



PR 2003/45 - Income tax: BioForest Wholesale Project No 1

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 This document has changed over time. This is a consolidated version of the ruling which was published on *18 June 2003*



Product Ruling

Income tax: BioForest Wholesale Project

No 1

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Potential participants 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**, **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.*

No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product. 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 participants 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 product fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants 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, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants 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 'BioForest Wholesale Project No 1', or just simply as 'the Project'.

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);
- Division 328 (ITAA 1997);
- Part 3-1 (ITAA 1997);
- Section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Section 82KZL (ITAA 1936);
- Sections 82KZME - 82KZMF (ITAA 1936);
- Section 82KZMG (ITAA 1936); and
- Part IVA (ITAA 1936).

Goods and services tax

3. All fees and expenditure referred to in this Ruling 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.

Changes in the law

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 taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering participating 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 participants in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

Class of persons

7. The class of persons to whom this Ruling applies is the persons more specifically identified in the Ruling part of this Product Ruling and 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, each of these persons, referred to as 'Growers', will be wholesale clients for the purpose of the *Corporations Act 2001* or will have accepted an offer which qualifies as a small scale offer for the purpose of the *Corporations Act 2001*.

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. Growers whose application has been conditionally accepted by BioForest Ltd subject to finance for the payment of the application fee, where the finance has not been approved by the lender and the funds have not been made available to BioForest Ltd by 30 June of the year in which the Project is entered into are also excluded from this Ruling.

Qualifications

9. The Commissioner rules on the precise arrangement identified in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner. The Ruling will be withdrawn or modified.

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Date of effect

11. This Ruling applies prospectively from 18 June 2003, 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 yet 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

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2006. 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.

Arrangement

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

- Application for a Product Ruling as constituted by documents provided on 2 May 2003, 14 May 2003, 21 May 2003, 23 May 2003 and 10 June 2003 and additional correspondence dated 13 May 2003, 21 May 2003, 30 May 2003, 10 June 2003 and 11 June 2003;
- Draft Information Memorandum for the BioForest Wholesale Project No 1, received 21 May 2003;
- Draft Constitution of the BioForest Wholesale Project No 1, dated 30 April 2003;
- Draft **Land Sourcing and Management Agreement** for the BioForest Wholesale Project No 1 between BioForest Ltd (as Manager and Grantor) and the Grower, received 10 June 2003;
- Draft **Lease** for the BioForest Wholesale Project No 1 between BioForest Ltd (as Manager and Grantor) and the Grower, received 10 June 2003;
- Draft **Deed of Profit a Prendre** for the BioForest Wholesale Project No 1 between BioForest Ltd and the Grower, received 10 June 2003; and
- Independent Foresters and Market Report, dated 21 April 2003.

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

15. The documents highlighted are those that Growers may 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 to which this Ruling applies.

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16. In accordance with the above documents, a Grower who participates in the arrangement must be a wholesale client or have accepted an offer that is a small scale offering. **This Ruling does not apply unless:**

- (a) the Grower is a wholesale client as defined in section 761G of the *Corporations Act 2001*; or
- (b) not being a retail client, the Grower has accepted a 'personal offer' of a small scale offering for the purpose of the *Corporations Act 2001*.

17. Each of these categories is explained in paragraphs 73 to 80 in the Explanations area of this Product Ruling.

18. As the Project's Growers are wholesale clients or have accepted an offer that is a small scale offering, the Project will not be a registered managed investment scheme under the *Corporations Act 2001*.

Overview

19. The salient features of the BioForest Wholesale Project No1 arrangement are as follows:

Location	South West of Western Australia and South East of Queensland
Type of business each participant is carrying on	Commercial growing and cultivation of: <ul style="list-style-type: none"> • Silky oak (<i>Grevillea robusta</i>); and • She-oak (<i>Casuarina cunninghamiana</i>); for the purpose of harvesting and selling the produce.
Number of hectares offered for cultivation	1,000
Size of each interest (Timberlot)	Approximately 0.5 hectares.
Minimum allocation per Grower	10 Timberlots.
Minimum subscription	100 Timberlots.
Number of trees to be established per hectare	800 Silky oak trees and 11,500 She-oak trees.
The term of the Project	Approximately 15 years.
Initial minimum cost	\$28,050 for 10 Timberlots

Ongoing and other costs	Management Fees, Rent, Costs of Felling, Costs of Sale, Costs of Processing, Harvesting Fees, Land Rehabilitation Cost, Performance Bonus and Insurance Premiums.
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The Project

20. The Project involves establishing, cultivating and harvesting Silky oak and She-oak plantations and the subsequent sale of the plantations' produce. The Project may also involve processing the Silky oak produce before its sale. The term of the Project is approximately 15 years.

