



PR 2007/99 - Income tax: Gunns Plantations Woodlot Project 2008 - Planting Option 3

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 This document has changed over time. This is a consolidated version of the ruling which was published on *5 December 2007*



Product Ruling

Income tax: Gunns Plantations Woodlot Project 2008 – Planting Option 3

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ⓘ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner’s opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

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. 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 scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product 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 Product Ruling.

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. Unless otherwise indicated, all legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997). In this Product Ruling the scheme is referred to as the Gunns Plantations Woodlot Project 2008 – Planting Option 3 or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities:

- are subject to the taxation obligations; and
- can rely on the taxation benefits,

set out in the Ruling section of this Product Ruling.

3. The members of the class of entities who are subject to those taxation obligations and who can rely on those taxation benefits are referred to as Growers.

4. Growers will be those entities that are accepted to participate in the scheme specified below as initial participants¹ on or after the date this Product Ruling is made. They will have executed the relevant Project Agreements set out in paragraph 35 on or before 30 June 2008. **This Ruling only applies in respect of Growers who selected Planting Option 3 in their application to participate in the Project (Option 3 Growers). Note that separate Product Rulings have been issued for Growers who selected:**

- **Planting Option 1 in their application to participate in the Project (Option 1 Growers – see PR 2007/97); and**
- **Planting Option 2 in their application to participate in the Project (Option 2 Growers – see PR 2007/98).**

5. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- participate in the scheme other than as initial participants;
- are accepted into this Project before the date of this Ruling or after 30 June 2008;

¹ For the purposes of this Product Ruling an 'initial participant' means a participant who has obtained their interest in the scheme from the Responsible Entity or the Manager of the scheme.

- participate in the scheme as Option 1 Growers or Option 2 Growers;
- participate in the scheme through offers made other than through the Product Disclosure Statement (PDS); and
- are associates of Gunns Plantations Limited or Gunns Plantations Limited itself.

Qualifications

6. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 35 to 96 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then:

- this Product Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Product Ruling may be withdrawn or modified.

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Superannuation Industry (Supervision) Act 1993

9. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this product may contravene the provisions of SISA 1993.

Date of effect

10. This Product Ruling applies prospectively from 5 December 2007, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 5 December 2007 until 30 June 2008, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to 30 June 2010.

11. However the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;
- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

12. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

13. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

14. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Changes in the law

15. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments to the law may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to the extent of those amendments this Product Ruling will be superseded.

16. Entities who are considering participating in the scheme 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

17. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes 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 Product Ruling is issued.

Goods and Services Tax

18. All fees and expenditure referred to in this Product 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.

Ruling

Application of this Ruling

19. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters into the scheme described at paragraphs 35 to 96 of this Ruling.

20. The Grower's participation in the Project must constitute the carrying on of business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Management Agreement and either an Agreement to grant a Sub-Forestry Right or a Sub-Forestry Right Deed.

Concessions for 'small business entities'²

21. From the 2007-08 income year, a range of concessions previously available under the simplified tax system (STS), will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

22. A 'small business entity' can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions the application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Ruling.

² The meaning of 'small business entity' is explained in section 328-110.

Deductions for the Establishment Fee**Section 8-1 and Division 27 of the ITAA 1997 and section 82KZMG of the Income Tax Assessment Act 1936**

23. Other than where a 'CGT event'³ happens to their interest within 4 years of 30 June 2008 (see paragraph 24 of this Ruling), a Grower who is an initial participant in the scheme may claim tax deductions for the following amount on a per Woodlot basis.

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
Establishment Fee	\$6,820 See Notes (i) & (ii)	Nil	Nil

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.
- (ii) Under section 82KZMG of the *Income Tax Assessment Act 1936* (ITAA 1936) the Establishment Fee is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 111 to 116 of this Ruling) and is deductible in the income year in which it is incurred.

'CGT event' within 4 years for Growers who are 'initial participants'**Section 82KZMGA**

24. A deduction for the Establishment Fee is not allowable where a 'CGT event' happens in relation to a Grower's interest before 1 July 2012 (subsection 82KZMGA(1) of the ITAA 1936).

25. Where deductions for these amounts have already been claimed by a Grower the Commissioner may amend their assessment at any time within two years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

26. Growers whose deductions are disallowed are still required to include in their assessable income the market value of the interest at the time of the 'CGT event' or the decrease in the market value of the interest as a result of the 'CGT event' (see paragraphs 117 to 119 of this Ruling).

³ Defined in section 995-1.

Deductions for loan interest, borrowing costs and terms arrangement establishment fees***Sections 8-1, 25-25 and 40-880 and Division 27***

27. A Grower who is an initial participant in the scheme may also claim tax deductions for the following fees and expenses on a per Woodlot basis, as set out in the table below.

