



# ***PR 2001/71 - Income tax: WRF Kangaroo Island Plantations 2002***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *13 June 2001*



# Product Ruling

## Income tax: WRF Kangaroo Island Plantations 2002

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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**, **Previous Rulings**, **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.*

*[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]*

### 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 in future years to confirm the arrangement has been implemented as described below and to ensure that 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.

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.

## **What this Product Ruling is about**

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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 WRF Kangaroo Island Plantations 2002, or just simply as 'the Project', or the 'product'.

### **Tax law(s)**

2. The tax laws dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
  - section 8-1 (ITAA 1997);
  - section 17-5 (ITAA 1997);
  - Division 27 (ITAA 1997);
  - Division 35 (ITAA 1997);
  - section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
  - section 82KZM (ITAA 1936);
  - sections 82KZMA – 82KZMD (ITAA 1936);
  - sections 82KZME – 82KZMF (ITAA 1936); and
  - Part IVA (ITAA 1936).

### **Goods and Services Tax**

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

### **Business Tax Reform**

4. The Government is currently evaluating further changes to the tax system in response to the Ralph *Review of Business Taxation* and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the laws enacted at the time it was issued, future tax changes may affect the operation of

those laws and, in particular, the tax deductions that are allowable. Where tax laws change, those changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering investing in the Project are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

### **Note to Promoters and Advisers**

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for investors in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that potential investors are fully informed of any changes in tax laws that take place after the Ruling is issued. Such action should minimise suggestions that potential investors have been negligently or otherwise misled.

### **Class of persons**

7. 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'.

8. 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 it.

### **Qualifications**

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

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11. This Ruling applies prospectively from 30 May 2001, 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).

12. 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

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13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2003. 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 change in the arrangement or in the persons' involvement in the arrangement.

## Previous Rulings

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14. This Ruling replaces Product Ruling PR 2001/19, which is withdrawn on and from the date this Ruling is made (30 May 2001). Product Ruling 2001/19 will continue to apply to investors who entered into the Project on or before 30 May 2001.

## **Arrangement**

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

- Application for Product Ruling dated 17 January 2001;
- The WRF Kangaroo Island Plantations 2002 Draft Prospectus dated 9 February 2001;
- **Draft Management Agreement between WRF Management Ltd (the ‘Manager’), Primary Securities Ltd (the ‘Responsible Entity’) and the Grower dated 22 February 2001;**
- **Draft Lease and Sub-Lease Agreement between KI Plantations Ltd (the ‘Lessor’), Primary Securities Ltd (the ‘Responsible Entity’) and the Grower, undated;**
- **Draft Constitution for WRF Kangaroo Island Plantations 2002, undated;**
- Draft Compliance Plan for WRF Kangaroo Island Plantations 2002 dated 28 November 2000;
- Draft Custodian Agreement dated 8 February 2000;
- Responsible Entity Services Agreement between WRF Management Ltd and Primary Securities Ltd, undated; and
- Additional correspondence from the Applicant dated 22 February 2001 and 16 May 2001.

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

16. The documents highlighted are those that Growers enter into. 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, which are a part of the arrangement. The effect of these agreements is summarised as follows.

**Overview**

17. This arrangement is called the WRF Kangaroo Island Plantations 2002.

Location	Kangaroo Island in South Australia.
Type of business each participant is carrying on	Commercial growing and cultivation of <i>Eucalyptus globulus</i> (Tasmanian Bluegum) trees for the purpose of producing timber for woodchipping.
Number of hectares under cultivation	3,000
Size of each Woodlot	1 hectare
Number of trees per hectare	An average of 1,000 trees per hectare
Expected production	150 – 240 cubic metres per Woodlot
The term of the investment	8 – 12 years approximately
Initial cost	\$8,068.40
<b>Initial cost per hectare</b>	\$8,068.40
Ongoing costs	Insurance to be provided by the Grower.

18. Growers participating in the arrangement will enter into a Management Agreement and a Lease and Sub-Lease Agreement for the Project. The Lease and Sub-Lease Agreement gives a Grower a lease or sub-lease from KI Plantations Ltd (the 'Lessor') over an identifiable area of land called a 'Woodlot' until 30 June 2013 or up until the trees are harvested and sold and net income distributed, whichever happens last. Each Woodlot is one hectare in size.

19. The Project Land is situated on Kangaroo Island in South Australia. KI Plantations Ltd will either lease or sub-lease land to the Growers to enable the Growers to carry on a long term commercial afforestation business. Growers are specifically granted rights to harvest timber on their Woodlots for this purpose.

