



# ***PR 2004/109 - Income tax: Sylvatech Tropical Timbers 2004 - Finance provided by Sylvatech Limited***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *24 November 2004*



## Product Ruling

# Income tax: Sylvatech Tropical Timbers 2004 – Finance provided by Sylvatech Limited

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### **Preamble**

*The number, subject heading, **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Previous Ruling**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVA 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 Tax Office **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 and how the product fits an existing portfolio. 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 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, 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 Tax Office 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.

Potential participants may wish to refer to the Tax Office website at [www.ato.gov.au](http://www.ato.gov.au) or contact the Tax Office directly to confirm the currency of this Product Ruling or any other Product Ruling that the Tax Office 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 laws' identified below apply to the defined class of persons who take part in the arrangement to which this Ruling refers. In this Ruling this arrangement is sometimes referred to as the 'Sylvatech Tropical Timbers 2004 – Finance provided by Sylvatech Limited' or 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 of the ITAA 1997;
  - section 17-5 of the ITAA 1997;
  - Division 27 of the ITAA 1997;
  - Division 35 of the ITAA 1997;
  - Division 328 of the ITAA 1997;
  - section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - section 82KZL of the ITAA 1936;
  - section 82KZME of the ITAA 1936;
  - section 82KZMF ITAA 1936;
  - section 82KZMG ITAA 1936; and
  - Part IVA of the ITAA 1936.

### Goods and Services Tax

3. In this Ruling, all fees and expenditure referred to include 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 who are more specifically identified in the Ruling part of this Product Ruling and who enter into the arrangement specified below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (for example being a party to the relevant agreements until their term expires) and deriving assessable income from this involvement. In this Ruling, these persons are referred to as 'Growers'.

8. More specifically, this Ruling only applies to Growers who are accepted into this Project from the date of this Ruling until 28 February 2005 **and** use the finance facility provided by Sylvatech Limited to fund their participation in the Project (see paragraphs 46 and 47). All other participants in Sylvatech Tropical Timbers 2004 should refer to Product Ruling PR 2004/23.

9. 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
- otherwise do not intend to derive assessable income from it.

## Qualifications

10. 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

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12. This Ruling applies prospectively from 24 November 2004, 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).

13. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on that private ruling if the income year to which it relates has ended or has commenced but not yet ended. However if the arrangement covered by the private ruling has not commenced, 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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14. 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 arrangement specified below. 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 person's involvement in the arrangement.

## Arrangement

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

- Application for Product Ruling dated 24 November 2003 and additional correspondence dated 13 January 2004, 14 January 2004, 15 January 2004, 6 February 2004, 9 February 2004, 19 February 2004, 23 February 2004 and 24 February 2004;
- Draft Product Disclosure Statement for Sylvatech Tropical Timbers 2004, received 24 February 2004;
- Replacement Constitution for Sylvatech Tropical Timbers 2004, received 14 January 2004;
- Draft Licence and Management Agreement between Sylvatech Securities Ltd [the 'Responsible Entity'] and the Grower, received 14 January 2004;
- Memorandum of Lease ['Head Lease'] between Tiwi Aboriginal Land Trust [the 'Head Lessor'] and Sylvatech Ltd (formerly Australian Plantation Group), dated 1 January 2000;
- Memorandum of Lease ['Head Lease'] between the Landowner and Sylvatech Ltd [the 'Sub-Lessor'] dated 12 December 2002;
- Draft Sub-Lease between Sylvatech Ltd [the 'Sub-Lessor'] and Sylvatech Securities Ltd [the 'Responsible Entity'], dated 18 November 2003;
- Draft Operations Agreement between Sylvatech Securities Ltd ['Responsible Entity'] and Sylvatech Forestry Pty Ltd [the 'Manager'], received 14 January 2004;
- Draft Forestry Expert Report prepared for Sylvatech Securities Ltd [the 'Responsible Entity'], dated 16 November 2003;
- Compliance Plan for Sylvatech Tropical Timbers 2004, dated 18 November 2003;
- Further correspondence received 2 September 2004, 9 September 2004, 24 September 2004, 1 October 2004 and 11 October 2004; and
- Draft finance package between Sylvatech Limited and the Grower, received 22 October 2004.

