



# ***PR 2002/127 - Income tax: Templegate Forestry Trust Jeremy 2 1988***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *6 November 2002*



## Product Ruling

### Income tax: Templegate Forestry Trust Jeremy 2 1988

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Contents	Para
What this Product Ruling is about	1
Date of effect	11
Withdrawal	13
Arrangement	14
Ruling	37
Explanations	41
Detailed contents list	53

Participants may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

#### **Preamble**

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons and Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

#### **No guarantee of commercial success**

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The Australian Taxation Office (ATO) **does not** sanction or guarantee this product. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Participants must form their own view about the commercial and financial viability of the product. This involves a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how this product fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for participants by confirming that the tax benefits set out below in the **Ruling** part of this document are available **provided that** the arrangement is carried out in accordance with the information we have been given and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, participants lose the protection of this Product Ruling. Participants may wish to seek assurances from the promoter that the arrangement has been carried out as described in this Product Ruling.

Participants should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

#### **Terms of Use of this Product Ruling**

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This Product Ruling has been given on the basis that the person(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

## What this Product Ruling is about

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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 relates. In this Ruling this arrangement is sometimes referred to as the Templegate Forestry Trust Jeremy 2 1988, or simply as 'the Project'.

### Tax law(s)

2. The tax law dealt with in this Ruling is:
- Division 35 of the *Income Tax Assessment Act 1997* ('ITAA 1997').

### 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 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 those persons who were accepted into the project between 12 April 1988 and 11 October 1988. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant Agreements until their term expires) and deriving assessable income from this involvement. In this Ruling these persons are referred to as 'Growers'.

8. The class of persons to whom this Ruling applies does not include persons who have terminated or who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from the Project. Nor does the Ruling apply to Growers who elect to collect and market the logs personally. Those Growers not exercising this election are referred to as 'non-electing Growers'.

**Qualifications**

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

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**Date of effect**

11. This Ruling applies prospectively 6 November 2002 for Growers who, between 12 April 1988 and 11 October 1988, entered into the specified arrangement that is set out below. However, the

Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on 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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13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2003. The Ruling continues to apply, even following its withdrawal, in respect of the tax laws ruled upon, to all persons within the specified class who entered into the specified arrangement that is set out below between 12 April 1988 and 11 October 1988. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

## **Arrangement**

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

- Templegate Forestry Trust Application for Product Ruling dated 28 June 2001;
- Prospectus prepared by Hampton Securities Pty Ltd for the Templegate Forestry Trust dated 12 April 1988;
- Supplemental Deed (dated 23 May 2000) to Consolidated Trust Deed dated 11 April 1988 (as amended by deed dated 4 July 1995) which established the 'Templegate Forestry Trust' for the purpose of the registration of the 'Templegate Forestry Trust Jeremy 2' managed investment scheme, herein referred to as the 'Constitution';
- **Proforma Lease and Management Agreement between Templegate Funds Management Limited and the Grower (now Great Southern Managers Australia Limited and the Grower);**

- Compliance Plan for Templegate Forestry Trust Jeremy 2 adopted by Great Southern Managers Australia Limited on 23 May 2000;
- Constitution of Great Southern Managers Australia Limited (the Responsible Entity) dated 7 August 1988 (herein referred to as the RE Constitution);
- The report of the Independent Consulting Forester on Plantations included in the Templegate Forestry Trust;
- Correspondence with the applicant dated 26 August 2002.

**Note: certain information received from Templegate Forestry Trust Jeremy 2 1988 has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.**

15. The documents highlighted are those that the Growers entered into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of the Grower, was or is a party to.

16. 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**

17. The salient features and effect of these arrangements are summarised below:

Location	Burruga, New South Wales.
Type of business each participant is carrying on.	Commercial growing of <i>Pinus radiata</i> trees.
Number of hectares offered for cultivation.	161 hectares.
Name used to describe the product.	Templegate Forestry Trust, Jeremy 2.
Size of each Woodlot	1 hectare.
Term of the Project	26 years.
Initial cost on a per hectare basis	\$9,000 per hectare.

On-going fees	Great Southern Managers Australia Ltd is to be paid 10% of net harvest proceeds as a Harvest Service Fee.
Other Costs	Growers to be charged for the cost of all insurance except Public Liability Insurance.

18. Growers who applied under the Prospectus dated 12 April 1988 entered into a Lease and Management Agreement and agreed to be bound by the terms of the Constitution.