20. The Draft Prospectus states that there is no minimum subscription for this Project, however applications made under the Prospectus will not be accepted after 13 months from the date of the Prospectus. Each investor may subscribe for a minimum of one Woodlot, at a cost of \$8,068.40 per Woodlot. For Growers who invest in this Project, an average of 1,000 trees will be planted per Woodlot (1,000 trees per hectare) during the period 1 July 2001 and 30 June 2002.

21. The Responsible Entity will only accept applications and execute Agreements for investors who lodge applications between 1 June and 30 June 2001 where the Landcare Services are capable of being completed by 30 June 2001. The Responsible Entity will be monitoring on a daily basis its ability to complete the Landcare Services by 30 June 2001.

22. Growers must subscribe for 1,350 non-voting shares in KI Plantations Ltd (the 'Lessor') at a cost of \$1,350 plus stamp duty. Growers will receive 300 options (per Woodlot) to acquire shares in WRF Securities Ltd with an exercise price of 35 cents per option. These options may be exercised up until 30 June 2002.

### **Constitution**

23. The Constitution for the Project sets out the terms and conditions under which the Responsible Entity agrees to act for the Grower and to manage the Project. Growers are entitled to assign their Grower's interest in certain circumstances (cl. 1.1). Under the Constitution, Growers appoint Primary Securities Ltd as a sole and exclusive agent in relation to the Project. The Lease and Sub-Lease Agreement and Management Agreement will be executed on behalf of a Grower following them signing the Application Form in the Prospectus. Growers are bound by the Constitution by virtue of their participation in the Project.

### **Compliance Plan**

24. The Responsible Entity has prepared a Compliance Plan in accordance with the Corporations Law. Under the Compliance Plan, a Compliance Committee will monitor to what extent the Responsible Entity meets its obligations as the Responsible Entity of the Project and the rights of the Growers are protected.

### **Interest in Land**

25. Growers participating in the arrangement will enter into a Lease and Sub-Lease Agreement between KI Plantations Ltd (the 'Lessor') and the Grower. Growers are granted an interest in land in the form of a lease or sub-lease to use their Woodlot for the purpose of conducting their afforestation business (cl. 2.1).

26. Each Grower must pay a fee for rent to the Lessor of an amount equal to \$36.30 per Woodlot each year, payable in advance on 30 June of the preceding year (Part 5.2, Schedule to the Lease and Sub-Lease Agreement). This fee is indexed annually. The initial rent fee is \$5.50 for the period from allotment to 30 June 2001, where Growers invest prior to 30 June 2001. For Growers who invest after 30 June 2001, the rent for Year 2 is payable in arrears on 30 June 2002. The term of the Grower's lease or sub-lease is up to until 30 June 2013 or up until the trees are harvested and sold and net income distributed, whichever happens last. This is estimated as occurring approximately between 8 and 12 years after the commencement of the Project.

**Management Agreement**

27. Each Grower enters into a Management Agreement with WRF Management Ltd (the 'Manager') for each Woodlot. Growers contract with the Manager to establish and maintain the plantation until maturity. Each Grower must pay to the Manager a Management Fee of \$682 in Year 2, and \$148.50 in Year 3 and every year thereafter to be indexed annually from 1 July 2003 (Part 2(c) and 2(d), Schedule to the Management Agreement). For Growers who invest before 30 June 2001 the management fee for Year 2 is payable in advance on 30 June 2001. For Growers who invest after 30 June 2001, the management fee for Year 2 is payable in arrears on 30 June 2002. Annual management fees for subsequent years are payable in advance on 30 June of the preceding year.

28. The Management Agreement provides that each Grower appoints the Manager to perform services under the agreement. The Schedule to the Management Agreement specifies the services to be performed by the Manager. The Manager will supervise and manage all silvicultural activities on behalf of each Grower and must:

- acquire appropriate trees;
- prepare and grade the Woodlot;
- plant *Eucalyptus globulus* trees on the land;
- keep the Woodlot free of competitive weeds, vermin, noxious animals and insects; and
- maintain the Woodlot according to good silvicultural and forestry practices.

29. The Manager will determine the appropriate time to harvest the trees having regard to sound forestry practice (cl.8.2). The Manager will harvest and sell the timber produce on the Growers' behalf at the highest price possible for the timber or milled timber (cl 9.2). The Grower may elect to take their own timber produce (cl. 10.1).