21. BioForest Ltd (BioForest) has identified suitable sites for the Project near Harvey, Pinjarra and Donnybrook in the South West of Western Australia and near Gympie and Maryborough in the South East of Queensland. The sites were identified using BioForest's site selection criteria and site evaluation procedure. When the Project commences and the land requirements are known, BioForest will acquire either leasehold interests or, for land in Queensland, profit a prendres (forest rights).

22. A Grower participating in the Project will enter into a Land Sourcing and Management Agreement with BioForest (as the Grantor). Under the agreement, the Grantor agrees to grant a lease or a profit a prendre of an identifiable area of land to the Grower, within 12 months of the execution of the agreement. The area of land which will be approximately 0.5 hectares in size is called a 'Timberlot'.

23. After the lease or profit a prendre of the Timberlot has been granted to a Grower, the Land Sourcing and Management Agreement provides that BioForest (as the Manager) will be responsible for establishing and cultivating trees on the Timberlot. The Manager will plant a minimum of 400 Silky oak and 5,750 She-oak trees on each Timberlot and the Establishment Services must be completed within 12 months of the execution of the Land Sourcing and Management Agreement.

24. The Information Memorandum states that each Grower must subscribe for a minimum of 10 Timberlots at an initial cost of \$2,805 per Timberlot. In addition, the memorandum states that a minimum of 100 Timberlots must be reached before the Project can commence.

25. Each Grower is entitled to apply for fully paid ordinary shares in BioEnergy Australia Ltd (BioEnergy), the unlisted parent company of BioForest. For each Timberlot a Grower has subscribed to, 400 shares in BioEnergy are offered at an issue price of \$1.70 per share.

26. When a Grower makes an application for a Timberlot, the Grower will execute a Power of Attorney enabling BioForest to act on their behalf. This enables BioForest to enter into the Land Sourcing and Management Agreement, Lease and/or Deed of Profit a Prendre on behalf of the Grower.

Constitution

27. The Constitution establishes the Project and operates as a deed binding on all of the Growers and BioForest as the Manager. The Constitution sets out the terms and conditions under which BioForest agrees to act as the Manager of the Project. Growers are bound by the Constitution by virtue of their participation in the Project.

28. Under the terms of the Constitution, all moneys received from Growers on application shall be paid to the Manager, which shall deposit those moneys into an application fund. The application moneys will be released when the Manager is reasonably satisfied that certain specified criteria in the Constitution have been met (clauses 5, 7 and 8).

29. The Manager will also:

- prepare the Management Agreement, Lease and/or Deed of Profit a Prendre (clause 6);
- keep a register of Growers (clause 27);
- after amounts listed in clause 31 of the Constitution are deducted, distribute the proceeds of sale of the timber products in accordance with clause 30; and
- provide growers with copies of reports that review the condition of the plantations (clauses 33.6, 33.7 and 33.8).

Land Sourcing and Management Agreement

30. A Land Sourcing and Management Agreement (Management Agreement) will be entered into between BioForest (as the Grantor and Manager) and the Grower.

31. Under the Management Agreement, the Manager agrees to determine the location of areas of land or Timberlots that will be used by the Grower to carry on a long term commercial afforestation business. The Timberlots will be located in either the South West of Western Australia or in South East Queensland, or in both of these States. After the Timberlots are located and within 12 months of the execution of the Agreement, the Grantor will grant to the Grower:

- a Lease of the Timberlots, for the Timberlots are located in Western Australia; and/or
- a Profit a Prendre (forest right) for the Timberlots, located in Queensland.

32. Under the Management Agreement the Grower appoints BioForest to manage the Grower's Timberlots. The Manager must provide the 'Establishment Services' and 'Services' as specified in the Agreement (clauses 1.1 and 5). The Establishment Services that the Manager will provide include:

- ripping and mounding the Timberlots;
- otherwise preparing the Timberlots for planting;
- procurement of sufficient She-oak and Silky oak seedlings or trees of appropriate size as is reasonably required to complete the planting services, described immediately below;
- the planting services, where 400 Silky oak seedlings or trees and 5,750 She-oak seedlings or trees are planted on each Timberlot;
- fertilising the Timberlots;
- spraying the Timberlots; and
- maintaining the Timberlots according to good silvicultural and forestry practices.

33. The Establishment Services will be completed during the 12 month period commencing from the date of execution of the Management Agreement. However, these services will only be conducted after the Timberlots are leased to the Grower and/or a Profit a Prendre is granted for the Timberlots to the Grower

34. The Services (also referred to as ongoing services) that the Manager will provide include:

- cultivating, tending, culling, fertilising, replanting, spraying and otherwise caring for the trees;
- keeping access roads in good repair and condition;
- undertaking pest control measures as required on the Timberlots;
- keeping in good repair and condition adequate firebreaks within the Plantation;

- obtaining a report from an independent forester and forwarding them to the Grower, within 4 months after planting, then every 6 months for the next year and then yearly;
- organising and arranging for the trees to be clearfelled when they have reached maturity or have otherwise become marketable;
- organising and arranging for the trees to be thinned and with respect to Silky oak, if the thinning results in a marketable quantity of forest produce, carrying out any other services as if that thinned forest produce had been clearfelled;
- organising and arranging for the trees to be pruned as and when the Manager considers appropriate having regard to good silvicultural practice;
- organising and arranging for the trees to be fertilised as and when the Manager considers appropriate having regard to good silvicultural practice;
- subject to clauses 7 and 8 of the Management Agreement, organising and arranging for the Silky oak trees to be processed after they have been clearfelled;
- carrying out any other obligation to be performed by the Manager pursuant to the terms of any agreement entered into by the Manager for the sale of forest produce; and
- obtaining all necessary approvals and consents required in relation to the provision of the services listed above.