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

16. The documents highlighted are those that the Growers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or an associate of the Grower will be a party to that are part of the arrangement to which this Ruling applies. All terms capitalised throughout the Product Ruling are defined terms in the documentation received for this Project.

17. All Australian Securities and Investments Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of the agreements may be summarised as follows.

#### Overview

18. This arrangement is called Sylvatech Tropical Timbers 2004 – Finance provided by Sylvatech Limited.

Location	Melville Island, one of the Tiwi Islands in the Arafura Sea, 60 km north of Darwin in the Northern Territory, Australia
Type of business each participant is carrying on	Commercial growing and cultivation of <i>Acacia mangium</i> trees for the purpose of producing woodchip or other suitable timber products.
Number of hectares offered for cultivation	2,500 hectares offered under this Product Disclosure Statement, with provision for oversubscription.
Size of each interest	0.5 hectares
Number of trees per hectare	Minimum of 1,100
The term of the investment	Approximately 8 years
Initial cost per Treefarm Unit	\$2,750 or \$2,475 if an Applicant is allotted 40 or more Treefarm Units.
Initial cost per hectare	\$5,500 or \$4,950 if an Applicant is allotted 40 or more Treefarm Units.

Ongoing costs	Annual Management Fee (which may be deferred); Annual insurance premiums; Marketing Fees; Harvesting, processing and transporting costs; Responsible Entity's Performance Bonus.
Other costs	Future payment obligations which the Responsible Entity reasonably believes will fall due after a distribution is made to Growers (if any). Potential administration charge for arranging insurance. Reimbursement of expenses of the Responsible Entity for work to be done following the realisation of the Project Property (if any).

19. The Project, Sylvatech Tropical Timbers 2004 ASRN 107 390 796, is registered as a Managed Investment Scheme under the *Corporations Act 2001*. The Responsible Entity for this Project is Sylvatech Securities Limited. The Project land is situated on Melville Island, one of the Tiwi Islands in the Arafura Sea, 60 km north of Darwin in the Northern Territory, Australia.

20. This Ruling only applies to Growers who are;

- accepted into the project between the date of this Ruling and 28 February 2005; and
- fund their participation in the Project using finance provided by Sylvatech Limited.

All other participants in Sylvatech Tropical Timbers 2004 should refer to Product Ruling PR 2004/23.

21. Growers applying under the Product Disclosure Statement will enter into a Licence and Management Agreement with the Responsible Entity. The Landowner has leased the land to Sylvatech Ltd and has consented to the Sub-Lease Agreement to the Responsible Entity. The Responsible Entity will grant a licence to the Grower to enable the Grower to carry on the business of afforestation for the commercial production of *Acacia mangium* trees. Under the Licence and Management Agreement, Growers licence an area of land called a 'Treefarm' for a term of approximately 8 years. Each Treefarm consists of a minimum of one Treefarm Unit which is 0.5 hectares in size.

22. Under the Licence and Management Agreement, Growers appoint the Responsible Entity to manage their Treefarm. The Responsible Entity will enter into an Operations Agreement with Sylvatech Forestry Pty Ltd (the 'Manager') to perform the services required under the Licence and Management Agreement. Under the Operations Agreement, the Manager will be responsible for the establishment, cultivation, harvesting and sale of the trees.

23. Applications may be accepted by the Responsible Entity on or before 28 February 2005.

24. Under the Product Disclosure Statement, the Responsible Entity will offer a maximum of 5,000 Treefarm Units, with provision for oversubscription. There is no minimum subscription for the Project. Each participant may subscribe for one or more Treefarm Units at a cost of \$2,750 each. However, Growers who subscribe for 40 or more Treefarm Units will receive a discount of 10% of the subscription cost. Each Treefarm Unit will be planted with a minimum of 550 trees (1,100 per hectare).