19. The Project land is situated in Burruga in New South Wales.

20. Growers participating in the Templegate Forestry Trust, enter into an Agreement with Beagle Holdings Pty Limited (formerly Templegate Holdings Limited) which gives them a lease over an identifiable area of land or woodlot, which has already established pinus radiata trees, until clearfell harvest. These leases are now with Great Southern Pine Pty Limited, due to the transmission of land from Beagle Holdings Limited to that company. The Growers also contracted with Templegate Funds Management Limited (the Manager) for the felling and sale of these trees. This responsibility is now that of Great Southern Managers Australia Limited (the Responsible Entity).

21. The Project was limited to available hectares in each plantation. The minimum investment was one woodlot (which is 1 hectare). The term of the project is approximately 26 years for Growers entering into a Lease and Management Agreement from the Prospectus dated 12 April 1988, commencing from the acceptance of the Grower's application and ending after the harvesting of the plantation which is expected to be 31 December 2014.

22. The project was fully subscribed.

### **Constitution**

23. The Constitution is the document under which the Project is established. It sets out the terms and conditions under which the Responsible Entity (Manager) agrees to act for the Growers and to manage the Project. The Responsible Entity will keep a register of Growers. Growers are entitled to assign their Grower's interest in certain circumstances.

24. The Lease and Management Agreements were executed on behalf of a Grower. Growers are bound by the Constitution.

**Interest of Growers**

25. A Grower has an interest in the 'Proceeds Fund' equal to the proportion that the number of woodlots held by the Grower compares to the total number of woodlots in the Project. A Grower does not have any interest in any particular part of the Proceeds Fund. The Proceeds Fund will be held by the Responsible Entity for the benefit of the Growers.

**Agreement**

26. Growers enter into a Lease and Management Agreement for one or more woodlots and contract with Great Southern Managers Australia Limited to maintain the plantation until maturity. The Responsible Entity has no obligation to repurchase Lease and Management Agreements, however Growers are free to assign them subject to the prospectus requirements of the Corporations Law. The Responsible Entity is covenanted to use its best endeavours to introduce a buyer to a Grower wishing to sell (subject to compliance with the Corporations Law).

27. The Responsible Entity will keep a register of Growers. Growers execute a Power of Attorney enabling the Manager (now the Responsible Entity - Great Southern Managers Australia Limited) to act on their behalf as required.

28. Great Southern Managers Australia Limited will maintain the trees in accordance with good silvicultural practice. The services to be provided by Great Southern Managers Australia Limited over the term of the Project are defined in the Agreement. Great Southern Managers Australia Limited will also be responsible for the maintenance of access roads and fire breaks and is required to keep the woodlots free of vermin. The Agreement provides that the Grower shall have at all times the full right, title and interest in the forest produce and the right to request that the forest produce be sold for their benefit.

**Harvesting**

29. The Responsible Entity has discretion to thin and harvest on a whole plantation basis in which case the timber to which each Grower is entitled is calculated as a proportion of the total timber harvested from the plantation. Any decision by the Responsible Entity to exercise its discretion to harvest as a whole is irrevocable. Growers will not be entitled to object to such a decision.

## **Grower's income and payment**

30. At thinning and clearfell, the Grower may request the Responsible Entity to sell the timber on their behalf, in common with the timber from other Growers. The costs of harvesting, haulage, sale and management fee (10% of the balance) are to be paid out of the Proceeds Fund. The Grower is entitled to the Grower's proportion of money in the Proceeds fund.

## **Fees**

31. The initial fees payable by Growers in respect of the Project are \$9000.

32. Following provision of the initial fee, Great Southern Managers Australia Limited will meet the Project's ongoing costs, other than insurance premiums payable by Growers, out of its own funds. Great Southern Managers Australia Limited arranges the harvesting and if so desired by the Grower, the sale of timber for which a fee of 10% of the net proceeds of sale is payable.

33. Great Southern Managers Australia Limited is required to lodge funds in an account known as the Maintenance Reserve Fund for an amount of the future maintenance costs to be determined by the independent forester. This will ensure that sufficient reserve funds will be available, if needed to meet ongoing maintenance costs of the Projects.

## **Compliance plan**

34. The Responsible Entity has prepared a compliance plan in accordance with the Corporations Law. 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.

## **Finance**

35. Growers were able to fund their investment in the project themselves, or borrow from an independent lender.

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

## **Ruling**

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

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

37. For a non-electing Grower who is an individual and who entered the Project between 12 April 1988 and 11 October 1988 the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner will decide for the income years ending 30 June 2001 to 30 June 2014 that the rule in section 35-10 does not apply to this activity provided that the Project is carried out in the manner described in this Ruling.