**Planting**

30. During the period from allotment to 30 June 2002, the Manager is required to plant *Eucalyptus globulus* trees on the Woodlots. After planting, the Manager will maintain the trees in accordance with good silvicultural practice. The services to be provided by the Manager over the term of the Project are outlined in the Schedule to the Management Agreement.

**Fees**

31. For Growers who invest in the Project, the following fees (per Woodlot) are payable on application;

<b>Expense</b>	<b>Cost per Woodlot</b>
Landcare expenses	\$4,339.50
Planting Fee	\$165.00
Prepaid Management Fees (relating to Years 2 - 10)	\$1,787.50
Prepaid Rent (relating to Years 1 – 10)	\$418.00
Acquisition of 1,350 shares in KI Plantations including stamp duty	\$1,358.40
<b>Total</b>	<b>\$8,068.40</b>

32. The Application monies will be banked in the Application Fund trust bank account formed under the Project's Constitution (cl. 3.7 of the Constitution). The Responsible Entity will direct the Custodian to pay the Management and Rent Fees yearly from the trust bank account, after the Manager has given an estimate of the fees required for the following 12 months (cl. 12 of the Constitution). If, for any reason, the Project is terminated prior to completion, the Responsible Entity shall refund the balance of the Project Fees to each Grower, including interest accrued, which have been paid in advance, after deducting any amounts due and payable by the Grower. This refund will occur on 30 June following the date of termination (cl. 10.6 of the Constitution).

33. The initial fee payable under the Management Agreement is \$4,339.50 per Woodlot being for Landcare expenses for establishing the plantation (Part 2(a), Schedule to the Management Agreement). Where Growers lodge their applications by 30 June 2001 and the Responsible Entity accepts the application and executes the Agreements, these services will be completed by 30 June 2001. For Growers who invest after 30 June 2001, the landcare services will be completed by 30 June 2002.

34. A planting service fee of \$165 is payable on 1 July 2001 for Growers who invest in the Project by 30 June 2001, for planting services to be carried out during the period 1 July 2001 and 30 June 2002. For Growers who invest after 30 June 2001, this fee is payable in arrears on 30 June 2002.

35. Management fees for Year 2 to Year 10 are payable in advance at the time of application (cl. 4 of the Constitution). Each Grower must pay to the Manager a Management Fee of \$682 in Year 2, and \$148.5 in Year 3 and every year thereafter to be indexed annually from 1 July 2003 (Part 2(c) and 2(d), Schedule to the Management Agreement). For Growers who invest before 30 June 2001 the management fee for Year 2 is payable in advance on 30 June 2001. For Growers who invest after 30 June 2001, the management fee for Year 2 is payable in arrears on 30 June 2002. Annual management fees for subsequent years are payable in advance on June of the preceding year.

36. Each Grower must pay a fee for rent to the Lessor of an amount equal to \$36.30 per Woodlot each year, payable in advance on 30 June of the preceding year (Part 5.2, Schedule to the Lease and Sub-Lease Agreement). This fee is indexed annually. The initial rent fee is \$5.50 for the period from allotment to 30 June 2001, where Growers invest prior to 30 June 2001. For Growers who invest after 30 June 2001, the rent for Year 2 is payable in arrears on 30 June 2002.

37. Before harvest, the Grower must pay to the Manager a harvest fee, equal to the amount stated on the Harvesting quote. The Harvesting quote will be provided to the Grower 3 months prior to harvesting taking place. After harvest, Growers must pay the Manager a Co-ordination fee of 5.5% of the Net Sale Proceeds (cl. 4.1 of the Management Agreement). These amounts will be withheld by the Responsible Entity from the Growers' Gross Sale Proceeds before the Harvest proceeds are paid out to the Growers.

## **Finance**

38. Growers can fund their investment in the Project themselves, or borrow from an independent lender.

39. 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 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-arm's length;

- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender, or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project are involved, or become involved, in the provision of finance to Members for the Project.

## **Ruling**

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### **Assessable income**

40. A Grower's share of the gross sales proceeds from the Project less any GST payable on these proceeds will be assessable income under section 6-5. Section 17-5 excludes from assessable income an amount relating to GST payable on a taxable supply.

### **Deductions where a Grower is not registered nor required to be registered for GST and invests in the Project by 30 June 2001**

41. A Grower may claim tax deductions in the Table below where the Grower:

- participates in the Project by 30 June 2001 to carry on the business of growing trees;
- incurs the fees shown in paragraphs 31 - 37; and
- is not registered nor required to be registered for GST.

