

PR 2000/7 - Income tax: 2000 Timbercorp Eucalypts Project

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Product Ruling

Income tax: 2000 Timbercorp Eucalypts Project

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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 these products as investments. Further, we give no assurance that the products are 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 products. 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 arrangements are 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 arrangements will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities in future years to confirm the arrangements have been implemented as described below and to ensure that participants in the arrangements 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 laws' identified below apply to the defined class of persons, who take part in the arrangements to which this Ruling relates. In this Ruling these arrangements are sometimes referred to as the 2000 Timbercorp Eucalypts Project or just simply as 'the Project' or the 'product'.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:

- section 8-1 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
- section 27-5 (ITAA 1997);
- section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- section 82KZM (ITAA 1936);
- Part IVA (ITAA 1936).

3. This Ruling does not deal with the Goods and Services Tax or any associated 'A New Tax System' legislative reforms, including the proposed changes announced as part of The New Business Tax System, except certain legislative reforms which have now been enacted.

Class of persons

4. The class of persons to whom this Ruling applies is those who enter into either of the arrangements described below on or after the date this Ruling is made. They will have a purpose of staying in the relevant 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'.

5. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the relevant arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

Qualifications

6. If the arrangements described in the Ruling are materially different from the arrangements that are actually carried out:

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

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Date of effect

8. This Ruling applies prospectively from **1 March** 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 arrangements during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangements prior to withdrawal of the Ruling. This is subject to there being no material difference in the arrangements or in the persons' involvement in the arrangements.

Arrangement

11. The arrangements that are the subject of this Ruling are described below. The relevant documents or parts of documents incorporated into this description of the arrangements are:

- Draft Prospectus dated 23 December 1999 prepared for Timbercorp Limited A.C.N. 055 185 067 (“Timbercorp”);
- Draft copy of **Management Agreement** dated 23 December 1999 between each Grower and Timbercorp;
- Draft copy of **Sub-lease (WA) Agreement** between each Grower and Timbercorp;
- Draft copy of **Sub-lease (Vic) Agreement** between each Grower and Timbercorp;
- Draft copy of **Sub-lease (SA) Agreement** between each Grower and Timbercorp;
- Draft copy of Plantation Services Agreement between Timbercorp and external contractor;
- Draft copy of Plantation Services Agreement between Timbercorp and Timbercorp Treefarms Pty Ltd;
- Draft copy of Wood Purchase Agreement between Timbercorp as agent for each Grower and future purchaser;
- Draft copy of the **Constitution** establishing the Project;
- 1999 Timbercorp Eucalypts Project Finance Package;
- Draft copy of the Custody Agreement between Timbercorp and Permanent Trustee Company Limited; and
- Letters from Timbercorp dated 1 February 2000 and 4 February 2000.

Note: certain information 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 Growers enter into or become a party to. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or

any associate¹ of a Grower, will be a party to, which are part of the arrangements to which this Ruling applies. The effect of these agreements is summarised as follows.

Overview

13. This arrangement is called the 2000 Timbercorp Eucalypts Project and will be registered as a managed investment scheme under the Corporations Law. Growers entering into the Project will sublease land from Timbercorp, in Victoria, South Australia or in Western Australia. The sublease is for a term expiring on the earlier of 12 years or the completion of harvesting. The minimum area of land leased by each Grower is three identifiable allotments of land of between one and 1.2 hectares which are referred to as Woodlots.

14. There are 10,000 Woodlots on offer at an initial cost of \$3,500 per Woodlot. There is an option to accept oversubscriptions. Timbercorp, as the Responsible Entity, does not propose to accept subscriptions to the Project after 31 May 2000. It is therefore expected that all Agreements to which each several Grower will enter into or become a party to, will be executed on or before 31 May 2000.