35. The Establishment Services are paid for by the Establishment Services fee and the ongoing services are paid for by an annual Management Fee.

Harvesting and Sale

36. The Grower will appoint the Manager to arrange for the harvest and sale of the forest produce grown on the Grower's Timberlots (clauses 7 and 8).

37. The Silky oak trees are expected to be thinned when they are 10 years of age. They will then be clear-felled at approximately 15 years of age. The She-oak trees which re-grow after harvest will be harvested at 3 to 4 yearly intervals.

38. If the processing of the Silky oak harvest will result in a greater return to each grower, then the Manager will arrange for the produce to be processed. In determining whether to process the Silky oak produce, the Manager will have regard to what is in the best interests of the Growers and consider all other relevant factors (clause 8).

39. The unprocessed produce and if applicable the processed produce from each Grower's Timberlot will be pooled with other Growers' produce from the Project and sold by the Manager on behalf of the Growers. However, the produce will not be pooled with produce from the plantations of other growers outside this Project. The Manager will use its best endeavours to negotiate the sale of the produce for the highest price practicable having regard to the circumstances at the time.

40. The Growers' proceeds from the sale of forest produce will be paid into a Proceeds Fund bank account (clause 3.3 of the Constitution). A Grower's Proportional Interest in these proceeds will be distributed to the Grower after deducting the amounts referred to in clause 10 of the Management Agreement. In addition, the Manager may at its discretion deduct the amounts referred to in clause 31.1 of the Constitution. These deductions include:

- the Grower's Proportional Interest of the Costs of Felling, the Costs of Sale and if applicable the Costs of Processing;
- any unpaid Rent or Management Fees due by the Grower to the Manager;
- the Harvesting Fee, being 10% of the Grower's Net Proceeds of Sale; and
- the Performance Bonus, being 25% of the excess of the Grower's Net Proceeds of Sale received during the Project's term over the bonus target. The Performance Bonus is payable only from the final net harvest proceeds.

41. In the event of a partial or total destruction of the trees on a Grower's Timberlot, the Grower's Proportional Interest in the distribution will be reduced in accordance with the degree or severity of the loss of the Timberlot (clause 10(f) of the Constitution).

42. If the Manager determines that amounts in the Proceeds Fund are too small to be distributed, the Manager may postpone distribution of those amounts until it determines that a reasonable amount is available for distribution (clause 30.5 of the Constitution).

Land Rehabilitation

43. After the land has been clearfelled, the Manager will be responsible for rehabilitating the Grower's Timberlot back to its original state before the establishment of the Grower's plantation. The Manager will charge the Grower a Land Rehabilitation fee for this service.

Lease and Deed of Profit a Prendre

44. Where the Manager makes a determination under the Management Agreement that a Grower's Timberlots will be located in Western Australia, the Manager will execute a Lease on behalf of the Grower to lease the Timberlots to the Grower. Where the Manager determines that a Grower's Timberlots will be located in Queensland, it will execute a Deed of Profit a Prendre on behalf of the Grower to grant a Profit a Prendre of the Timberlots to the Grower. The Manager may also determine that the Grower's Timberlots will be located in both Western Australia and Queensland. In this situation, both a Lease and a Profit a Prendre will be executed on behalf of the Grower, respectively.

45. Both the Lease and the Deed of Profit a Prendre will give the Grower a full right and interest in the forest produce and the right to have the produce sold. (clause 11.3 of both the Lease and Deed of Profit a Prendre). The Lease or Deed of Profit a Prendre will terminate on the date that the final distribution of the sale proceeds is made to the Grower or on the date the Project is terminated, pursuant to the terms of the Constitution.

46. Each Grower must pay Rent to the Manager for the leasehold interest and/or profit a prendre being an amount as specified in the Schedule to the Lease and the Schedule to the Deed of Profit a Prendre.

47. Under both the Lease and Deed of Profit a Prendre, among other things, the Grower:

- must not use the Timberlots for any purpose other than silviculture;
- must cultivate and work the Timberlots for the purpose of commercial silviculture;
- shall keep the Timberlots reasonably free of noxious weeds, scrub and undergrowth and prevent erosion or degradation of the Timberlots; and
- shall comply will all laws and regulations relating to the use and occupancy of the Grower's Timberlots.