### ***Section 8-1 – prepaid fees***

42. Expenditure incurred by a Grower who invests in the Project by 30 June 2001 is subject to the prepayment rules contained in sections 82KZME and 82KZMF. Therefore, a Grower who prepays fees that are otherwise allowable under section 8-1 **may not** be entitled to claim a tax deduction for the full amount of the fees in the year in which the expenditure is incurred unless it is 'excluded expenditure' (see note (ii) below).

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43. The amount and timing of tax deductions allowable each year for such fees must be determined using the formula in subsection 82KZMF(1). In that formula, which is shown below, the 'eligible service period' means, generally, the period over which the services are to be provided.

$$\text{Expenditure X} \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

In this Project, the tax deductions allowable for Management fees and rent (detailed at paragraphs 35 and 36 in the Arrangement) must be calculated by applying the formula to the amount incurred each year by the Grower. The application of this method is shown in the Example at paragraph 97.

Fee Type	ITAA 1997 Section	Year 1 deductions 30 June 2001	Year 2 deductions 30 June 2002	Year 3 deductions 30 June 2003
Landcare Expenses	8-1	\$4,339.50		
Planting fee	8-1		\$165	
Management Fee	8-1	Amount must be calculated – see notes (i), (ii) & (iv) below	Amount must be calculated – see notes (i), (ii) & (iv) below	Amount must be calculated – see notes (i), (ii) & (iv) below
Rent	8-1	\$5.50 plus Amount to be calculated – see notes (i), (ii) & (iv) below	Amount must be calculated – see notes (i), (ii) & (iv) below	Amount must be calculated – see notes (i), (ii) & (iv) below
Interest	8-1	As incurred - See Notes (ii), (iii) & (iv) (below)	As incurred – See Notes (ii), (iii) & (iv) (below)	As incurred - See Notes (ii), (iii) & (iv) (below)

**Notes:**

- (i) The Management fees and rent shown in the Table above **MAY NOT** be deductible in full in the year incurred. The deduction for each year's fees must be determined using the formula above (see paragraph 43). The Project Manager will inform Growers of the number of days in the 'eligible service period' in the first 'expenditure year'. This figure is necessary to calculate the deduction allowable for the fees incurred. See Example 2 at paragraph 97.

- (ii) Amounts of less than \$1,000 will be ‘excluded expenditure’. Excluded expenditure is an ‘exception’ to the prepayment rules and is deductible in full in the year in which it is incurred. Deductibility of amounts of \$1,000 or more, such as may occur where a Grower acquires a number of interests in the Project, will be determined on the same basis as the prepaid Management fees, i.e., using the formula shown above (in paragraph 43).
- (iii) The deductibility or otherwise of interest arising from agreements that Growers enter into to finance their participation is outside the scope of this Ruling. However, all Growers who enter into agreements to finance their participation in the Project should read carefully the discussion of the prepayment rules in paragraphs 87 to 91 below as those rules may be applicable if interest is prepaid.
- (iv) Where a Grower **chooses** to prepay fees beyond 13 months, sections 82KZME and 82KZMF will not apply to set the amount and timing of that Grower’s tax deductions. Instead, unless the expenditure is ‘excluded expenditure’, the amount and timing of the tax deductions is determined under either subsection 82KZM(1) or subsection 82KZMD(2) (see paragraph 82). To apportion the expenditure over the eligible service period, these provisions, which apply respectively to ‘small business taxpayers’ and taxpayers who are not ‘small business taxpayers’, effectively use the same formula as that shown above.

**Deductions where a Grower is not registered nor required to be registered for GST and invests in the Project after 30 June 2001**

44. A Grower may claim tax deductions in the Table below where the Grower:

- participates in the Project after 30 June 2001 to carry on the business of growing trees;
- incurs the fees shown in paragraphs 31 to 37; and
- is not registered nor required to be registered for GST.

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Fee Type	ITAA 1997 Section	Year 1 deductions 30 June 2001	Year 2 deductions 30 June 2002	Year 3 deductions 30 June 2003
Landcare Expenses	8-1		\$4339.50	
Planting fee	8-1		\$165.00	
Management Fee	8-1		\$682.00	Amount must be calculated – see notes (i), (ii) & (iv) below
Rent	8-1		\$36.30	Amount must be calculated – see notes (i), (ii) & (iv) below
Interest	8-1		As incurred - See Notes (ii), (iii) & (iv) (below)	As incurred See Notes (ii), (iii) & (iv) (below)

**Notes:**

- (i) The Management fee shown in the Table at paragraph 44 above **MAY NOT** be deductible in full in the year incurred. The deduction for each year's fees must be determined using the formula above (see paragraph 43). The Project Manager will inform Growers of the number of days in the 'eligible service period' in the first 'expenditure year'. This figure is necessary to calculate the deduction allowable for the fees incurred. See Example 2 at paragraph 97.
- (ii) Amounts of less than \$1,000 will be 'excluded expenditure'. Excluded expenditure is an 'exception' to the prepayment rules and is deductible in full in the year in which it is incurred. Deductibility of amounts of \$1,000 or more, such as may occur where a Grower acquires a number of interests in the Project, will be determined on the same basis as the prepaid Management fees, i.e., using the formula shown above (in paragraph 43).