## Constitution

25. The Constitution for the Project sets out the terms and conditions under which the Responsible Entity agrees to act for the Growers and to operate the Project. Application monies will be held by the Responsible Entity on trust for the Applicants until an Interest is issued. Money will be transferred from the Application Fund where the following conditions are satisfied:

- the Responsible Entity has issued an Interest to an Applicant;
- the Responsible Entity is ready, willing and able to perform its duties pursuant to the Licence and Management Agreement entered with the Applicant; and
- any matter required to be attend to which is necessary for the creation of the Growers' Interest whether by reason of this Constitution or otherwise has been attended to.

26. The Responsible Entity will keep a register of Growers (clause 8). The Licence and Management Agreement will be executed on behalf of the Grower following them signing the Application Form and the Power of Attorney in the Product Disclosure Statement. Growers are bound by the Constitution by virtue of their participation in the Project.

## Compliance plan

27. The Responsible Entity has prepared a Compliance Plan in accordance with the *Corporations Act 2001*. Its purpose is to ensure that the Responsible Entity meets its obligations as the Responsible Entity of the Project and that the rights of the Growers are protected.

**Interest in land**

28. The Licence and Management Agreement commences on the date the Agreement is executed. The Agreement is terminated pursuant to the provisions of the Agreement or on the date of completion of the Project (see paragraph 30). The Responsible Entity grants a licence to the Grower under the terms of the Licence and Management Agreement. Should the Head Lease between the Head Lessor and the Sub-Lessor terminate for any reason, the Sub-Lease will continue as a Lease between the Grower and the Head Lessor (clause 11.2 of the Sub-Lease). Should the Sub-Lease between the Sub-Lessor and the Responsible Entity terminate, then to the greatest extent possible, the Sub-Lessor will honour and assume the obligations, duties and responsibilities of the Sub-Lessee under the Licence and Management Agreement as if it were the licensor under those agreements (clause 13.5 of the Sub-Lease).

29. Growers are granted an interest in land in the form of a licence to use and occupy their Treefarm for the purpose of planting, growing, maintaining, cultivating and harvesting *Acacia mangium* trees (clause 3.1(a) of the Licence and Management Agreement). Growers have a legal interest in the Trees grown on the Grower's Treefarm from the commencement of their Licence and Management Agreement until the date of first Clearfall (Schedule 1 – Dictionary of the Constitution). Growers must pay a licence fee to the Responsible Entity. This fee is included in the Management fees payable under the Licence and Management Agreement (clause 6).

**Licence and Management Agreement**

30. Each Grower enters into a Licence and Management Agreement with the Responsible Entity. The term of the Project is from the date of execution of this agreement until the earlier of the date the harvest of the trees is completed, the termination of the Grower's interest under the Agreement or 30 June 2013, or such later date as determined by the Responsible Entity having regard to sound silvicultural practices.

31. Growers contract with the Responsible Entity to establish, maintain and manage the Grower's Treefarm and perform the harvest, processing and sale of the Grower's Produce from the Grower's Treefarm. Growers must pay an Establishment fee on application. Growers may elect on application to pay the Management fees for each year of the Project annually or use the deferred payment option. Under the deferred payment option, the fee is paid as a percentage out of the Gross Harvest Proceeds.

32. The Responsible Entity will engage the Manager to provide the following Establishment Services:

- supplying and planting seedlings or cuttings of *Acacia mangium*;

- ploughing, ripping and mounding the Treefarm;
- spraying the Treefarm for the control of weeds which may significantly interfere with the establishment of the trees;
- fertilising the Treefarm in accordance with sound silvicultural practices; and
- planting on the Treefarm sufficient trees in accordance with the number of trees per hectare specified in the Agreement.