48. In addition, the Manager will arrange for insurance that will be paid for by the Grower, to insure against destruction or damage to each Timberlot. In addition, the Grower may take out additional insurance cover for each of the Grower's Timberlots, at the Grower's own expense (clause 5.4 and clause 12 of both the Lease and Deed of Profit a Prendre).

Fees

49. The Grower must pay the following amounts to BioForest for each Timberlot:

- **Establishment Services Fee** of \$2,805 payable on application. (item 3 of the Schedule to the Management Agreement);
- **Annual Management Fees** of \$275, payable on 1 May of each financial year. The first payment is due on 1 May 2005. The first and subsequent payment of the annual Management Fees will be adjusted to reflect movements in the Consumer Price Index (CPI) from 1 July 2004 (item 3 of the Schedule to the Management Agreement);
- **Annual Rent** of \$165, payable on 1 May of each financial year. The first payment is due on 1 May 2004. Commencing from 1 July 2004, the Rent will be adjusted to reflect movements in the CPI (item 6 of the Schedule to both the Lease and Deed of Profit a Prendre);
- **Costs of Felling, Costs of Sale** and if applicable the **Costs of Processing** equal to the Grower's proportional interest of these costs. These costs are deducted from the Grower's Gross Proceeds of Sale (clause 10 of the Management Agreement);
- **Harvesting Fee** equal to 10% of the Net Proceeds of Sale. This fee is deducted from these proceeds (Item 3 of the Schedule to the Management Agreement);
- **Land Rehabilitation Costs** of \$385 (indexed), payable after clear-felling and deducted from the Net Proceeds of Sale (item 3 of the Schedule to the Management Agreement);

- **Performance Bonus**, being 25% of the excess of the net proceeds of sale received during the Project's term over the 'bonus target' (the 'bonus target' is the amount specified under the heading 'Manager's Performance Bonus' in Part 7 of the Information Memorandum). The Performance Bonus is payable only from the final net harvest proceeds (item 3 of the Schedule to the Management Agreement); and
- **Annual Insurance Premiums**, that are applicable to the Timberlot and payable when advised by the Manager (clause 5.4 of both the Lease and Deed of Profit a Prendre).

Finance

50. Growers can fund their involvement in the Project themselves or borrow from an independent lender. Growers are required to obtain their own finance for the Project.

51. This ruling will not apply to Growers whose application has been conditionally accepted by BioForest Ltd subject to finance for the payment of the application fee, where the finance has not been approved by the lender and the funds have not been made available to BioForest, by 30 June 2003 for 2003 Growers or by 30 June 2004 for 2004 Growers.

52. This Ruling also does not apply if a Grower enters into an 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' 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 terms are of a non-arm's length nature;
- 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;

- 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 for the Project.

Ruling

Application of this Ruling

53. This Ruling applies only to Growers who are accepted to participate in the Project:

- on or before 30 June 2003 (2003 Growers); or
- on or between 1 July 2003 and 31 May 2004 (2004 Growers).

the Grower has executed a Land Sourcing and Management Agreement by the relevant date.

54. The Grower's participation in the Project must constitute the carrying on of a business of primary production. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the project is accepted and the Project has commenced. Under the terms of the Information Memorandum a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 100 Timberlots is achieved (page 17 of the Information Memorandum).

55. The ruling does not apply to Growers whose application has been conditionally accepted by the Manager subject to finance for the payment of the application fee, where the finance has not been approved by the lender and the funds have not been made available to BioForest, by 30 June 2003 for 2003 Growers or by 30 June 2004 for 2004 Growers.

The Simplified Tax System ('STS')

Division 328

56. For a Grower participating in this Project the recognition of income and the timing of tax deductions will depend upon whether, in an income year(s), the Grower is an 'STS taxpayer' or is not an 'STS taxpayer'. To be an 'STS taxpayer' a Grower:

- must be eligible to be an 'STS taxpayer'; and
- must have elected to be an 'STS taxpayer'.

Qualification

57. This Product Ruling assumes that a Grower who is an 'STS taxpayer' is so for the income year in which their participation in the Project commences. A Grower may become an 'STS taxpayer' at a later point in time. Also, a Grower who is an 'STS taxpayer' may choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer' during the term of the Project. These are contingencies, relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

Assessable Income***Section 6-5 and section 328-105***

58. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

59. The Grower who is not an 'STS taxpayer' recognises ordinary income from carrying on the business of afforestation at the time that income is derived.

60. The Grower who is an 'STS taxpayer' recognises ordinary income from carrying on the business of afforestation at the time that income is received (paragraph 328-105(1)(a)).

Deductions for Management fees and Rent***Section 8-1 and section 328-105***

61. A Grower may claim tax deductions under section 8-1 of the ITAA 1997, for the revenue expenses in the following Tables.