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

- the ‘exception’ in subsection 35-10(4) applies (see paragraph 45 in the Explanations part of this ruling, below);
- a non-electing Grower’s business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45; or
- a non-electing Grower’s business activity produces assessable income for an income year greater than the

deductions attributable to it for that year (apart from the operation of subsection 35-10(2)).

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

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

## **Explanations**

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

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

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

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

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

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

45. In broad terms, the tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);
- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year)(section 35-35);
- (c) at least \$500,000 of real property, or an interest in real property, (excluding any private dwelling) is used on a continuing basis in carrying on the business activity in that year (section 35-40); or
- (d) at least \$100,000 of certain other assets (excluding cars, motor cycles and similar vehicles) are used on a continuing basis in carrying on the business activity in that year (section 35-45).

46. A non-electing Grower who participates in the Project will be carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling indicates that a non-electing Grower who acquires the minimum allocation of one woodlot in the Project is unlikely to have their activity pass one of the tests until the income year ended 30 June 2015. Non-electing Growers who acquire more than one interest in the Project may however, find that their activity meets one of the tests in an earlier income year.

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

48. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, the second arm of the discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where the business activity has started to be carried on and for that, or those income years;

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

49. Information provided with this Product Ruling indicates that a non-electing Grower who acquires the minimum investment of one woodlot in the Project is expected to be carrying on a business activity that will pass one of the tests in the income year ended 30 June 2015, or will produce a taxation profit.

50. The Commissioner will decide for such a non-electing Grower that it would be reasonable to exercise the second arm of the discretion for all income years up to, and including the income year ended 30 June 2014.

51. The applicant has stated that the business activity comprised by a non-electing Grower's involvement in this Project has started to be carried on, and will continue to be carried on in a manner that is not materially different to that described in the arrangement that is set out in paragraphs 14 to 36 of this Product Ruling. If, however, the Project is not carried on during the income years specified above (see paragraph 37), in the manner described in the arrangement, this Ruling may be affected. Specifically, the decision in relation to paragraph 35-55(1)(b), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) not apply, may be affected, because the Ruling no longer applies (see paragraph 9). Non-electing Growers may need to apply for private rulings on how paragraph 35-55(1)(b) will apply in such changed circumstances.

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

- the report of the independent forester and additional expert or scientific evidence provided with the application by the Responsible Entity.

## **Detailed contents list**

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

	<b>Paragraph</b>
<b>What this Product Ruling is about</b>	<b>1</b>
Tax law(s)	2

Goods and Services Tax	3
Changes in the Law	4
Note to promoters and advisers	6
Class of persons	7
Qualifications	9
<b>Date of effect</b>	<b>11</b>
<b>Withdrawal</b>	<b>13</b>
<b>Arrangement</b>	<b>14</b>
Overview	17
Constitution	23
Interest of Growers	25
Agreement	26
Harvesting	29
Grower's income and payment	30
Fees	31
Compliance Plan	34
Finance	35
<b>Ruling</b>	<b>37</b>
Division 35 - Deferral of losses from non-commercial business activities	37
Section 35-55 - Commissioner's discretion	37
<b>Explanations</b>	<b>41</b>
Division 35 - Deferral of losses from non-commercial business activities	41
<b>Detailed contents list</b>	<b>53</b>

**Commissioner of Taxation**

6 November 2002

*Previous draft:*

Not previously released in draft form

*Related Rulings/Determinations:*TR 92/1; TR 97/16; TR 98/22;  
TD 93/34;*Subject references:*

- non-commercial losses
- product rulings
- public rulings

*Legislative references:*

- TAA 1953 Part IVAAA
- ITAA 1936 Part IVA

# PR 2002/127

- ITAA 1936 82KL
  - ITAA 1997 Div 35
  - ITAA 1997 35-10
  - ITAA 1997 35-10(2)
  - ITAA 1997 35-10(3)
  - ITAA 1997 35-10(4)
  - ITAA 1997 35-30
  - ITAA 1997 35-35
  - ITAA 1997 35-40
  - ITAA 1997 35-45
  - ITAA 1997 35-55
  - ITAA 1997 35-55(1)
  - ITAA 1997 35-55(1)(a)
  - ITAA 1997 35-55(1)(b)
  - Copyright Act 1968
- 

ATO references:

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