33. The Responsible Entity will engage the Manager to perform the following ongoing services:

- maintain, tend and otherwise care for the Trees as and when required;
- in the wet season of planting, replant any significant area(s) of the Treefarm where tree deaths will limit the overall yield of the Treefarm;
- monitor and control weed growth during the first wet season post planting that may limit the growth of the Treefarm;
- monitor the development of the Treefarm and if economically feasible, conduct form pruning operations to reduce the incidence of multi stemmed trees;
- monitor and control, to the extent necessary, any insects or vermin that may be causing significant damage to the trees;
- monitor soil and foliar nutrient status and, to the extent determined necessary, fertilise the trees; and
- maintain in good repair and condition access to the Treefarm.

## Planting

34. Under the Licence and Management Agreement, the Responsible Entity is required to prepare the land for planting and supply the necessary seedlings or cuttings of *Acacia mangium*. The Responsible Entity will engage the Manager to provide these services and to plant the seedlings or cuttings on the Treefarms by 31 March 2005 or within 12 months of the application being accepted, whichever is the earlier. Each Treefarm will be planted with seedlings or cuttings at a minimum of 1,100 per hectare. The Manager will, in the wet season of planting, replant any significant areas where tree deaths will limit the overall yield of the Plantation to the extent agreed by the Manager and the Responsible Entity (Item 4(b), Schedule 1 of the Operations Agreement).

**Harvesting**

35. The Manager has been contracted by the Responsible Entity to perform all harvesting activities on the Plantation from the Date of First Clearfall (Item 6, Schedule 1 of the Operations Agreement). Growers appoint the Responsible Entity to sell the Grower's Produce. The Responsible Entity will use all reasonable endeavours to arrange for the sale of the Grower's Produce from the clearfalling of the Treefarm (clause 10.1, Licence and Management Agreement).

36. The Responsible Entity will place into the Proceeds Fund Bank Account the Gross Harvest Proceeds from the sale of the Trees. The Responsible Entity is entitled to deduct from the Proceeds Fund prior to a Grower receiving a distribution:

- costs of production;
- any insurance premiums, effected by the Responsible Entity under the Licence and Management Agreement, in respect of those Growers' Treefarms remaining at the relevant time and yet to be harvested;
- Management fees after the Date of First Clearfall, payable in respect of Treefarms remaining at the time and yet to be harvested (such fees calculated in accordance with the Licence and Management Agreement); and
- fees payable under the Licence and Management Agreement. (Clause 10.6 of the Licence and Management Agreement).

37. Upon, the winding up of the Project, the Responsible Entity may retain from the proceeds of realisation of Project Property money to meet future payment obligations which the Responsible Entity reasonably believes will fall due after a distribution is made to Growers and to pay its own remuneration and expenses for work to be done following the realisation of Project Property.

38. The net amount available for each Grower, after all deductions are made by the Responsible Entity under the Constitution, must be paid to the Growers within 4 months after 30 June of the relevant year. However, if the amount to be distributed to a Grower is less than \$30 per Treefarm Unit, then except for the Final Distribution under the Constitution, the Responsible Entity may in its absolute discretion, not make a distribution. In this case, the net amount will be carried forward for subsequent distribution.

**Fees**

39. All Growers must pay an Establishment fee on application for establishment services. This fee is equal to \$2,750 per Treefarm Unit or \$2,475 per Treefarm Unit if an Applicant is allotted 40 or more Treefarm Units. The establishment services will be provided by 31 March 2005 or within 12 months of the application being accepted, whichever is the earlier.