62. However, if for any reason, an amount shown in the Tables below is not fully paid in the year in which it is incurred by a Grower who is an 'STS taxpayer' then the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower. Any amount or part of an amount shown in the Tables below which is not paid in the year in which it is incurred will be deductible in the year in which it is actually paid.

63. The deductions set out in the table below will be allowable on a per Timberlot basis:

2003 Growers

Fee Type	ITAA 1997 Section	Year ended 30 June 2003	Year ended 30 June 2004	Year ended 30 June 2005
Management Fees	8-1	\$2,805 See Notes (i) & (ii) below	Nil	\$275 (indexed) See Notes (i) & (iii) below
Rent	8-1	Nil	\$165 See Notes (i) & (iii) below	\$165 (indexed) See Notes (i) & (iii) below

2004 Growers

Fee Type	ITAA 1997 Section	Year ended 30 June 2004	Year ended 30 June 2005	Year ended 30 June 2006
Management Fees	8-1	\$2,805 See Notes (i) & (ii) below	\$275 (indexed) See Notes (i) & (iii) below	\$275 (indexed) See Notes (i) & (iii) below
Rent	8-1	\$165 See Notes (i) & (iii) below	\$165 (indexed) See Notes (i) & (iii) below	\$165 (indexed) See Notes (i) & (iii) below

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (e.g. input tax credits): Division 27. See Example at paragraph 131;
- (ii) The Establishment Services Fee (initial management fee) is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 106 to 110 in the Explanations). Consequently, the Establishment Fee is deductible in the year in which it is incurred (where the Grower is **not an 'STS taxpayer'**) or the year in which it is paid (where the Grower is an **'STS taxpayer'**); and

- (iii) Where a Grower, pays the Management Fee and Rent in the relevant income years shown in the relevant agreement or deed, those fees are deductible in full in the year that they are incurred (where the Grower is **not** an ‘STS taxpayer’) or the year in which they are paid (where the Grower is an ‘STS taxpayer’).

However, if a Grower chooses to prepay fees for the doing of a thing (e.g., the provision of management services or the leasing of land) that will not be wholly done in the income year the fees are incurred, the prepayment rules of the ITAA 1936 may apply to apportion those fees. In such cases, the tax deduction for the prepaid fee must be determined using the formula shown in paragraph 104 unless the expenditure is ‘excluded expenditure’.

‘Excluded expenditure’ is an ‘exception’ to the prepayment rules and is deductible in full in the year in which it is incurred. For the purpose of this Ruling ‘excluded expenditure’ refers to an amount of expenditure of less than \$1,000.

Shares

64. The shares in BioEnergy are CGT assets (section 108-5 of the ITAA 1997) and the amounts paid by a Grower to acquire those assets are an outgoing of capital and not allowable as a deduction.

65. The amounts paid for each share will represent the first element of the cost base of the share (subsection 110-25(2)). Any disposal of the shares by a Grower will be a CGT event and may give rise to a capital gain or loss.

Dividends relating to the shares

66. Dividends paid out of profits by BioEnergy are included in the assessable income of shareholders under subsection 44(1) of the ITAA 1936.

Interest

67. The deductibility or otherwise 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. However, all Growers who borrow funds in order to participate in the Project, should read the discussion of the prepayment rules in paragraphs 98 to 105 (below) as those rules may be applicable if

interest is prepaid. Subject to the ‘excluded expenditure’ exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower’s choice.

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

Section 35-55 - Commissioner’s discretion

68. For a Grower who is an individual and who enters the Project during the years ended 30 June 2003 or 30 June 2004, 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 in the following table 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.

2003 Grower	30 June 2003 to 30 June 2006
2004 Grower	30 June 2004 to 30 June 2006

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

- the ‘exception’ in subsection 35-10(4) applies;
- a Grower’s business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the Grower’s business activity produces assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsection 35-10(2)).

70. Where the ‘exception’ in subsection 35-10(4) applies, or the Grower’s business activity satisfies one of the tests, or the discretion in subsection 35-55(1) is exercised, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of the 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.

71. Growers are reminded of the important statement made on Page 1 of this Product Ruling. Consequently, 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 commercially viable. An assessment of the Project or the product from this perspective has not been made.

Section 82KL and Part IVA

72. For a Grower who participates in the Project and incurs expenditure as required by the Management Agreement, Lease or Deed of Profit a Prendre, the following provisions of the ITAA 1936 have application as indicated:

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

Explanation

Corporations Act 2001

73. For this Ruling to apply, an offer for an interest in the Project must:

- have been made to, and accepted by a Grower, who qualifies as a wholesale client as defined in section 761G of the *Corporations Act 2001*; or
- be an offer which qualifies as a small scale offering as defined in section 1012E of the *Corporations Act 2001*.