Fee Type	Year ending 30 June 2008	Year ending 30 June 2009	Year ending 30 June 2010
Interest on loans with Gunns Finance Pty Ltd or Allco Managed Investments	As incurred See Note (iii)	As incurred See Note (iii)	As incurred See Note (iii)
Loan Establishment Fee with Gunns Finance Pty Ltd or Allco Managed Investments	Must be calculated See Note (iv)	Must be calculated See Note (iv)	Must be calculated See Note (iv)
Terms Arrangement Establishment Fee with Gunns Plantations Limited	Must be calculated See Notes (i) and (v)	Must be calculated See Notes (i) and (v)	Must be calculated See Notes (i) and (v)

Notes:

- (iii) Interest on loans with Gunns Finance Pty Ltd or Allco Managed Investments Ltd as trustee for the Gateway Momentum Funding Trust No. 1 (Allco Managed Investments) is deductible in the year in which it is incurred (section 8-1). The deductibility or otherwise of interest arising from agreements entered into with financiers other than Gunns Finance Pty Ltd or Allco Managed Investments, is outside the scope of this Ruling. Prepayments of interest to any lender, including Gunns Finance Pty Ltd or Allco Managed Investments, are also not covered by this Product Ruling. Growers who enter into agreements with other financiers and/or prepay interest may request a private ruling on the deductibility of the interest incurred (see paragraph 110 of this Ruling).

- (iv) Loan Establishment Fee of \$150 plus 0.4% or \$250 plus 0.5% of the loan amount, payable to Gunns Finance Pty Ltd or Allco Managed Investments respectively, is a borrowing expense and is deductible under section 25-25. The deduction is spread over the period of the loan or 5 years, whichever is the shorter.

The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Gunns Finance Pty Ltd or Allco Managed Investments is outside the scope of this Ruling.

- (v) The Establishment Fee of \$150 plus 0.4% of the amount payable to Gunns Plantations Limited in respect of the Terms Arrangement is not deductible in full when it is incurred. Under section 40-880 it is deductible in equal proportions over five income years beginning in the year in which the Establishment Fee is incurred (see paragraphs 133 and 134 of this Ruling).

Assessable income from 'CGT events' for Growers who are initial participants

Sections 6-10, 17-5 and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936

28. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning⁴ – see at paragraph 32 of this Ruling) happens to the interest held by a Grower who is an initial participant in this Project, the market value of the interest, or the decrease in the market value of the interest, is included in the Grower's assessable income (section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936), less any GST payable on those proceeds (section 17-5).

29. The amount is included in the Grower's assessable income in the income year in which the 'CGT event' happens (subsection 82KZMGB(2) of the ITAA 1936).

30. 'CGT events' for these purposes include those relating to:

- a **clear-fell harvest of all or part of the trees** grown on the Grower's Woodlot;
- the **sale, or any other disposal** of all or part of the 'interest' in the Project held by the Grower; or
- any other 'CGT event' that results in a reduction of the market value of the 'interest' in the Project held by the Grower.

⁴ A thinning of the trees includes a selective harvest of immature trees to facilitate better outcomes at harvest. A thinning differs from a clear fell of a percentage of mature trees which may occur over two or more income years.

31. Where an amount arising from a 'CGT event' is included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936 the anti-overlap provisions in section 118-20 of the ITAA 1997 will operate to exclude that amount from the capital gains provisions in Part 3-1 of the ITAA 1997.

Amounts received by Growers where the Project trees are thinned

Sections 6-5 and 17-5

32. An amount received by a Grower in respect of a thinning of the trees grown in this Project is not an amount received as a result of a 'CGT event' and is not otherwise assessable under section 82KZMGB of the ITAA 1936. The amount is a distribution of ordinary income that arises as an incident of the Grower holding an interest in the Project. Growers include amounts received for thinning the trees in their assessable income in the income year in which the amounts are derived (section 6-5 of the ITAA 1997) less any GST payable on those proceeds (section 17-5 of the ITAA 1997).

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

Section 35-55 – exercise of Commissioner's discretion

33. An Option 3 Grower who is an individual accepted into the Project in the year ended 30 June 2008 may have losses arising from their participation in the Project that would be deferred to a later income year under 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 Option 3 Growers for the income years ended **30 June 2008 to 30 June 2032**. This conditional exercise of the discretion will allow those losses to be offset against the Option 3 Grower's other assessable income in the income year in which the losses arise.

Prepayment provisions and anti-avoidance provisions

Sections 82KZME, 82KZMF and 82KL and Part IVA

34. For a Grower who commences participation in the Project and incurs expenditure as required by 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 and 82KZMF;
- 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.

Scheme

35. The scheme that is the subject of this Ruling is specified below. This scheme incorporates the following:

- Application for a Product Ruling as constituted by documents and correspondence received, 6 June 2007, 13 June 2007, 5 September 2007, 30 October 2007, 7 November 2007, 19 November 2007 and 22 November 2007;
- Draft **Product Disclosure Statement** for the Gunns Woodlot Project 2008, received 30 October 2007 and amended 19 November 2007;
- Draft **Constitution** establishing the Gunns Woodlot Project 2008, received 30 October 2007;
- Draft Compliance Plan for the Gunns Woodlot Project 2008, received 6 June 2007;
- Draft Forestry Right Deed between the owner of the Land (as Landowner) and Gunns Plantations Limited (Gunns Plantations), received 6 June 2007;
- Draft **Sub-Forestry Right Deed** to be entered into by each Grower and Gunns Plantations Limited, received 6 June 2007;
- Draft **Agreement to grant a Sub-Forestry Right** between Gunns Plantations Limited and the Grower, received 6 June 2007;
- Draft **Management Agreement**, to be entered into by each Grower, Gunns Limited and Gunns Plantations Limited (the Manager), received 5 September 2007;
- Draft **Woodlot Finance Package** for the Gunns Plantations Limited Woodlot Project 2008 to be entered into by each Grower and Gunns Finance Pty Ltd, received 6 June 2007;
- Draft **Finance Application** for the Gunns Plantations Limited Woodlot Project 2008 to be entered into by each Grower and Allco Managed Investments, received 6 June 2007;
- Draft **Terms Arrangement** to be entered into by each Grower (Investor) and 'Guarantor for Investor' and Gunns Plantations Limited, received 30 October 2007;