40. Upon application, Growers may elect to pay the Management fee under the annual payment option or the deferred payment option. Under the annual payment option, Growers are required to pay an amount of \$125.40 in arrears by 30 June of each year of the Project until the Date of First Clearfall. This fee will be indexed annually commencing in the year ended 30 June 2006. From the date of First Clearfall, the amount of Management fees payable will be calculated by reference to the proportion of Treefarms yet to be harvested. This amount will be deducted by the Responsible Entity out of the Proceeds Fund once the Net Harvest Proceeds have been determined.

41. If the deferred payment option is selected, for the period up until the Date of First Clearfall, Growers must pay an amount of 15.95% of the Gross Harvest Proceeds which will be deducted from each distribution made from the Proceeds Fund. For the period after the date of First Clearfall, the amount of Management fees payable will be calculated by reference to the proportion of Treefarms yet to be harvested. This amount will be deducted by the Responsible Entity out of the Proceeds Fund once the Net Harvest Proceeds have been determined.

42. A licence fee is payable under the Licence and Management Agreement by all Growers. This fee is included in the annual Management fee and the deferred Management fee (clause 6, Licence and Management Agreement).

43. All Growers must pay a Marketing fee of 4.4% of the Gross Harvest Proceeds, in respect of marketing services provided under the Licence and Management Agreement. This fee is payable at any time after the Gross Harvest Proceeds have been paid into the Proceeds Fund in accordance with the Constitution and the Net Harvest Proceeds have been determined.

44. All Growers must also pay a Performance Bonus to the Responsible Entity if the distributions paid and payable to the Grower exceed the Performance Bonus Target of \$7,600. The Performance Bonus will be equal to 22% of the distributions paid and payable to the Grower in excess of \$7,600 per Treefarm Unit.

45. The Responsible Entity is appointed to arrange insurance of the Growers' produce against the destruction of, or damage to, the Growers' Produce. Up until the date of First Clearfall the Grower will be liable for the annual cost of this insurance. After the Date of First Clearfall, the Responsible Entity will bear the cost of this insurance

but will be entitled to have this cost reimbursed from the Proceeds Fund out of Gross Harvest Proceeds.

### **Finance**

46. Growers will fund their participation in the Project by using a finance package provided by Sylvatech Limited. All finance arrangements will be on a full recourse basis and no funds from the Project will be used to provide such loans.

47. The terms of the loan under the finance package with Sylvatech Limited are:

- 36 months principal and interest, then rate review, followed by 60 months principal and interest, then rate review, then up to 24 months principal and interest.

The balance of the loan is immediately due and payable on the date of distribution of the proceeds of sale of harvest or upon distribution by the Responsible Entity of the insurance proceeds if a Grower's Treefarm is damaged.

48. This Ruling does not apply if the finance arrangement entered into by the Grower includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- entities involved with the project (other than Sylvatech Limited) are involved in the provision of finance to the Grower for this project;
- 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; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

## Ruling

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### Application of this Ruling

49. This Ruling applies only to Growers who are accepted to participate in the Project on or before 28 February 2005, have chosen to finance their participation in the Project with Sylvatech Limited and who have executed a Licence and Management Agreement by this date. 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.

### The Simplified Tax System (STS)

#### *Division 328*

50. For a Grower participating in the Project, the recognition of income and the timing of tax deductions, including those related to capital allowances, is different depending on whether the Grower is 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

51. 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.

### Tax outcomes for Growers who are not 'STS taxpayers'

#### Assessable income

##### *Section 6-5*

52. That part of the net harvest 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.

53. The Grower recognises ordinary income from carrying on the business of afforestation at the time that income is derived.