74. Small scale offers and offers to wholesale clients do not require a prospectus or product disclosure statement.

75. A Grower in the Project may be a person who is a wholesale client within the definition in section 761G. A person will be a wholesale client where the persons satisfies one of the following tests:

- the 'product value test' (paragraph 761G(7)(a));
- the 'individual wealth test' (paragraph 761G(7)(c)); and
- the 'professional investor test' (paragraph 761G(7)(d)).

76. A participant in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will satisfy the 'product value test' where:

- the minimum amount payable for the interests in the project on acceptance of the offer by the person to whom the offer is made is at least \$500,000; or

- the amount payable for the interests in the project on acceptance by the person to whom the offer is made and the amounts previously paid by the person for interests in the project of the same class that are held by the person add up to at least \$500,000.

77. A participant in a managed investment scheme, referred to below as ‘the person’ or ‘the person to whom the offer is made’, will satisfy the ‘individual wealth test’ where, it appears from a certificate given by a qualified accountant no more than 6 months before the offer is made, that the person to whom the offer is made:

- has net assets of at least \$2.5 million; or
- has a gross income for each of the last 2 financial years of at least \$250,000 a year.

78. A participant in a managed investment scheme, referred to below as ‘the person’ or ‘the person to whom the offer is made’, will satisfy the ‘professional investor test’ where:

- the person is a financial services licensee; or
- the person controls at least \$10 million for the purposes of investment in securities.

79. Alternatively, under section 1012E, a Grower may participate in the project by accepting a ‘personal offer’ for an interest in the project. Offers made under section 1012E cannot be accepted by more than 20 investors in any 12 month period and these investors, in aggregate, must not invest more than \$2 million dollars (subsection 1012E(2)).

80. An offer will be a ‘personal offer’ where it can only be accepted by the person to whom it is made, and it is made to a person who is likely to be interested in the offer because of previous contact, or professional or other connection with the person making the offer, or because they have indicated that they are interested in offers of that kind (subsection 1012E(5)).

Is the Grower carrying on a business?

81. For the amounts set out in the Tables above to constitute allowable deductions, the Grower’s afforestation activities as a participant in BioForest Wholesale Project No 1 must amount to the carrying on of a business of primary production.

82. Where there is a business, or a future business, the gross proceeds from the sale of timber from the scheme will constitute 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.

83. For schemes such as that of BioForest Wholesale Project No 1, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As Taxation Ruling TR 2000/8 sets out, these circumstances have been established in court decisions such as *FCT v. Lau* (1984) 84 ATC 4929; 16 ATR 55.

84. Generally, a Grower will be carrying on a business of afforestation, and hence primary production, if:

- the Grower has an identifiable interest in the land (by lease) or holds rights over the land (by licence) on which the Grower's trees are established;
- the Grower has a right to harvest and sell the timber from those trees;
- the afforestation activities are carried out on the Grower's behalf;
- the afforestation activities of the Grower are typical of those associated with an afforestation business; and
- the weight and influence of general indicators point to the carrying on of a business.

85. In this Project each Grower enters into a Management Agreement. In addition, the Grower enters into a Lease and/or a Deed of Profit a Prendre.

86. Under the Lease and/or Deed of Profit a Prendre, each individual Grower will have rights over a specific and identifiable area of at least 5 hectares of land. The lease and/or deed provide the Grower with an ongoing interest in the specific trees on the plantation for the term of the Project. Under the lease and/or deed, the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose.

87. Under the Management Agreement, the Manager is engaged by the Grower to establish and maintain the Grower's identifiable area of land during the term of the Project. The Manager has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the plantation on the Grower's behalf.

88. The Manager is also engaged to harvest and sell, on behalf of the Grower, the timber grown on the Grower's plantation.

89. 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 Project's description for all the indicators.

90. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of timber that will return a before-tax profit, i.e. a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

91. The Manager's services are also consistent with general silvicultural practices. They are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses. Each plantation is of a size and scale to allow it to be commercially viable.

92. The Grower's degree of control over the Manager as evidenced by the Management Agreement, and supplemented by the Corporations Act, is sufficient. During the term of the Project, the Manager will provide the Grower with regular progress reports on the Grower's Plantation and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Manager in certain instances, such as cases of default or neglect.

93. 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. For the purposes of this Ruling, the Grower's afforestation activities in the BioForest Wholesale Project No 1 will constitute the carrying on of a business.

The Simplified Tax System

Division 328

94. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

95. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductibility of lease and management fees***Section 8-1***

96. Consideration of whether the management fees and rent 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 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.

97. The management fees and rent associated with the afforestation activities will relate to the gaining of income from the Grower's business of afforestation (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of produce) 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. 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.

Prepayments provisions***Sections 82KZL to 82KZMG***

98. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. 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 will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the

provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

99. For this Project only section 82KZL (an interpretive provision) and sections 82KZME, 82KZMF and 82KZMG are relevant. Subject to section 82KZMG, if the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for prepaid expenditure under section 82KZMF using the formula in subsection 82KZMF(1). These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF.