- Draft Wood Sale Agreement, received 6 June 2007;
- Deed Poll by Gunns Limited in favour of the Growers, received 5 September 2007;
- Draft Establishment Services Sub-contracting Agreement between Gunns Plantations Limited (Manager) and Gunns Limited, received 6 June 2007;
- Draft Maintenance and Pruning Services Sub-contracting Agreement between Gunns Plantations Limited (Manager) and Gunns Limited, received 5 September 2007;
- Custody Agreement between Gunns Plantations Limited (as Trustee) and Gunns Limited (as Custodian), received 6 June 2007;
- Draft Variation of Custody Agreement between Gunns Plantations Limited (as Trustee) and Gunns Limited (as Custodian), received 6 June 2007; and
- Independent Forester's Report dated 21 November 2007, received 22 November 2007.

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

36. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

37. The documents highlighted are those that a Grower may enter into. For the purposes of describing the scheme 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 scheme. The effect of these agreements is summarised as follows.

38. The main features of the Gunns Plantations Woodlot Project 2008 – Planting Option 3 are as follows:

Location	Tasmania and New South Wales
Type of business to be carried on by each Grower	Commercial growing of <i>Pinus radiata</i> (Radiata Pine) for the purpose of harvesting and selling as softwood sawlogs and woodchip logs
Term of the Project	25 years
Size of each Woodlot	One hectare
Minimum allocation per Grower	One Woodlot
Minimum subscription	Nil

Initial cost	Establishment Fee of \$6,820 for one Woodlot
Other costs	<p>Growers who have requested any insurance, except public liability insurance, will be charged for the cost of the insurance.</p> <p>A fee for sales commission, rental and maintenance will be charged at the time of thinning (Years 13 and 18) and at the end of the Project. The fee will equal 9.9% of the Wood Sale Proceeds from the Grower's Woodlot.</p>

39. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Gunns Plantations Limited has been issued with an Australian Financial Service Licence 238701 and will be the Responsible Entity for the Project.

40. An offer to participate in the Project will be made through a PDS. The offer under the PDS is for 17,500 hectares in the Project and will invite participants to apply for one or more one hectare Woodlot in the Project. Gunns Plantations Limited may accept oversubscriptions.

41. An entity that participates in the Project will do so by acquiring an interest in the Project on or before 30 June 2008 which will consist of a minimum of one Woodlot of one hectare in size.

42. To participate in the Project applicants must complete the Application Form and the Power of Attorney Form contained in the PDS and pay the Application Fee. Payment of the Application Fee constitutes full payment of the Establishment Fee. In accordance with clauses 7 and 8 of the Constitution these monies will be released to Gunns Plantations Limited when certain specific criteria have been met.

43. Applicants will also execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints Gunns Plantations Limited to enter into, on behalf of the Grower, a Sub-Forestry Right Deed, an Agreement to grant a Sub-Forestry Right Deed and a Management Agreement and amend, vary or complete any blanks in these Agreements, required to hold an interest in the Project.

44. For the purposes of this Ruling, Applicants who are accepted to participate in the Project and have executed a Management Agreement and either an Agreement to grant a Sub-Forestry Right Deed or a Sub-Forestry Right Deed on or before 30 June 2008 will become Option 3 Growers. **This Ruling only applies to Option 3 Growers. Note that separate Product Rulings, PR 2007/97 and PR 2007/98, have been issued for Growers who selected Planting Options 1 and 2, respectively.**

45. Growers will enter into a Sub-Forestry Right Deed with Gunns Plantations Limited as the Grantor. The Sub-Forestry Right Deed will comprise contractual rights in relation to an identifiable area of land called a Woodlot. The Sub-Forestry Right Deed will enable Growers to access the land to establish, maintain and have their Woodlot harvested for their benefit. Growers will also contract with Gunns Plantations Limited as their Manager, under a Management Agreement, to have Trees planted on their Woodlot for the purpose of eventual felling and sale in 25 years.

46. The Grower irrevocably and unconditionally appoints the Manager as sole agent to market, enter into negotiations and sell the Wood on the Grower's behalf, on terms and conditions substantially similar to the draft Wood Sale Agreement, pursuant to the Management Agreement.

47. The Manager, as agent for the Grower, must first offer to sell the Wood to Gunns Limited or an entity nominated by Gunns Limited on terms and conditions substantially similar to those contained in the draft Wood Sale Agreement, pursuant to the Management Agreement.

48. Growers Trees on their Woodlot will be sold on a Stumpage basis. However, ownership and risk will only pass to the Purchaser when delivered and accepted by the Purchaser in accordance with clause 7(g) of the Wood Sale Agreement.

