreement, rights in the form of a lease over an identifiable area of land consistent with the intention to carry on a business of growing trees. Under the Management Agreement Growers appoint TAL, as Manager, to provide services such as planting, cultivating, tending, culling, pruning, fertilising, replanting, spraying, maintaining and otherwise caring for the trees. Growers control their investment. The specific cost to the Grower of these services provided during the preparation and planting period will total \$8,250. Growers may either collect their

own forest produce and arrange for its sale or they have the option of TAL arranging marketing and sale for a fee from the gross sale proceeds.

38. The Sublease and Management Agreement give Growers full right, title and interest in the forest produce and the right to have the forest produce sold for their benefit. The relevant documentation contemplates that Growers will have an ongoing interest in the growing trees. The trees belong to the Growers in the sense that they have an interest in the land on which they are growing and a profit à prendre in respect of the timber produce, which confers an equitable interest in the trees upon the Grower.

39. Growers have the right to use the land in question for afforestation purposes and to have TAL come onto the land to carry out its obligations under the Constitution, Lease and the Management Agreement. The Growers' degree of control over TAL, as evidenced by the Agreements and supplemented by the Corporations Law, is sufficient. Under the Project, Growers are entitled to receive regular progress reports on TAL's activities. Growers are able to terminate arrangements with TAL in certain instances, such as cases of default or neglect. The afforestation activities described in the Lease and Management Agreement are carried out on the Growers' behalf.

40. 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 arrangement's description for all the indicators. The Independent Forester's report is that the Project's success is expected. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections contained in the Prospectus that suggest 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 fees in question being allowed as a deduction.

41. Growers will engage the professional services of a Manager with appropriate credentials. There is a means to identify which trees Growers have an interest in. These services are based on accepted silvicultural practices and are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses.

42. 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.

43. The fees associated with the afforestation activities will relate to the gaining of income from this business and, hence, have a sufficient connection to the operations by which this income (from the

sale of timber) is to be gained from this business. They will, thus, be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. No capital component is identifiable. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Sections 27-5 and 27-30

44. Section 8-1 is however, subject to section 27-5 of the ITAA 1997. The latter operates to deny a deduction that would otherwise be allowable under section 8-1, to the extent that the loss or outgoing incurred on or after 1 July 2000 includes an amount relating to a GST input tax credit to which a Grower is entitled, or a decreasing adjustment that a Grower has.

45. Section 27-30 of the ITAA 1997 operates to deny a deduction that would be otherwise available under section 8-1 for the year ended 30 June 2000 to the extent that the loss or outgoing (incurred after 30 November 1999 and before 1 July 2000) includes an amount relating to an input tax credit to which a Grower will be entitled after 1 July 2000.

Section 82KZM and sections 82KZMA – 82KZMD

46. Section 82KZM operates to spread over more than one income year a deduction for prepaid expenditure that would otherwise be immediately deductible, in full, under section 8-1. The section applies to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement that is not wholly done within 13 months of income as the execution of the relevant agreement.

47. Under the Management Agreement the fee of \$8,250 per Woodlot will be incurred on execution of the Agreement. This fee is charged for providing services to a Grower only for the period of 13 months from the execution of the Agreement. In each instance, the fees are charged for providing services to a Grower by 30 June of the year of execution of the Agreement. The fees are expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the arrangement's description that the fees have been inflated to result in reduced fees being payable for subsequent years. On this basis the basic precondition for section 82KZM's operation is not satisfied and it will not apply to the expenditure by Growers of \$8,250 per Woodlot.

48. There is no evidence that might suggest the services covered by the fee could not be provided within the same year of income as the expenditure in question is incurred. Thus, for the purposes of this

Ruling, no part of the initial fee is for TAL doing 'things' that are not to be wholly done within the year of income of the fee being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditures identified above in each of the financial years ended 30 June 2000 to 30 June 2002. New sections 82KZMB, 82KZMC and 82KZMD will not apply to the Project since the services to be provided in respect of the initial fee are to be completed in the same year of income as the expenditure is incurred (see paragraph 82KZMA(3)(c)).

Section 82KL

49. Section 82KL is a specific anti-avoidance provision that operates to deny an otherwise allowable deduction for certain expenditure incurred, but effectively recouped, by the taxpayer. Under subsection 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'.

50. 'Additional benefit' (see the definition of 'additional benefit' at subsection 82KH(1) and paragraph 82KH(1F)(b)) is, broadly speaking, a benefit received that is additional to the benefit for which the expenditure is ostensibly incurred. The 'expected tax saving' is essentially the tax saved if a deduction is allowed for the relevant expenditure.

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

Part IVA

52. For Part IVA to apply there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C), and a dominant purpose of entering into or carrying out the scheme to enable the relevant taxpayer to obtain a tax benefit in connection with the scheme (section 177D).

53. The Treecorp Clearwood Project 2000 will be a 'scheme'. The Growers will obtain a 'tax benefit' from entering into the scheme, in the form of the tax deductions per leased area 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 enabling the relevant taxpayer to obtain this tax benefit.

54. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the sale of the timber produce. Further, there are no features of the Project, such as the payment of excessive management fees and non-recourse loan financing by any entity associated with the Project, 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. No ruling is given on the application of Part IVA to financing arrangements entered into between investors and other financiers in respect of lending arrangements to invest in the Project.

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Commissioner of Taxation

17 May 2000

Previous draft:

Not previously issued in draft form

- taxation administration

Related Rulings/Determinations:

TR 92/20; TR 97/11; PR 1999/95;
 TR 92/1; TR 97/16; TD 93/34;
 TR 98/22

Legislative references:

- ITAA 1997 6-5
 - ITAA 1997 8-1
 - ITAA 1997 27-5
 - ITAA 1997 27-30
 - ITAA 1936 82KL
 - ITAA 1936 82KL(1)
 - ITAA 1936 82KZM
 - ITAA 1936 82KZMA
 - ITAA 1936 82KZMA(3)(c)
 - ITAA 1936 82KZMB
 - ITAA 1936 82KZMC
 - ITAA 1936 82KZMD
 - ITAA 1936 82KH(1)
 - ITAA 1936 82KH(1F)(b)
 - ITAA 1936 Part IVA
 - ITAA 1936 177A
 - ITAA 1936 177C
 - ITAA 1936 177D

Subject references:

- afforestation
 - carrying on a business
 - commencement of business
 - management fee expenses
 - producing assessable income
 - product rulings
 - public rulings
 - schemes and shams
 - tax avoidance
 - tax benefits under tax avoidance schemes
 - tax shelters
 - tax shelters project

ATO references:

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