- (iii) The deductibility or otherwise of interest arising from agreements that Growers enter into to finance their participation is outside the scope of this Ruling. However, all Growers who enter into agreements to finance their participation in the Project should read carefully the discussion of the prepayment rules in paragraphs 87 to 91 below as those rules may be applicable if interest is prepaid.
- (iv) Where a Grower **chooses** to prepay fees beyond 13 months, sections 82KZME and 82KZMF will not apply to set the amount and timing of that Grower's tax deductions. Instead, unless the expenditure is 'excluded expenditure', the amount and timing of the tax deductions is determined under either subsection 82KZM(1) or subsection 82KZMD(2) (see paragraph 82). To apportion the expenditure over the eligible service period, these provisions, which apply respectively to 'small business taxpayers' and taxpayers who are not 'small business taxpayers', effectively use the same formula as that shown above.

**Deductions where a Grower is registered or is required to be registered for GST and invests in the Project by 30 June 2001**

45. Where a Grower who is registered or is required to be registered for GST:

- participates in the Project by 30 June 2001 to carry on the business of growing trees;
- incurs the fees shown in paragraphs 31 to 37; and
- is entitled to an input tax credit for the fees,

then the tax deductions shown in the Table at paragraph 43 will exclude any amounts of input tax credit (Division 27 of the ITAA). See Example 1 at paragraph 96.

**Deductions where a Grower is registered or is required to be registered for GST and invests in the Project after 30 June 2001**

46. Where a Grower who is registered or is required to be registered for GST:

- participates in the Project after 30 June 2001 to carry on the business of growing trees;
- incurs the fees shown in paragraphs 31 to 37; and
- is entitled to an input tax credit for the fees,

then the tax deductions shown in the Table at paragraph 44 will exclude any amounts of input tax credit (Division 27 of the ITAA). See Example 1 at paragraph 96.

### **Division 35 – deferral of losses from non-commercial business activities**

#### **Section 35-55 – Commissioner’s discretion**

47. For a Grower who is an individual and who enters the Project during the year ended 30 June 2001, the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner will decide for the income years ending 30 June 2001 to 30 June 2010 that the rule in section 35-10 does not apply to this activity provided that the Project is carried out in the manner described in this Ruling.

48. This exercise of the discretion in subsection 35-55(1) will not be required where, for any year in question:

- a Grower’s business activity satisfies one of the objective tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the ‘Exception’ in subsection 35-10(4) applies (see paragraph 68 in the Explanations part of this ruling, below).

49. Where either the Grower’s business activity satisfies one of the objective tests, the discretion in subsection 35-55(1) is exercised, or the Exception in subsection 35-10(4) applies, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of deductions attributable to their business activity in excess of any assessable income from that activity, i.e., any ‘loss’ from that activity, to a later year. Instead, this ‘loss’ can be offset against other assessable income for the year in which it arises.

50. Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner’s decision to exercise the discretion in paragraph 35-55(1)(b) as an indication that the Tax Office sanctions or guarantees the Project or the product to be a commercially viable investment. An assessment of the Project or the product from this perspective has not been made.

#### **Section 82KL**

51. Section 82KL does not apply to deny the deduction otherwise allowable.

**Part IVA**

52. 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**

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**Section 8-1**

53. Consideration of whether the management fees and the rent are deductible under section 8-1, begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing 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 that 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 in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

**Is the Grower carrying on a business?**

54. An afforestation scheme can constitute the carrying on of a business. Where there is a business, or a future business, the Gross Harvest Proceeds each year from timber produce from Woodlots comprising the Project 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 each year from the Woodlot. Generally, a Grower will be carrying on a business of afforestation where:

- the Grower has an identifiable interest in specific growing trees coupled with a right to harvest and sell the timber produce;

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- the afforestation activities are carried out on the Grower'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.