Constitution

49. The Constitution establishes the Project and operates as a deed binding all Growers and Gunns Plantations Limited. The Constitution sets out the terms and conditions under which Gunns Plantations Limited agrees to act as Responsible Entity and thereby manage the Project. Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

50. In order to acquire an interest in the Project, the Grower must make an application for a Woodlot in accordance with clauses 4.1 and 4.2. Among other things, the application is to be completed in a form approved by the Responsible Entity, signed by or on behalf of the Applicant, lodged at the registered office of the Responsible Entity and accompanied by payment of the Application Money in a form acceptable to the Responsible Entity.

51. Under clause 3.1 of the Constitution, the Responsible Entity holds the Application Money on trust. The Responsible Entity or the Custodian will deposit all Application Moneys received from applicants in the Application Portion account (clauses 3.4 and 5).

52. Once the Responsible Entity has accepted the application and all of the Project Documents have been executed and remain in force (clause 7) the Application Money may be transferred and applied against the fees due to the Responsible Entity (clause 8).

53. In summary, the Constitution also sets out provisions relating to:

- the general functions, powers and duties under which the Responsible Entity agrees to act for the Growers and to manage the Project;
- the complaints procedure (clause 14);
- the termination of the Project (clauses 33 and 34);
- the keeping of a register of Members (clause 26);
- collections, payments, distributions and deductions (clauses 28, 29 and 30); and
- accounting and auditing requirements (clauses 31 and 32).

Compliance Plan

54. As required by the *Corporations Act 2001*, Gunns Plantations Limited has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that Gunns Plantations Limited manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected. Compliance is monitored by a Compliance Committee.

Forestry Right Deed and Sub-Forestry Right Deed

55. Each Landowner as the registered proprietor of the Land will grant to Gunns Plantations Limited a Forestry Right Deed over the Land for the purpose of carrying out the Permitted Activities for the Term of the Project. Each Landowner and Gunns Plantations Limited will sign a Registration Instrument and any other document required to enable the Forestry Right Deed, or any rights established by the grant of the Forestry Right, to be registered against the title or titles to the Land.

56. Gunns Plantations Limited (as Grantor) subsequently grant the Forestry Right to the Grower under the Sub-Forestry Right Deed, to establish, plant, tender, maintain and harvest the Trees for the Term of the Project. The Grower's and Grantor's rights and obligations are set out in clause 4 and 5 of the Sub-Forestry Right Deed respectively. The Grower has, at all times, full right, title and interest in the Trees and the right to have the Trees sold for the benefit of the Grower.

Agreement to grant a Sub-Forestry Right

57. The Agreement to grant a Sub-Forestry Right is granted by Gunns Plantations Limited to a Grower upon acceptance of the Application in cases where Gunns Plantations Limited are not immediately in a position to grant the Grower a Sub-Forestry Right Deed in respect of the Grower's Woodlot.

58. Gunns Plantations Limited will undertake all reasonable steps to grant the Sub-Forestry Right Deed in respect of the Grower's Woodlot as soon as practicable after acceptance of an Application. It is a requirement of their Australian Financial Services Licence that Gunns Plantations Limited will enter into and lodge for registration the Forestry Right Deed within nine months after the date of the Grower being accepted into the Project.

Management Agreement

59. Under the Management Agreement the Grower appoints Gunns Plantations Limited (as Manager) to manage the Woodlot and to carry out the Services subject to the terms and conditions of the Agreement. The Services means the Establishment Services and the Maintenance Services. The Agreement will commence on the date the Management Agreement is executed and shall continue until its termination under clause 2.

60. Growers contract with the Manager to establish and maintain the Growers Woodlot until maturity. The Manager undertakes that the Establishment Services and Maintenance Services will be carried out in accordance with good silvicultural practice (clauses 5 and 6).

61. The Manager will commence the provision of the Establishment Services on or after the Commencement Date and will use all reasonable endeavours to complete the Establishment Services on each Woodlot by 30 June 2009 (clause 4).

62. The Establishment Services include, amongst other things:

- the ploughing and cultivation required for the planting of Seedlings;
- procuring the supply of healthy Seedlings to an average density per hectare as stated in item 4 of Schedule 1; and
- the planting of all Seedlings.

63. The Manager will commence the provision of the Maintenance Services from the commencement of the Sub-Forestry Right Deed and shall continue to provide the Maintenance Services until the termination of this Agreement (clause 5).

64. The Manager will be entitled to a Maintenance Fee for providing Maintenance Services, which will be deducted by the Custodian on behalf of the Manager from the Wood Sale Proceeds and paid to the Manager in accordance with the Constitution.

65. If requested by the Grower, the Manager will procure insurance cover against destruction or damage of the Grower's Woodlot by fire and other usual risks. The Manager will invoice the Grower for the relevant insurance premium together with an administration charge of 11% of the amount of the premium for each year or part thereof.

66. The Manager will be responsible for insuring the Plantation against public risk for an amount of not less than \$10,000,000 during the Term of the Project.

Establishment Services Sub-contracting Agreement

67. Gunns Plantations Limited, as Manager of the Woodlots, appoints Gunns Limited as its sub-contractor to perform the Establishment Services under the Management Agreement.

68. Gunns Limited is bound by the same obligations as Gunns Plantations Limited in relation to its performance of the Establishment Services under the Management Agreement.