**Deductions for Establishment fee, Management fee, Insurance and Interest****Section 8-1**

54. A Grower who is not an 'STS taxpayer' may claim tax deductions for the following revenue expenses:

<b>Fee Type</b>	<b>ITAA 1997 section</b>	<b>Year ended 30 June 2005</b>	<b>Year ended 30 June 2006</b>
<b>Establishment fee</b>	8-1	See Notes (i) & (ii)	
<b>Management fees (Annual Payment Option only)</b>	8-1	\$125.40 – See Notes (i), (iii) & (iv)	\$125.40 – See Notes (i), (iii) & (iv)
<b>Insurance</b>	8-1	As incurred – See Notes (i) & (v)	As incurred – See Notes (i) & (v)
<b>Interest</b>	8-1	As incurred – See Notes (i) & (vi)	As incurred – See Notes (i) & (vi)

**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 (for example input tax credits): Division 27. See Example 1 at paragraph 95.
- (ii) The Establishment fee payable is equal to \$2,750 per Treefarm Unit or \$2,475 per Treefarm Unit if an Applicant is allotted 40 or more Treefarm Units. This fee is not prepaid and therefore is deductible in full in the year incurred.
- (iii) Where a Grower who is not an 'STS taxpayer' pays the Management fee in the relevant income years shown in the Licence and Management Agreement, those fees are deductible in full in the year they are incurred.
- (iv) This amount is only deductible by Growers who elect on application to pay Management fees under the annual payment option. Growers who elect to pay Management fees under the deferred payment option are not entitled to this deduction.
- (v) The cost of insuring the Grower's Produce is deductible when incurred. However, Growers should read the discussion of the prepayment rules in paragraphs 76 to 86 as those rules may be applicable if the insurance cost is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the amount is required to be prepaid or is prepaid at the Grower's choice.

- (vi) Interest paid under the Sylvatech Limited finance package (see paragraphs 46 to 47) will be deductible when incurred. However, Growers should read the discussion of the prepayment rules in paragraphs 76 to 86 as those rules may be applicable if the interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the amount is required to be prepaid or is prepaid at the Grower's choice.

## **Tax outcomes for Growers who are 'STS taxpayers'**

### **Assessable income**

#### **Section 6-5**

55. That part of the net harvest 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.

56. The Grower recognises ordinary income from carrying on the business of afforestation at the time the income is received (paragraph 328-105(1)(a)).

### **Deductions for Establishment fee, Management fee, Insurance and Interest**

#### **Section 8-1 and section 328-105**

57. A Grower who is an 'STS taxpayer' may claim tax deductions for the following revenue expenses:

<b>Fee Type</b>	<b>ITAA 1997 sections</b>	<b>Year ended 30 June 2005</b>	<b>Year ended 30 June 2006</b>
<b>Establishment fee</b>	8-1 & 328-105	See Notes (vii), (viii) & (ix)	
<b>Management fee</b>	8-1 & 328-105	\$125.40 – See Notes (vii), (viii), (x) & (xi)	\$125.40 – See Notes (vii), (viii), (x) & (xi)
<b>Insurance</b>	8-1 & 328-105	When Paid – See Notes (vii) & (xii)	When Paid – See Notes (vii) & (xii)
<b>Interest</b>	8-1 & 328-105	When Paid – See Notes (vii) & (xiii)	When Paid – See Notes (vii) & (xiii)

**Notes:**

- (vii) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example input tax credits): Division 27. See Example 1 at paragraph 95.
- (viii) If, for any reason, an amount shown in the Table above 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 Table above which is not paid in the year in which it is incurred will be deductible in the year in which it is actually paid.
- (ix) The Establishment fee payable is equal to \$2,750 per Treefarm Unit or \$2,475 per Treefarm Unit if an Applicant is allotted 40 or more Treefarm Units. This fee is not prepaid and therefore is deductible in full in the year incurred.
- (x) Where a Grower who is an 'STS taxpayer', pays the Management fee in the relevant income years shown in the Licence and Management Agreement, those fees are deductible in full in the year that they are paid.
- (xi) This amount is only deductible by Growers who elect on application to pay Management fees under the annual payment option. Growers who elect to pay Management fees under the deferred payment option are not entitled to this deduction.
- (xii) The cost of insuring the Grower's Produce is deductible when paid. However, Growers should read the discussion of the prepayment rules in paragraphs 76 to 86 as those rules may be applicable if the insurance cost is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the amount is required to be prepaid or is prepaid at the Grower's choice.
- (xiii) Interest paid under the Sylvatech Limited finance package (see paragraphs 46 to 47) will be deductible when paid. However, Growers should read the discussion of the prepayment rules in paragraphs 76 to 86 as those rules may be applicable if the interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the amount is required to be prepaid or is prepaid at the Grower's choice.