55. For this Project Growers have rights under the Lease and Sub-Lease Agreement in the form of a lease or sub-lease over an identifiable area of land consistent with the intention to carry on a business of growing trees. Under the Management Agreement Growers engage the Manager to acquire tree seedlings and plant out the seedlings on the leased land and to provide ongoing services to care for and maintain the trees. Growers are considered to have control of their operations.

56. The Management Agreement provides Growers with more than a chattel interest in the trees. The Project documentation contemplates Growers will have an ongoing interest in the trees.

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

58. 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 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.

59. 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.

60. Growers have a continuing interest in the trees from the time they are acquired until the cessation of the Project. 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.

61. The rent and management 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 income (from the sale of timber produce) is to be gained from the 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. The fee appears to be reasonable. There is no capital component of the management fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

### **Interest deductibility**

62. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or other financier is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by, the Tax Office.

63. While the terms of any finance agreement entered into between relevant Growers and such financiers are subject to commercial negotiation, those agreements may require interest to be prepaid. Under the prepayment rules contained in sections 82KZME, 'agreement' (defined in subsection 82KZME(4)) is a broad concept and includes all activities that relate to the agreement including those that give rise to deductions or assessable income. It will encompass activities not described in the Arrangement or otherwise dealt with in the Product Ruling, such as a loan to finance participation in the Project.

64. Therefore, unless the prepaid interest is 'excluded expenditure', where such a loan facility requires interest to be prepaid and the requirements of section 82KZME are met, relevant Growers will be required use the formula in subsection 82KZMF(1) to determine any tax deduction that may be allowable. The relevant formula is shown above in paragraph 43 and the method is explained in Example 2 at paragraph 97.

**Division 35 – deferral of losses from non-commercial business activities**

65. Under the rule in subsection 35-10(2) a deduction for a loss incurred by an individual (including an individual in a general law partnership) from certain business activities will not be allowable in an income year unless:

- the ‘Exception’ in subsection 35-10(4) applies;
- one of four objective tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or
- if one of the objective tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

66. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer’s allowable deductions attributable to the business activity over that taxpayer’s assessable income from the business activity.

67. Under the loss deferral rule in subsection 35-10(2) the relevant loss is not able to be taken into account in the calculation of taxable income in the year that loss arose. Instead, in a later year it may be offset against any income from the same or similar business activity or, if one of the objective tests is passed, or the Commissioner’s discretion exercised, against other income.

68. For the purposes of applying the objective tests, subsection 35-10(3) allows taxpayers to group business activities ‘of a similar kind’. Under subsection 35-10(4), there is an ‘Exception’ to the general rule in subsection 35-10(2) where the loss is from a primary production business activity and the individual taxpayer has other assessable income for the income year from sources not related to that activity of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

69. In broad terms, the objective tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);
- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year) (section 35-35);
- (c) at least \$500,000 of real property is used on a continuing basis in carrying on the business activity in that year (section 35-40); or

- (d) at least \$100,000 of certain other assets are used on a continuing basis in carrying on the business activity in that year (section 35-45).

70. A Grower who participates in the Project will be carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling indicates that a Grower who acquires the minimum investment of one interest in the Project is unlikely to pass one of the objective tests or produce a taxation profit until the income year ended 30 June 2011. Growers who acquire more than one interest in the Project may, however, pass one of the tests in an earlier income year.

71. Therefore, prior to this time, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

72. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, for an individual Grower who acquires an interest(s) in the Project, the Commissioner will decide that it would be unreasonable not to exercise the second arm of the discretion in paragraph 35-55(1)(b) for the term specified in paragraph 47 of this Product Ruling.

73. The second arm of the discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where:

- (i) the business activity has started to be carried on; and
- (ii) there is an objective expectation that the business activity of an individual taxpayer will either pass one of the objective tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

74. This Product Ruling is issued on a prospective basis (i.e., before an individual Grower's business activity starts to be carried on). Therefore, if the Project fails to be carried on during the income years specified above (see paragraph 47), in the manner described in the Arrangement (see paragraphs 15 to 39), the Commissioner's discretion will not have been exercised, because one of the key conditions in paragraph 35-55(1)(b) will not have been satisfied.

75. In deciding that the second arm of the discretion in paragraph 35-55(1)(b) will be exercised on this conditional basis, the Commissioner has relied upon:

- the report of the independent silviculturist; and

- independent, objective, and generally available information relating to the afforestation industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity.

**Prepayments provisions – sections 82KZM, 82KZMA – 82KZMD and 82KZME – 82KZMF**

76. The prepayments provisions of the ITAA operate 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. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (e.g., the performance of management services or the leasing of land) that is not wholly done within the same year of income as the year in which the expenditure is incurred.