15. The Growers will enter into a Management Agreement with Timbercorp to have a Tasmanian Blue Gum (*Eucalyptus globulus*) plantation established on this leased land for the purpose of eventual felling and sale in 8-12 years. Seedling stocking rate is between 833 and 1,250 trees per hectare. There is the opportunity to participate in a second rotation.

16. The Project will also allow two Growers to enter into a joint venture. They will be bounded by the Terms and Conditions of the Joint Venture set out in the Application Form attached to the Draft Prospectus of the Project.

17. Under this joint venture:

- a first joint venture Grower will be responsible for procuring the preparation and establishment of the Woodlots; and
- a second joint venture Grower will be responsible for procuring the ongoing provision of land and maintenance (Cls 4(a) & (b), Terms and Conditions of the Joint Venture).

18. The Terms and Conditions of the Joint Venture provide that each joint venturer will be entitled to a separate, discrete share of the timber to be sold. (Cls 5(a) & (b)).

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

Management Agreement

19. Growers contract with Timbercorp to establish and maintain the plantation until maturity (cl 6) and to harvest and sell the wood on their behalf (cls 7, 8). The services provided include acquiring seeds or seedlings on behalf of Growers, establishing and maintaining the trees, constructing and maintaining firebreaks, repairing damage to roads and fences, preventing and combating degradation of the Woodlots and taking out public risk insurance (cl 6(b)).

20. Growers execute a Power of Attorney enabling Timbercorp to act on their behalf in entering Wood Purchase Agreements with the future purchaser, or any other agreement for the sale of the Grower's wood (cl 7).

21. Under the financial hardship provision, Growers can apply to have their remaining annual rent and maintenance fees from year 6 paid by Timbercorp in return for 5% of their sale proceeds for each year in which the costs are paid by Timbercorp (cl 12). Growers are not entitled to assign the Management Agreement except in certain circumstances (cl 24).

Sub-lease Agreements

22. Growers enter into a Sub-lease Agreement with Timbercorp as sub-lessor. The Sub-lease Agreement is conditional upon the Grower entering into the Management Agreement and in some cases, the Wood Purchase Agreement (cl 4.2). It is also conditional upon Timbercorp receiving approval from the WA Planning Commission and any local, state or Commonwealth government approvals, if required (cl 4.1). Clause 13 of each Sub-lease Agreement grants an interest in the land to the Grower. Growers are not entitled to assign the Sub-lease Agreement except in certain circumstances (cl 18.10).

Fees

23. Having regard to the contractual terms of the Management and Sub-lease Agreements, the fees payable by a Grower per Woodlot will be as follows:

- \$3,770 plantation preparation and establishment fee payable in two instalments. \$3,370 is payable on lodging the Application and the balance of \$400 is payable on 31 October 2000;
- \$130 land rental fee for the period ending 30 June 2000 payable on lodging the Application. Thereafter, the land rental fee is \$270 per Woodlot p.a. payable on 31

October of each year. This fee will be reviewed each year to the greater of the previous year's rent or indexed using a formula based on CPI increases and will be payable in respect of each year commencing on 1 July and expiring on the next succeeding 30 June (i.e., quarterly in arrears and three quarterly in advance); and

- \$75 forest maintenance fee indexed, payable on 31 October of each year in respect of the period 1 July to the next succeeding 30 June (i.e., quarterly in arrears and three quarterly in advance).

24. Timbercorp will endeavour to arrange fire insurance, with premiums anticipated to be approximately \$10 per Woodlot in the first year increasing to some \$65 per Woodlot at maturity.

25. Timbercorp may appoint a custodian to receive application moneys and ensure those moneys are applied in accordance with the agreements. Timbercorp will pay the custodian fees.

Establishment and Maintenance of the Plantation

26. The Draft Prospectus of the Project states that the Woodlots will be prepared for planting by 30 June 2000 and will be planted by June 2001. The Independent Forester's Report sets out the details of the plantation establishment and management activities to be undertaken. These include, among others, selection of seed, seedlings, site preparation, planting method, subsequent plantation care and silvicultural tending of the plantation. The Management Plan provides a time table when these activities will be undertaken. Timbercorp will sub-contract all plantation establishment and maintenance functions to either Timbercorp Treefarms Pty Ltd, a related company, or to an external contractor. Timbercorp will provide ongoing reports to the Growers on the progress of the plantations.