Maintenance and Pruning Services Sub-contracting Agreement

69. Gunns Plantations Limited, as Manager of the Woodlots, appoints Gunns Limited as its sub-contractor to perform the Maintenance and Pruning Services under the Management Agreement. Pruning Services will not be carried out for Option 3 Growers.

70. Gunns Limited is bound by the same obligations as Gunns Plantations Limited in relation to its performance of the Maintenance and Pruning Services under the Management Agreement.

Deed Poll and draft Wood Sale Agreement

71. Under the Management Agreement, the Grower appoints the Manager as agent to sell the Wood on its behalf, on terms no less favourable than those set out in the draft Wood Sale Agreement.

72. The draft Wood Sale Agreement sets out the terms and conditions under which the Manager, as agent for each Selling Grower, sells the Relevant Log Type from the Region to a potential Purchaser.

73. In addition, Gunns have entered into a Deed Poll to purchase the pulp wood grown in Tasmania from Option 3 Growers for a Purchase Price that is determined to be fair and reasonable having regard to several factors including the market price of similar wood and its quality. In respect of the sawlogs and other pulp wood Harvested under Option 3, the Manager, pursuant to clause 12 of the Management Agreement, has committed to negotiate a separate off-take agreement with potential purchasers.

Pooling of Timber and Grower's Entitlement to Net Proceeds

74. The Constitution sets out provisions relating to the Grower's entitlement to Wood Sale Proceeds. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers who have contributed Trees are entitled to benefit from distributions of Wood Sale Proceeds from the pool;
- any pooled Trees must consist only of Trees contributed by Option 3 Growers; and
- in the event of a Grower's Woodlot being partially or totally destroyed, their share of the Wood Sale Proceeds will be adjusted accordingly (clause 3.7 of the Constitution).

Fees

75. Under the terms of the Management Agreement and the Sub-Forestry Right Deed, a Grower will make payments as described below on a per Woodlot basis.

Fees payable under the Management Agreement

76. The payment of the Application Fee amount of \$6,820 per Woodlot by each Grower constitutes full payment of the Establishment Fee for the provision of Establishment Services.

77. Other fees payable include the Maintenance Fee and Sales Commission. These fees will be payable from the Wood Sale Proceeds at the time of thinning, estimated to be in Years 13 and 18, as well as at Harvest in Year 25. The fees will be deducted by the Custodian on behalf of the Manager from the Wood Sale Proceeds and paid to the Manager in accordance with the Constitution. The Maintenance Fee will be 2.2% of the Grower's entitlement to Wood Sale Proceeds. The Sales Commission will be 2.2% of the Grower's entitlement to Wood Sales Proceeds.

78. If requested by the Grower, and the Manager procures insurance cover against destruction or damage of the Grower's Plantation by fire and usual risks, the Manager will invoice the Grower for the amount of the relevant insurance premium together with an administration charge of 11% of the amount of the premium in each Year of the Term or part of a Year for which insurance is effected.

Fees payable under the Sub-Forestry Right Deed

79. Gunns Plantations Limited is entitled to a Rental Fee from the Grower. The Rental Fee will be 5.5% of the Grower's entitlement to Wood Sales Proceeds and will be deducted by the Custodian on behalf of Gunns Plantations Limited from the Wood Sale Proceeds at the time of thinning, estimated to be in Years 13 and 18, as well as at Harvest in Year 25, and paid to Gunns Plantations Limited in accordance with the Constitution.

Finance

80. A Grower who does not pay the Application Fee in full upon application can borrow from Gunns Finance Limited, or execute a Terms Arrangement with Gunns Plantations Limited, or borrow from Allco Managed Investments, or borrow from an independent lender external to the Project.

81. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with Gunns Finance Pty Ltd, Gunns Plantations Limited or with Allco Managed Investments that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling. A Grower who enters into a finance arrangement with an independent lender external to the Project other than Allco Managed Investments, may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

82. A Grower cannot rely on any part of this Product Ruling if the Application Fee, other than an Application Fee payable subject to a finance arrangement or a Terms Agreement, is not paid in full by 30 June 2008. Where an application is accepted by Gunns Plantations Limited, subject to finance approval by any lending institution, a Grower cannot rely on this Ruling if written evidence of that approval has not been given to Gunns Plantations Limited by 30 June 2008.

Terms Arrangement

83. If Gunns Plantations Limited accepts that the Application Fee can be paid under the Terms Arrangement, then the Grower must complete the Terms Arrangement and also direct debit request. Gunns Plantations Limited reserves the right to either accept or reject the application.

84. Where Gunns Plantations Limited accepts an application from a Grower to pay the Application Fee under a Terms Arrangement a deposit of 10% is payable on application.

85. An Establishment Fee of \$150 plus 0.4% of the balance of the Application Fee will be payable by the Investor.

86. The balance of the Application Fee plus the applicable Establishment Fee is payable by 11 equal monthly instalments commencing on the last business day of the month following the month of acceptance into the Project by Gunns Plantations Limited. The full amount of the Application Fee must be paid no later than 12 months from the date the Grower is accepted to participate in the Project.

87. Gunns Plantations Limited will take security over the Grower's Woodlot.

88. Interest will not be levied to the Grower, provided that all instalments are made on time.

Finance offered by Gunns Finance Pty Ltd

89. A Grower (called a Borrower in the Woodlot Finance Package) can finance the cost of their Application Fee by borrowing from Gunns Finance Pty Ltd (as the Lender) provided that the conditions precedent in clause 3 of Part B of the Loan Terms is satisfied. The Term of the Loan is for 3, 5, 10 or 15 years.