77. In this Project, the Landcare Expense of \$4,339.50 will be incurred on the execution of the Management Agreement. The Landcare Expense is charged for providing establishment services to a Grower by 30 June of the year of execution of the Agreement. In particular, the Landcare Expense is expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the description of the arrangement that the Landcare Expense has been inflated to result in reduced fees being payable for subsequent years.

78. There is also no evidence that might suggest the establishment 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 Landcare Expense is for the Manager doing ‘things’ that are not to be wholly done within the year of income of the fee being incurred. On this basis, provided a Grower incurs expenditure as required by the agreements as set out in paragraph 33, then the basic precondition for the operation of the prepayment provisions is not satisfied and fees will be deductible in the year in which they are incurred.

***Growers who invest in the Project and choose to pay fees for a period in excess of that required by the Project’s agreements***

79. Although not required under the Management Agreement, a Grower participating in the Project may choose to prepay fees for a number of years. Where this occurs the prepayments provisions of the ITAA will operate to apportion the expenditure and allow an income tax deduction over the period that the prepaid benefits are provided.

80. The amount and timing of tax deductions for any such prepaid fees otherwise deductible under section 8-1 will depend upon when the respective amounts are incurred and what the 'eligible service period' is, as defined in subsection 82KZL(1), in relation to these amounts. The 'eligible service period' means generally, the period over which the services are to be provided. The relevant provision of the ITAA will depend on a number of factors including the amount and timing of the prepayment and, where the 'eligible service period' exceeds 13 months, whether the Grower is a 'small business taxpayer'.

81. Where a Grower participating in this Project incurs expenditure in respect of an eligible service period that ends 13 months or less from the time the expenditure was incurred, but also in respect of the doing of a thing not to be wholly done within the income year in which that expenditure has been incurred, and the other tests in section 82KZME are met, then section 82KZMF will apply in the manner set out in the formula below.

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

In the formula, the 'eligible service period' means, generally, the period to which the services are to be provided.

82. Where a Grower participating in this Project incurs expenditure in respect of a period that ends more than 13 months after that expenditure has been incurred, then section 82KZM will apply if the Grower is a 'small business taxpayer' or section 82KZMD if the Grower is not a 'small business taxpayer'. For a 'small business taxpayer' (see paragraphs 84 to 86) the amount and timing of the allowable deductions will then be calculated using the formula in subsection 82KZM(1) and for non-small business taxpayers using the formula in subsection 82KZMD(2). Both formulae are the same, or effectively the same as that shown in paragraph 81 above, concerning section 82KZMF.

83. A prepaid fee of less than \$1,000 incurred in an expenditure year is 'excluded expenditure' as defined in subsection 82KZL(1). Subsections 82KZM(1), 82KZME(7) and 82KZMA(4) all provide that 'excluded expenditure' is an exception to the prepayment rules discussed above. Therefore, a prepaid fee of less than \$1,000 is deductible in full in the year in which it is incurred. However, where a Grower acquires more than one interest in the Project and the quantum of a prepaid fee is \$1,000 or more, then the amount and timing of the deduction allowable must be determined using the formula shown above.

## **Small business taxpayers**

84. A 'small business taxpayer' is defined in section 960-335 of the ITAA 1997 as a taxpayer who is carrying on a business and either their 'average turnover' for the year is less than \$1,000,000 or their turnover recalculated under section 960-350 is less than \$1,000,000.

85. 'Average turnover' is determined under section 960-340 by reference to the average of the taxpayer's 'group turnover'. The group turnover is the sum of the 'value of business supplies' made by the taxpayer and entities connected with the taxpayer during the year (section 960-345).

86. Whether a Grower is a 'small business taxpayer' depends upon the circumstances of each Grower and is beyond the scope of this Product Ruling. It is the responsibility of each Grower to determine whether or not they are within the definition of a 'small business taxpayer'.

## **Sections 82KZME and 82KZMF – prepaid fees**

87. Expenditure prepaid by Growers who invest in the Project meets the requirements of subsections 82KZME(1) and (2) and the expenditures are incurred under an 'agreement' as described in subsection 82KZME(3). Therefore, unless one of the exceptions to section 82KZME applies to the expenditures, the amount and timing of tax deductions for those expenditures are determined under section 82KZMF.

88. In relation to the requirements of subsection 82KZME(1) and (2), the prepaid management fees, rent and (in relation to Growers investing before 30 June 2001) planting fee incurred by a Grower who participates in the Project:

- is otherwise deductible under section 8-1; and
- has an 'eligible service period' that ends not more than 13 months after the Grower incurs the expenditure; and
- is incurred in return for the doing of a thing under the agreement that is not wholly to be done within the expenditure year.