27. The harvest period is between 45 days prior to 8 years after planting and 45 days prior to 12 years after planting. Timbercorp will be responsible for arranging the marketing, harvesting and sale of the wood, with the Grower kept informed of the details, including proposed purchase price and harvesting and delivery costs.

Finance

28. A finance option is offered by Timbercorp Finance Pty Ltd, a company associated with Timbercorp. Finance is available to a maximum of \$2,600 per \$3,500 Woodlot. The interest rate depends on the term of the loan. Security is over the Grower's interest in the Project, i.e., the Woodlots and the entitlement to wood proceeds. The loan is repayable by equal monthly instalments of principal and

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interest and is provided on a full recourse basis. Legal action will be taken over any outstanding repayments.

29. The custodian (if one is appointed) will be custodian of the application moneys, including loan funds if the finance option is taken, and ensure those moneys are applied in accordance with the agreements.

30. This Ruling does not apply if a Grower enters into a finance agreement that includes any of the following features –

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- entities associated with the Project, other than Timbercorp Finance Pty Ltd, are involved in the provision of finance for the Project;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrowers risk;
- additional benefits will be granted to the borrowers for the purpose of section 82KL or the funding arrangements transform the project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arms length;
- repayments of the principal and 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) back to the lender or any associate; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

31. There is no agreement, arrangement or understanding between any entity or party associated with the Project and any financial or other institution other than Timbercorp Finance Pty Ltd for the provision of any finance to the Growers for any purpose associated with the Project.

Ruling

Section 8-1

32. Growers (who are not joint venture growers) accepted into the Project on or before 31 May 2000 will be able to claim deductions under section 8-1 of the ITAA 1997, for the years ended 30 June 2000 to 30 June 2002, inclusive, as follows:

Deductions available for year:

	Year 1	Year 2	Year 3
Fee Type per Woodlot	30/6/2000	30/6/2001	30/6/2002
Plantation preparation & establishment fee	\$3,370	\$400	nil
Rent	\$130	\$270	\$270
Annual maintenance fee	nil	\$75	\$75
Interest on borrowed funds	As incurred	As incurred	As incurred
Insurance	As incurred	As incurred	As incurred

33. Joint venture Growers in the Project will be allowed deductions under section 8-1 of the ITAA 1997 as follows:

- (i) for the first joint venture Grower, fees as per the above Table in relation to plantation preparation and establishment and interest on borrowed funds; and
- (ii) for the second joint venture Grower, fees as per the above Table in relation to rent, annual maintenance, insurance and interest on borrowed funds.

34. New Section 27-5 of the ITAA 1997 operates to deny a deduction that would otherwise be available under section 8-1, to the extent that the loss or outgoing incurred (after 1 July 2000) includes an amount relating to a GST input tax credit to which a Grower is entitled.

Sections 82KZM and 82KL; Part IVA

35. For a Grower who invests in the Project the following provisions of the ITAA 1936 have application as indicated:

- (i) the expenditure by Growers does not fall within the scope of section 82KZM;

- (ii) section 82KL does not apply to deny the deductions otherwise allowable; and
- (iii) 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.

Explanations

Section 8-1

36. Consideration of whether the plantation preparation and establishment fee, maintenance fees and annual rent are deductible under section 8-1 begins with paragraph 8-1(1)(a). 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 paragraph 8-1(1)(b) 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 paragraph 8-1(1)(b) applies. However, that does not preclude the application of paragraph 8-1(1)(a) and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

37. 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 in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income. These operations will be the planting, tending, maintaining and harvesting of the trees.

38. 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.