90. Common features to each of the Loans include:

- the Grower's application to participate in the Project has been accepted by Gunns Plantations Limited;
- a loan Establishment Fee of \$150 plus 0.4% of the loan amount is added to the Loan amount;
- Gunns Finance Pty Ltd will take security over the Grower's Woodlot;
- an interest rate of 10.5% per annum which will be reviewed in accordance with Item 7 of the Loan Schedule;
- an additional 2% interest per annum applies to overdue amounts due and payable;
- Repayment Amounts are due as per Item 5 of the Loan Schedule. Repayment Date will be on the last business day of each month, commencing in July 2008;
- Growers who enter into these finance arrangements will be required to make equal monthly repayments of the balance over the Term of the Loan; and
- there is no requirement that Growers must have insurance over their Woodlot.

91. The initial deposit required under the Woodlot Finance Package may vary from 0% to 20% of the Application Fee at the discretion of Gunns Finance Pty Ltd. Similarly the interest rates may be varied within good commercial terms at the discretion of Gunns Finance Pty Ltd.

92. The Grower agrees to repay the Loan and pay interest and all other Outstanding Monies to Gunns Finance Pty Ltd. The Grower will pay the Repayment Amount on the Repayment Date of each month during the Term of the Loan as detailed in Part D – Loan Schedule.

Finance offered by Allco Managed Investments

93. Allco Managed Investments may also make loans available to Growers under the Finance Application for periods of 3, 5, 6, 7, 10 or 15 years.

94. There are three types of Loan on offer by Allco Managed Investments for Option 3 Growers. The first type is a Loan with monthly principal and interest repayments and may be for 3, 5, 10 or 15 years. The second type of Loan involves a two year interest only period followed by monthly principal and interest repayments and may be for 5, 7 or 10 years duration in total. The third type of Loan involves a three year interest only period followed by principal and interest repayments and may be for 6, 10 or 15 years.

95. Common features to each of the Loans include:

- the Grower's application to participate in the Project has been accepted by Gunns Plantations Limited, subject to the finance approval;
- a loan Establishment Fee of \$250 plus 0.5% of the loan amount is added to the Loan amount;
- Allco Managed Investments will take security over the Grower's Woodlot;
- an indicative deposit of between 10% and 20% of the Application Fee applies although this may be varied by Allco Managed Investments;
- interest rates will be fixed for the term of the loan at the time of approval;
- an additional 3% interest per annum applies to overdue amounts due and payable;
- Growers who break the term of the loan will be liable for break costs; and
- the Growers must have insurance over their Woodlot.

96. 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;
- 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 of the ITAA 1936 or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Gunns Finance Pty Ltd or Allco Managed Investments, are involved or become involved in the provision of finance to Growers for the Project.

Commissioner of Taxation5 December 2007

Appendix 1 – Explanation

❶ ***This Appendix is provided as information to help you understand how the Commissioner’s view has been reached. It does not form part of the binding public ruling.***

Is the Grower carrying on a business?

97. For the amounts set out in paragraphs 23 and 27 of this Ruling to constitute allowable deductions the Grower’s afforestation activities as a participant in the Gunns Plantations Woodlot Project 2008 – Planting Option 3, must amount to the carrying on of a business of primary production.

98. Two Taxation Rulings are relevant in determining whether a Grower will be carrying on a business of primary production.

99. The general indicators used by the Courts are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

100. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Gunns Plantations Woodlot Project 2008 – Planting Option 3. As Taxation Ruling TR 2000/8 sets out, the relevant principles have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

101. Having applied these principles to the arrangement set out above, a Grower in the Gunns Plantations Woodlot Project 2008 – Planting Option 3, is accepted to be carrying on a business of growing and harvesting wood for sale.

Deductibility of the Establishment Fee and loan interest

Section 8-1

102. The Establishment Fee is deductible under section 8-1 (see paragraphs 43 and 44 of TR 2000/8). A ‘non-income producing’ purpose (see paragraphs 47 and 48 of TR 2000/8) is not identifiable in the arrangement and there is no capital component evident in the Establishment Fee (see paragraphs 49 to 51 of TR 2000/8).

103. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Subject to the prepayment provisions (see paragraphs 106 to 116 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred. (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7.)

104. Some Growers may finance their participation in the Project through a Loan Agreement with Gunns Finance Pty Ltd or the Preferred Financier, Allco Managed Investments. Applying the same principles as that used for the Establishment Fee, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

105. Other than where the prepayment provisions apply (see paragraphs 106 to 110 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

Prepayment provisions

Sections 82KZL to 82KZMG

106. 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 income year, then it is not expenditure to which the prepayment rules apply.

107. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and section 82KZMG of the ITAA 1936 (an operative provision). References to sections 82KZME and 82KZMF of the ITAA 1936 are made only in respect of their interaction with section 82KZMG of the ITAA 1936 and to confirm that these provisions have no application to expenditure incurred by Growers who participate in the scheme set out in this Ruling.