Sections 82KZME and 82KZMF

100. Other than expenditure deductible under section 82KZMG, if the requirements of subsections 82KZME(2) and (3) are met, the formula in subsection 82KZMF(1) (see paragraph 104 below) will apply to apportion expenditure that is otherwise deductible under section 8-1 of the ITAA 1997. The requirements of subsection 82KZME(2) will be met if expenditure is incurred by a taxpayer in return for the doing of a thing that is not to be wholly done within the year the expenditure is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1)).

101. The requirements of subsection 82KZME(3) will be met where the agreement (or arrangement) has the following characteristics:

- the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year;
- the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the arrangement are managed by someone other than the taxpayer; and
- either :
 - a) there is more than one participant in the agreement in the same capacity as the taxpayer; or
 - b) the person who promotes, arranges or manages the agreement (or an associate of that person) promotes similar agreements for other taxpayers.

102. For the purpose of these provisions, the agreement includes all activities that relate to the agreement (subsection 82KZME(4)). This has particular relevance for a Grower in this Project who, in order to participate in the Project may borrow funds from a financier not associated with the Project. Although undertaken with an unrelated party, that financing would be an element of the arrangement. The funds borrowed and the interest deductions are directly related to the activities under the arrangement. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF.

103. There are a number of exceptions to these rules, but for Growers participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1). However, for the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the arrangement that is less than \$1,000. Such expenditure is immediately deductible.

104. Where the requirements of section 82KZME are met, section 82KZMF applies to apportion relevant prepaid expenditure. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

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

105. In the formula 'eligible service period' (defined in subsection 82KZL(1)) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

Section 82KZMG

106. Under section 82KZMG(1), expenditure is excluded from the prepayment rules that would otherwise apply, to the extent that the prepaid amount satisfies the requirements of subsections 82KZMG(2) to (4).

107. Subsection 82KZMG(2) requires that the expenditure is:

- incurred on or after 2 October 2001 and on or before 30 June 2006;
- the eligible service period must be 12 months or shorter and must end on or before the last day of the year of income after the expenditure year; and

- for the doing of a thing under the agreement that is not to be wholly done within the expenditure year.

108. To satisfy subsection 82KZMG(3) the agreement must satisfy the following requirements:

- it must be an agreement for planting and tending trees for felling;
- be an agreement where the taxpayer does not have day to day control over the operations arising out of the agreement. (A right to be consulted or to give directions does not equate to day to day control for the purposes of this requirement); and
- either:
 - (a) there must be more than one participant in the agreement in the same capacity as the taxpayer who incurs the expenditure; or
 - (b) the manager manages, arranges or promotes the agreement, or an associate of the manager, manages, arranges or promotes similar agreements.

109. Under subsection 82KZMG(4) the expenditure incurred by the taxpayer must be paid for 'seasonally dependent agronomic activities' undertaken by the manager during the 'establishment period' for the relevant planting of trees for felling.

110. Subsection 82KZMG(5) defines the 'establishment period' to commence at the time that the first 'seasonally dependent agronomic activity' is performed in relation to a specific planting of trees and to conclude with the planting of trees. Where it is necessary to apply a fertiliser or herbicide to the trees at the same time as planting then those activities fall within the establishment period. Planting of Trees refers to the main planting of the particular Timberlot and expressly excludes specific planting to replace existing seedlings that have not survived.

Application of the prepayment provisions to this Project

111. Under the Management Agreement, a Grower incurs a first year fee for Establishment Services. This fee consists of expenditure for 'seasonally dependent agronomic activities'. As the requirements of section 82KZMG have been met, a deduction is allowable in the same income year as the expenditure is incurred.

112. Where Growers elect to pay the annual Management Fee and Rent in accordance with the relevant agreements or deeds, these amounts are not prepaid. These amounts are charged for planting services, maintenance services and for a leasehold interest or profit a prendre until 30 June of the year in which the amounts are incurred. A Grower who is an 'STS taxpayer' can, consequently, claim an immediate deduction for each of the relevant fees in the income year in which the fee is paid. A Grower who is not an 'STS taxpayer' can claim an immediate deduction for each of the relevant fees in the income year in which the fee is incurred.

Growers who choose to pay fees for a period in excess of that required by the Project's agreements

113. Although not required under the Management Agreement and Lease or Deed of Profit a Prendre, a Grower participating in the Project may choose to prepay fees for a period beyond the 'expenditure year'. Similarly, Growers who borrow funds in order to participate in the Project may either choose, or be required to prepay interest. Where this occurs, contrary to the conclusion reached in paragraph 112 above, section 82KZMF will apply to apportion the expenditure and allow a deduction over the period in which the prepaid benefits are provided.

114. However, as noted above, prepaid fees of less than \$1,000 incurred in an expenditure year will be excluded expenditure and will not be subject to apportionment under section 82KZMF.