39. For this Project Growers have, under the Sub-lease and Management Agreements, 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 Sub-lease and Management Agreements, Growers appoint Timbercorp, 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.

40. The Sub-lease and Management Agreements give Growers more than a chattel interest in the timber on harvest. The Project documentation contemplates Growers will have an ongoing interest in the growing trees - the trees are the Growers' property and Growers have a legal interest in the land being the lease itself.

41. Growers have the right to use the land in question for afforestation purposes and to have Timbercorp come onto the land to carry out its obligations under the Sub-lease and Management Agreements. The Growers' degree of control over Timbercorp 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 Timbercorp's activities. Growers are able to terminate arrangements with Timbercorp in certain instances, such as cases of default or neglect. The afforestation activities described in the Sub-lease and Management Agreements are carried out on the Growers' behalf.

42. 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. 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 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.

43. 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.

44. 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.

45. 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. The fees will thus be deductible under paragraph 8-1(1)(a) of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. No capital component is identifiable. The tests of deductibility under paragraph 8-1(1)(a) are met. The exclusions do not apply.

Interest deductibility

46. Some Growers intend to finance the investment through a loan facility. Whether the interest fees are deductible under section 8-1 depends on the same reasoning as that applied to whether the rent and plantation preparation and establishment fee of \$3,500 per Woodlot to be incurred in the year ending 30 June 2000 will be deductible. The interest fees incurred in the years ending 30 June 2000, 30 June 2001 and 30 June 2002 will be in respect of a loan to finance the operations - the tending, maintenance and harvesting of the trees, and the lease of the land on which the trees will have been planted - that will continue to be directly connected with the gaining of 'business income' from the Project. These fees will thus also have a sufficient connection with the gaining of assessable income. No capital, private or domestic component is identifiable in respect of them.

Insurance deductibility

47. Insurance may be arranged to insure the Woodlots against fire and other risks. Any insurance recovery will be assessable. The insurance premiums will thus have a sufficient connection with the gaining of assessable income from the Project. No capital, private or domestic component is identifiable in respect of them.

Section 82KZM

48. 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 the same year of income as the execution of the relevant agreement.

49. Under the Sub-lease and Management Agreements the fee of \$3,500 per Woodlot will be incurred on execution of these Agreements. This fee is charged for providing services to a Grower by 30 June 2000.

50. For this Ruling's purposes no explicit conclusion can be drawn from the arrangement's description, that the fee has been inflated to result in reduced fees being payable for subsequent years. The fee is expressly stated to be for a number of specified services. There is also 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, it can be accepted that no part of the initial fee is for Timbercorp 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 expenditure by Growers.

51. 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

52. Section 82KL's operation depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. Here, there may be a loan provided by Timbercorp Finance Pty Ltd to the Grower. The loan is provided on a full recourse basis, and on commercial terms. 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

53. 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 Timbercorp Eucalypts Project will be a 'scheme', commencing when the Prospectus is issued. The Growers will obtain a 'tax benefit'

from entering into the scheme, in the form of the deduction of the initial fee of \$3,500 per Woodlot, allowable under section 8-1, 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.

54. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the eventual harvesting of the trees. Further, there are no features of the Project, for example, such as the plantation preparation and establishment fee being 'excessive', and uncommercial, predominantly financed by a non-recourse loan, and resulting in insufficient 'real money' coming into the Responsible Entity's hands, that might suggest the Project was so 'tax driven', and so designed to produce a tax deduction of a certain magnitude that would attract the operation of Part IVA.

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Commissioner of Taxation

1 March 2000

Previous draft:

Not previously issued in draft form

- schemes and shams
- taxation administration
- tax avoidance

Related Rulings/Determinations:

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

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 82KZM
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1997 8-1
- ITAA 1997 27-5

Subject references:

- carrying on a business
 - commencement of business
 - fee expenses
 - interest expenses
 - management fee expenses
 - producing assessable income
 - product rulings
 - public rulings
-

ATO references:

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