Application of the prepayment provisions to this Project

Sections 82KZME and 82KZMF

108. Other than the Establishment Fee (see below), the fees payable under the scheme to which this Product Ruling applies are payable only out of the Wood Sale Proceeds and the interest payable to Gunns Finance Pty Ltd or to Allco Managed Investments is incurred monthly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application.

109. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Grower in this Project chooses or is required to prepay interest under a loan agreement (including loan agreements with lenders other than Gunns Finance Pty Ltd or Allco Managed Investments).

110. As stated in Note (iii) of paragraph 27 of this Ruling, prepayments of interest are not covered by this Product Ruling and Growers who make such prepayments may instead request a private ruling on the tax consequences of the prepaid interest.

Section 82KZMG

111. Expenditure that meets the requirements of section 82KZMG of the ITAA 1936 is excluded from the application of the prepayment rules in sections 82KZME and 82KZMF of the ITAA 1936 that would otherwise apply.

112. Section 82KZMG of the ITAA 1936 provides a '12 month rule' that, in effect, facilitates an immediate deduction for certain prepaid expenditure⁵ incurred under an 'agreement for planting and tending trees for felling' (subsection 82KZMG(3) of the ITAA 1936).

113. The 12 month rule applies to expenditure for 'seasonally dependent agronomic activities' that will be carried out during the establishment period of a particular planting of trees (subsection 82KZMG(4) of the ITAA 1936). Seasonally dependent agronomic activities are explained in Taxation Determination TD 2003/12.

114. Whilst the establishment period itself may exceed 12 months, each seasonally dependent agronomic activity must be completed within 12 months of commencement of its eligible service period (as defined in subsection 82KZL(1) of the ITAA 1936), and by the end of the income year following the 'expenditure year' (see subsections 82KZMG(1) and (2) of the ITAA 1936).

115. Under the Management Agreement each Grower incurs an Establishment Fee of \$6,820 per Woodlot in the income year ended 30 June 2008 for 'seasonally dependent agronomic activities' that will be carried out during the 'establishment period' of the Trees.

116. The expenditure for 'seasonally dependent agronomic activities' meets all other requirements of section 82KZMG of the ITAA 1936 and, therefore, other than where section 82KZMGA of the ITAA 1936 applies (see paragraphs 117 to 119 of this Ruling), a deduction is allowable in the income year ended 30 June 2008 for the full amount of expenditure incurred by the Grower for the Establishment Fee.

⁵ The expenditure must be incurred on or before 30 June 2008 (subsection 82KZMG(2) of the ITAA 1936).

'CGT event' within 4 years for Growers who are initial participants**Section 82KZMGA**

117. A Grower who is an initial participant in the Project cannot deduct an amount that meets the requirements of section 82KZMG of the ITAA 1936 if a 'CGT event' happens in relation to the Grower's interest within 4 years of 30 June 2008 (subsection 82KZMGA(1) of the ITAA 1936). In this Project, only the Establishment Fee meets the requirements of section 82KZMG of the ITAA 1936. Accordingly, the deduction of \$6,820 per 'interest' for the Establishment Fee will not be allowable if a 'CGT event' happens to the Grower's interest within the 4 year period.

118. Where subsection 82KZMGA(1) of the ITAA 1936 applies, the Commissioner may amend any affected Grower's assessment within 2 years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936)

119. A Grower whose deduction for the Establishment Fee is disallowed because of section 82KZMGA of the ITAA 1936 is still required to include in their assessable income the market value of the interest at the time of the 'CGT event' or the decrease in the market value of the interest as a result of the 'CGT event' (section 82KZMGB of the ITAA 1936).

Assessable income from 'CGT events' for Growers who are initial participants**Sections 6-10, 10-5, and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936**

120. Section 6-10 of the ITAA 1997 includes in assessable income amounts that do not constitute ordinary income. These amounts, called statutory income, are listed in the table in section 10-5 of the ITAA 1997 and include amounts that are included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936.

Section 82KZMGB

121. Where a 'CGT event' (other than for a 'CGT event' in respect of a thinning)⁶ happens to an interest held by a Grower who is an initial participant in this Project, section 82KZMGB of the ITAA 1936 includes an amount in the assessable income of the Grower if:

- the Grower can deduct or has deducted Establishment Fee (shown in paragraph 23 of this Ruling); and

⁶ A thinning under this scheme is not a 'CGT event'.

- subsection 82KZMG(1) of the ITAA 1936 applies to the timing of the deduction of Establishment Fee (or would apply if section 82KZMGA of the ITAA 1936 were disregarded – see above).

Market value rule applies to ‘CGT events’

122. If, as a result of the ‘CGT event’ the Grower either:

- no longer holds the interest; or
- otherwise - where the Grower continues to hold the ‘forestry interest’ but there is a decrease in the market value of the interest,

then the market value of the interest at the time of the event, or the decrease in market value of the interest as a result of the event, is included in the assessable income of the Grower (subsection 82KZMGB(2) of the ITAA 1936). A market value rule applies rather than the amount of money actually received from the CGT event (subsection 82KZMGB(3) of the ITAA 1936). However, the market value and the actual amount of money received may be the same.

123. The market value amount included in the assessable income of a Grower is the value of the interest just before the ‘CGT event’, or where the Grower continues to hold their interest after the ‘CGT event’, the amount by which the market value of the interest is reduced by the ‘CGT event’ (subsection 82KZMGB(2) of the ITAA 1936).