## **Tax outcomes that apply to all Growers**

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

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

58. A Grower who is an individual and enters the Project during the year ended 30 June 2005 may have losses arising from their participation in the Project that would be deferred to a later income year under the section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for the years ending 30 June 2005 to 30 June 2012. This conditional exercise of the discretion will allow those losses to be offset against the Grower’s other assessable income in the income year in which losses arise.

#### ***Sections 82KZME to 82KZMF, 82KL and Part IVA***

59. For a Grower who participates in the Project and incurs expenditure as required by the Licence and Management Agreement the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower does not fall within the scope of sections 82KZME to 82KZMF (but see paragraphs 76 to 86);
- 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**

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

60. For the amounts set out in the Tables above to constitute allowable deductions, the Grower’s afforestation activities as a participant in the Project must amount to the carrying on of a business of primary production.

61. For schemes such as the Project, 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 *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

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

- the Grower has an identifiable interest (by lease or by licence) in the land on which the Grower's trees are established;
- the Grower has a right to harvest and sell the wood produce 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.

63. In this Project, each Grower enters into a Licence and Management Agreement. Under the licence, each individual Grower will have rights over a specific and identifiable area of land (Treefarm). The Licence and Management Agreement provides the Grower with an ongoing interest in the specific trees on the Treefarm for the term of the Project.

64. Under the licence the Grower must use the Treefarm in question for the purpose of carrying out afforestation activities and for no other purpose. The licence allows the Responsible Entity to come onto the land to carry out its obligations under the Licence and Management Agreement.

65. Under the Licence and Management Agreement the Responsible Entity is engaged by the Grower to maintain the trees on the Grower's Treefarm during the term of the Project, according to the principles of sound afforestation practice which includes fertilisation and weed control. The Responsible Entity will subcontract the management services to the Manager under the Operations Agreement. The Manager has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to maintain the Treefarm on the Grower's behalf.

66. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the trees grown on the Grower's Treefarm.

67. 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.

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

69. The pooling of wood produce from trees grown on the Grower's Treefarm with the wood produce of other Growers is consistent with general afforestation practices. Each Grower's proportionate share of the sale proceeds of the pooled wood products will reflect the proportion of the trees contributed from their Treefarm.

70. The Responsible Entity's services are consistent with general afforestation practices. While the size of a Treefarm is relatively small, it is of a size and scale to allow it to be commercially viable (see Taxation Ruling IT 360).

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

72. 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 Growers' afforestation activities in the Project will constitute the carrying on of a business.

## **The Simplified Tax System**

### ***Division 328***

73. 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.

74. 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 Establishment fees and Management fees**

### ***Section 8-1***

75. Consideration of whether the initial Establishment fees 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 is contractually committed 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.

76. The Establishment fee and Management fee associated with the afforestation activities will relate to the gaining of income from the Grower's business of afforestation, and hence have a sufficient connection to the operations by which income (from the regular sale of wood 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 Establishment fee or Management fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

### **Prepayment provisions**

#### ***Sections 82KZL to 82KZMG***

77. 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 (for example 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.

78. For this Project, only section 82KZL (an interpretive provision) and section 82KZMG are relevant.

#### ***Section 82KZMG***

79. Under subsection 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).

80. 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.

81. 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 is more than one participant in the agreement in the same capacity as the taxpayer; or
  - (b) the manager manages, arranges or promotes the agreement, or an associate of the manager, manages, arranges or promotes similar agreements.

82. 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.