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

115. Division 35 applies to losses from certain business activities for the income year ended 30 June 2001 and subsequent years. Under the rule in subsection 35-10(2), a deduction for a loss made by an individual (including an individual in a general law partnership) from certain business activities will not be taken into account in an income year unless:

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

116. 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.

117. Losses that cannot be taken into account in a particular year of income, because of subsection 35-10(2), can be applied to the extent of future profits from the business activity, or are deferred until one of the tests is passed, the discretion is exercised, or the exception applies.

118. For the purposes of applying the 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.

119. In broad terms, the tests mentioned in paragraph 115 above, 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 (excluding cars, motor cycles and similar vehicles) are used on a continuing basis in carrying on the business activity in that year (section 35-45).

120. 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 allocation of 10 Timberlots in the Project during the year ended 30 June 2003 or 2004 is unlikely to have their activity pass one of the tests until the year ended 30 June 2013. Growers who acquire more than the minimum allocation in the Project may however, find that their activity meets one of the tests in an earlier income year.

121. 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.

122. 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, the second arm of the discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where the business activity has started to be carried on and for that, or those income years;

- (i) because of its nature, it has not yet met one of the tests set out in Division 35; and
- (ii) there is an expectation that the business activity of an individual taxpayer will either pass one of the tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

123. Information provided with this Product Ruling indicates that a Grower who acquires the minimum allocation in the Project is expected to be carrying on a business activity that will either pass one of the tests in the income years ended 30 June 2013 and 30 June 2018, or will produce a taxation profit for the income years ended 30 June 2007, 30 June 2010, 30 June 2013 and 30 June 2018.

124. The Commissioner will decide for such a 2003 Grower that it would be reasonable to exercise the second arm of the discretion for all income years up to, and including the income year ended 30 June 2006. Similarly, the Commissioner will decide for such a 2004 Grower that it would be reasonable to exercise the second arm of the discretion for all income years up to, and including the income year ended 30 June 2006.

125. This Product Ruling is issued on a prospective basis (i.e. before an individual Grower's business activity starts to be carried on). The Project, however, may fail to be carried on during the income years specified above (see paragraph 68) in the manner described in the Arrangement (see paragraphs 14 to 52). If so, this Ruling, and specifically the decision in relation to paragraph 35-55(1)(b), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) apply, may be affected. This is because if the Ruling no longer applies (see paragraph 9) 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.

126. 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 forester and additional evidence provided with the application by the Manager; and
- independent, objective and generally available information relating to the plantation timber industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Manager.

Section 82KL

127. The operation of section 82KL 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 – general tax avoidance provisions

128. 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).

129. The BioForest Wholesale Project No1 will be a ‘scheme’ commencing with the issue of the Information Memorandum. A Grower will obtain a ‘tax benefit’ from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 61 to 63 that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

130. 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. 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 are 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.

Example

Entitlement to GST input tax credits

131. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her viticulture business. Her manager is registered for GST and charges her a management fee payable every six months in advance. On 1 December 2001 Susan receives a valid tax invoice from her manager requesting payment of a management fee in advance, and also requesting payment for an improvement in the connection of electricity for her vineyard that she contracted him to carry out. The tax invoice includes the following details:

Management fee for period 1/1/2002 to 30/6/2002	\$4,400*
Carrying out of upgrade of power for your vineyard as quoted	<u>\$2,200*</u>
Total due and payable by 1 January 2002 (includes GST of \$600)	<u>\$6,600</u>

*Taxable supply

Susan pays the invoice by the due date and calculates her input tax credit on the management fee (to be claimed through her Business Activity Statement) as:

$$\frac{1}{11} \times \$4,400 = \$400.$$

Hence her outgoing for the management fee is effectively \$4,400 *less* \$400, or \$4,000.

Similarly, Susan calculates her input tax credit on the connection of electricity as:

$$\frac{1}{11} \times \$2,200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2,200 *less* \$200, or \$2,000.

In preparing her income tax return for the year ended 30 June 2002, Susan is aware that the management fee is deductible in the year incurred. She calculates her management fee deduction as \$4,000 (not \$4,400).

Susan is aware that the electricity upgrade is deductible 10% per year over a 10 year period. She calculates her deduction for the power upgrade as \$200 (one tenth of \$2,000 only, not one tenth of \$2,200).

Detailed contents list

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Commissioner of Taxation

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Related Rulings/Determinations:

TR 92/1; TR 92/20; TD 93/34;
 TR 97/11; TR 97/16; TR 98/22;
 PR 1999/95; TR 2000/8

Subject references:

- advance expenses and payments for certain forestry expenditure
- carrying on a business
- commencement of business
- fee expenses
- forestry agreement
- interest expenses
- management fees
- producing assessable income
- product rulings
- public rulings
- seasonally dependent agronomic activity
- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

Legislative references:

- ITAA 1936 Div 3 H Pt III
- ITAA 1936 44(1)
- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
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