89. The 'eligible service period' (defined in subsections 82KZL(1)) means, generally, the period over which the services are to be provided.

90. In relation to an 'agreement' referred to in subsection 82KZME(3), the Project is an 'agreement' (this being a broad concept under subsection 82KZME(4)), where, during the term of this Product Ruling:

- the Grower's allowable deductions attributable to the Project for each expenditure year exceeds the Grower's assessable income from the Project (if any) for the expenditure year; and
- the Grower does not have day-to-day control over the operation of the Project; and
- there is more than one Grower participating in the Project.

91. The prepaid management fees, rent and planting fee, do not fall within any of the 5 exceptions to section 82KZME and therefore, the deduction for each year is determined using the formula in subsection 82KZMF(1) as set out in paragraph 81. Section 82KZMF overrides section 8-1 and apportions the management fees and rent over the period that the services for which the prepayment is made are performed.

### **Section 82KL**

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

### **Part IVA**

93. 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).

94. The WRF Kangaroo Island Plantations 2002 Project will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 43 to 46 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.

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

## Examples

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### Example 1 – entitlement to 'input tax credit'

96. Margaret, who is registered for GST, invests in the Green Circle Bluegums Project. The management fees are payable on 1 July each year for management services to be provided over the following 12 months. On 1 July 2000 Margaret pays her first year's management fees of \$5,500 and is eligible to claim a tax deduction for the fees in the income year ended 30 June 2001. The extent of her deduction for the management fees however, is reduced by the amount of any 'input tax credit' to which she is entitled. The Project Manager provides Margaret with a 'tax invoice' showing its ABN and the price of the taxable supply for management services as \$5,500. Using the details shown on the valid tax invoice, Margaret calculates her input tax credit as:

$$1/11 \times \$5,500 = \$500$$

Therefore, the tax deduction for management fees that she can claim in her income tax return for the year ended 30 June 2001 is \$5,000 (\$5,500 less \$500).

### Example 2 – apportionment of fees

97. Murray decides to invest in the ABC Pineforest Prospectus which is offering 500 interests of 0.5ha in an afforestation project of 25 years. The management fees are \$5,000 in the first year and \$1,200 for years 2 and 3. From year 4 onwards the management fee will be the previous year's fee increased by the CPI. The first year's fees are payable on execution of the agreements for services to be provided in the following 12 months and thereafter, the fees are payable in advance each year on the anniversary of that date. The project is subject to a minimum subscription of 300 interests. Murray

provides the Project Manager with a 'Power of Attorney' allowing the Manager to execute his Management Agreement and the other relevant agreements on his behalf. On 5 June 2001 the Project Manager informs Murray that the minimum subscription has been reached and the Project will go ahead. Murray's agreements are duly executed and management services start to be provided on that date.

Murray, who is not registered nor required to be registered for GST calculates his tax deduction for management fees for the 2001 income year as follows:

Management fee x  $\frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$

$$\$5,000 \text{ X } \frac{26}{365}$$

= \$356 (this is Murray's total tax deduction in 2001 for the Year 1 prepaid management fees of \$5,000. It represents the 26 days for which management services were provided in the 2001 income year).

In the 2002 income year Murray will be able to claim a tax deduction for management fees calculated as the sum of two separate amounts:

$$\$5,000 \text{ X } \frac{339}{365}$$

= \$4,643 (this represents the balance of the Year 1 prepaid fees for services provided to Murray in the 2002 income year).

$$\$1,200 \text{ X } \frac{26}{365}$$

= \$85 (this represents the portion of the Year 2 prepaid management fees for the 26 days during which services were provided to Murray in the 2002 income year).

\$4,643 + \$85 = \$4,728 (The sum of these two amounts is Murray's total tax deduction for management fees in 2002).

Murray continues to calculate his tax deduction for prepaid management fees using this method for the term of the Project.

## **Detailed contents list**

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## **Commissioner of Taxation**

30 May 2001

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### *Previous draft:*

Not previously issued in draft form

### *Related Rulings/Determinations:*

TR 92/1; TR 97/11; TR 97/16;  
TR 92/20; TR 98/22; TD 93/34;  
PR 1999/95; PR 2001/19

### *Subject references:*

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

### *Legislative references:*

- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 Division 27
- ITAA 1997 Division 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
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- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
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- ITAA 1936 82KZMA
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