83. 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 plantation and expressly excludes specific planting to replace existing seedlings that have not survived.

#### *Application of the prepayment provisions to this Project*

84. For Growers who elect to pay the Management fee under the annual payment option, the Licence and Management Agreement also requires them to incur a Management fee of \$125.40 (plus indexation) per year during Years 2 to 9, for the performance of management services during the term of the Project. Under the Licence and Management Agreement, Growers incur licence fees which are incorporated into the Management fee to licence land during the term of the Project.

85. The Management fees incurred under the Licence and Management Agreement in Years 2 to 9 are not prepaid. The Establishment fee incurred under the Licence and Management Agreement by Growers is also not prepaid. The Management fee is charged for providing management services and for the licence of the land to a Grower until 30 June of the year in which the fees are incurred. The Establishment fee is for establishment services to be provided in the first year of the Project.

86. On this basis, the basic precondition in subsection 82KZME(2) is not satisfied and, in these circumstances, section 82KZMF will have no application to the Management fees in Years 2 to 9, or to the Establishment fee incurred by Growers.

87. A Grower who is an 'STS taxpayer' can, therefore, 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.

### **Interest deductibility**

#### ***Growers who use the Sylvatech Limited finance package***

88. Growers will finance their participation in the Project through a finance package provided by Sylvatech Limited (see paragraphs 46 to 47). Under the terms of the finance package, interest must be paid.

89. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of the Establishment and Management fees. The interest incurred for the year ended 30 June 2005 and in subsequent years of income will be in respect of a loan to finance the Project business operations of growing trees and is therefore directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1. However, interest will only be deductible up to the date net harvest proceeds are paid to the grower under the terms of the Constitution.

### **Deferral of losses from non-commercial business activities**

#### ***Division 35***

90. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years 30 June 2005 to 30 June 2012, the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14, *Income tax: Division 35 – non-commercial business losses*. Accordingly, based on the evidence supplied, the Commissioner has determined that for the income year ended 30 June 2005 up to and including 30 June 2012:

- it's because of its nature, the business activity will not satisfy one of the four tests set out in Division 35;

- there is an objective expectation that within a period that is commercially viable for the afforestation industry, a Grower's activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit; and
- a Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later year is able to offset that loss against their other assessable income.

91. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling, a Grower will need to apply for a private ruling on the application of section 35-35 to those changed circumstances.

### **Section 82KL**

92. 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**

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 Project will be a 'scheme' commencing with the issue of the Product Disclosure Statement. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 53 and 56 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.

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 their wood 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 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

### Example 1 – entitlement to GST input tax credits

96. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her afforestation 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	\$2,200*
Total due and payable by 1 January 2002 (includes GST of \$600)	\$6,600

\*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**

97. Below is a detailed contents list for this Product Ruling:

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# PR 2004/109

*Previous draft:*

Not previously issued in draft form

*Related Rulings/Determinations:*

TR 92/1; TR 92/20; TR 97/11;  
TR 97/16; TR 98/22; TR 2000/8;  
TR 2001/14; PR 1999/95;  
PR 2004/23; TD 93/34; IT 360

*Subject references:*

- carrying on a business
- commencement of business
- management fee expenses
- non-commercial losses
- primary production
- primary production expenses
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- taxation administration

*Legislative references:*

- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-35
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)

- ITAA 1997 Div 328
- ITAA 1997 Subdiv 328-F
- ITAA 1997 Subdiv 328-G
- ITAA 1997 328-105
- ITAA 1997 328-105(1)(a)
- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZME(2)
- ITAA 1936 82KZMF
- ITAA 1936 82KZMG
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- ITAA 1936 82KZMG(2)
- ITAA 1936 82KZMG(3)
- ITAA 1936 82KZMG(4)
- ITAA 1936 82KZMG(5)
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
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*Case references:*

- Commissioner of Taxation v. Lau (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55

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