124. This provision will apply where the interest is sold, is extinguished, or ceases, and will include ‘CGT events’ such as a full or partial sale of the interest or from a full or partial clear-fell harvest of the trees grown under the Project.

Anti-overlap provisions

Section 118-20

125. Generally, where as a result of a ‘CGT event’ a capital gain would otherwise be included in a taxpayer’s assessable income, section 118-20 will apply to reduce the capital gain if, because of the event, a provision of the ITAA other than the CGT provisions includes an amount in the taxpayer’s assessable income.

126. In the case of interests held by Growers who are initial participants in this Project the market value, or the reduction in the market value of the interest from a CGT event is included in assessable income by section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936. Therefore, section 118-20 of the ITAA 1997 will operate to reduce to nil any capital gain that would otherwise be assessable under the CGT provisions in Part 3-1 of the ITAA 1997.

Amounts received by initial participants where the Project trees are thinned**Section 6-5**

127. Section 82KZMGB of the ITAA 1936 specifically excludes from its operation a 'CGT event' that happens in respect of a thinning (see paragraph 82KZMGB(1)(d) of the ITAA 1936).

128. Thinning amounts received by a Grower who is an initial participant in this Project do not arise as a result of a 'CGT event' and are not otherwise assessable under section 82KZMGB of the ITAA 1936. The receipt of an amount arising from a thinning of the Project trees is a distribution that arises as an incident of the Grower holding an interest in the Project. It is an item of ordinary income and is assessable under section 6-5 of the ITAA 1997 in the year in which it is derived.

Borrowing costs**Section 25-25**

129. A deduction is allowable for expenditure incurred by a Grower in borrowing money to the extent that the borrowed money is used for the purpose of producing assessable income (subsection 25-25(1)).

130. In this Project the Loan Establishment Fee of \$150 plus 0.4% of the loan amount payable to Gunns Finance Pty Ltd, is incurred to borrow money that is used or is to be used solely for income producing purposes during each income year over the term of the loan.

131. In this Project the Loan Establishment Fee of \$250 plus 0.5% of the loan amount payable to Allco Managed Investments, is incurred to borrow money that is used or is to be used solely for income producing purposes during each income year over the term of the loan.

132. The deduction for the borrowing expense is spread over the period of the loan or 5 years, whichever is the shorter (subsection 25-25(4)).

Establishment Fee payable under a Terms Arrangement**Section 40-880**

133. Growers who elect to pay their Application Fee under the Terms Arrangement must pay an Establishment Fee of \$150 plus 0.4% of the amount payable. This expenditure does not constitute a borrowing expense and is therefore not deductible under section 25-25. As it is capital in nature it is also not deductible under section 8-1.

134. However, section 40-880 will allow the Establishment Fee to be deducted in equal proportions over five income years starting in the year in which the Grower incurred the amount (subsection 40-880(2)). Section 40-880 applies to capital expenditure that is incurred in relation to a business and which is not taken into account elsewhere or denied deductibility under another provision of income tax law (subsection 40-880(1)).

Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion

135. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years 30 June 2008 to 30 June 2032, the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 Income tax: non commercial business losses: Commissioner's discretion. Based on the evidence supplied, the Commissioner has determined that for those income years:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

136. 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 income year is able to offset that loss against their other assessable income.

137. 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 35-55 to those changed circumstances.

Section 82KL – recouped expenditure

138. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefits(s)'. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL of the ITAA 1936. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA – general tax avoidance provisions

139. For Part IVA of the ITAA 1936 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).

140. The Gunns Plantations Woodlot Project 2008 – Planting Option 3 will be a 'scheme'. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 23 and 27 of this Ruling that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

141. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the Wood. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

PR 2007/97; PR 2007/98;
TR 97/7; TR 97/11; TR 98/22;
TR 2000/8; TD 2003/12;
TR 2007/6

Subject References

- advance deductions and expenses for certain forestry expenditure
- carrying on a business
- commencement of business
- fee expenses
- forestry agreement
- interest expenses
- management fees
- non-commercial losses
- primary production
- producing assessable income
- product ruling
- public ruling
- seasonally dependent agronomic activity
- tax avoidance
- tax benefits
- tax shelter
- taxation administration

Legislative References:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZLA
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 82KZMG
- ITAA 1936 82KZMG(1)
- ITAA 1936 82KZMG(2)

- ITAA 1936 82KZMG(3)
- ITAA 1936 82KZMG(4)
- ITAA 1936 82KZMGA
- ITAA 1936 82KZMGA(1)
- ITAA 1936 82KZMGA(2)
- ITAA 1936 82KZMGB
- ITAA 1936 82KZMGB(1)(d)
- ITAA 1936 82KZMGB(2)
- ITAA 1936 82KZMGB(3)
- ITAA 1936 170
- ITAA 1936 Part IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5
- ITAA 1997 6-10
- ITAA 1997 8-1
- ITAA 1997 10-5
- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 25-25(1)
- ITAA 1997 25-25(4)
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 40-880
- ITAA 1997 40-880(1)
- ITAA 1997 40-880(2)
- ITAA 1997 Pt 3-1
- ITAA 1997 118-20
- ITAA 1997 328-110
- ITAA 1997 995-1
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968
- Corporations Act 2001
- SISA 1993

Case References:

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

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