



PR 2002/72 - Income tax: Malanda Bamboo Project

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 This document has changed over time. This is a consolidated version of the ruling which was published on *22 May 2002*



Product Ruling

Income tax: Malanda Bamboo Project

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Preamble

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

No guarantee of commercial success

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

Potential participants must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the ‘track record’ of the management, the level of fees in comparison to similar products, how 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 potential participants by confirming that the tax benefits set out below in the **Ruling** part of this document are available **provided that** the arrangement is carried out in accordance with the information we have been given and have described below in the **Arrangement** part of this document.

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

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

Terms of Use of this Product Ruling

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

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

What this Product Ruling is about

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 Malanda Bamboo Project, or simply as 'the Project'.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- Section 6-5 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
 - Section 8-1 (ITAA 1997);
 - Section 17-5 (ITAA 1997);
 - Division 27 (ITAA 1997);
 - Division 35 (ITAA 1997);
 - Division 40 (ITAA 1997);
 - Division 70 (ITAA 1997);
 - Division 328 (ITAA 1997);
 - Section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
 - Section 82KZL (ITAA 1936);
 - Section 82KZME (ITAA 1936);
 - Section 82KZMF (ITAA 1936); and
 - Part IVA (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 those persons who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant agreement until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling, each of these persons referred to as 'Growers', will have accepted an offer which qualifies as a small scale offer for the purposes of the *Corporations Act 2001*.

8. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion or who otherwise do not intend to derive assessable income from it. Nor does it include persons who

- elect to tend and nurture the bamboo on their Farm Lots, and /or
- elect to have a third party tend and nurture the bamboo on their Farm Lots, and/or
- elect to have their shoots and timber harvested and stored separately from the produce from other Farm Lots, and/or

- elect to harvest and sell their own shoots and timber.

Qualifications

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

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Date of effect

11. This Ruling applies prospectively from 22 May 2002, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on 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

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2004. 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

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

- Product Ruling application dated 21 March 2002;
- **Malanda Bamboo Project - Information Memorandum, received in the ATO 13 May 2002;**
- **Malanda Bamboo Pty Limited (MB) – Constitution dated 21 March 2002;**
- **Draft copy of Management Agreement between Bamboo Plantation Services Pty Limited ('BPS' or 'Manager') and Growers – version received in the ATO 14 May 2002;**
- Copy of contract of Sale of Real Estate between Glen Allyn Plantations Ltd and Malanda Bamboo Pty Limited;
- Letter from applicant's agent to the ATO, dated 27 March 2002.
- Further correspondence between the Applicant and the ATO dated 19 April 2002; 29 April 2002, 30 April 2002; 1 May 2002 and 3 May 2002, 9 May 2002, 13 May 2002 and 14 May 2002.

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

15. In accordance with the above documents, a Grower who participates in the arrangement must have accepted an offer that is a small scale offering. **This Ruling does not apply unless** the Grower has accepted a 'personal offer' of a small scale offering for the purpose of the *Corporations Act 2001*.

16. Small scale offering is explained in paragraphs 66 to 68 in the Explanations area of this Product Ruling. The documents highlighted are those Growers enter into or become a party to. For the purposes of describing the arrangement to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, to which the Grower, or an associate of the Grower, will be a party. The effect of these agreements may be summarised as follows.

Overview

17. The arrangement is called the Malanda Bamboo Project.

Location	The Atherton Tablelands district of Northern Queensland								
Type of business each participant is carrying on	Commercial growing of bamboo for the production of bamboo shoots and timber.								
Number of hectares under cultivation	The Information Memorandum provides for approximately 50 hectares to be planted.								
Number of Farm Lots offered	47								
Size of each Farm Lot	Between 0.75 and 1.0 hectares.								
Number of plants per Farm Lot	200.								
Expected production	Estimated 12 000 kilograms per hectare of edible shoots and 800 culms (bamboo timbers) per Farm Lot.								
The Term of the Project	10 years, with 2 further 10 year options.								
Initial fees per Farm Lot	<table> <tr> <td>Shares</td> <td>\$6,000</td> </tr> <tr> <td>Plant establishment</td> <td>\$1,040</td> </tr> <tr> <td>Management</td> <td><u>\$35,260</u></td> </tr> <tr> <td>Total</td> <td>\$42,300</td> </tr> </table>	Shares	\$6,000	Plant establishment	\$1,040	Management	<u>\$35,260</u>	Total	\$42,300
Shares	\$6,000								
Plant establishment	\$1,040								
Management	<u>\$35,260</u>								
Total	\$42,300								
Ongoing annual fees per Farm Lot	<p>For management, administration, harvesting, sales and all other costs in operating the business:</p> <table> <tr> <td>Year 2</td> <td>\$7,150</td> </tr> <tr> <td>Year 3</td> <td>\$7,150 + CPI</td> </tr> <tr> <td>Year 4 onwards</td> <td>Cost plus 10%</td> </tr> </table> <p>Rates and taxes pro rata Farm Lot entitlements, levied by Malanda Bamboo Pty Ltd.</p>	Year 2	\$7,150	Year 3	\$7,150 + CPI	Year 4 onwards	Cost plus 10%		
Year 2	\$7,150								
Year 3	\$7,150 + CPI								
Year 4 onwards	Cost plus 10%								
Other costs	<p>Crop insurance if available.</p> <p>Performance bonus is payable to the Manager if thresholds are met.</p>								
Minimum subscription	10 Farm Lots must be subscribed for before any Farm Lots are allocated to Growers								

Other Features	<p>A Grower may elect to care for and maintain their own Farm Lot or appoint an approved third party.</p> <p>A Grower may elect to have the manager harvest and sell their produce separately.</p> <p>A Grower may elect to harvest and sell their own produce.</p>
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The Project

18. Under the Information Memorandum, Growers are invited to establish and operate a bamboo plantation by subscribing for shares in the land owning company, MB and by entering into a Management Agreement with BPS.

19. MB will offer up to 47 Farm Lots to Growers. There are 52 interests in total with 5 being reserved for Directors of the Manager. The property has a total area of 54 hectares and a planting capacity of 10,400 plants. The balance of the land is described in the survey as "Common property" and is comprised of areas that are not plantable, including a creek running through the middle of the property, access ways, rainforest and steep areas and shed. The subject property is improved, fenced ex-dairy and all capital works have been carried out. Acceptance of a Grower into the Project will not occur until applications equating to 10 Farm Lots have been received.

20. The objective is the commercial production of bamboo shoots and timber.

21. Growers will be invited to apply for 3 Farm Lots in the Project. Applications for 1 and 2 Farm lots may be accepted subject to the total number of Growers not exceeding 20.

22. No applications will be issued in the Project after 31 May 2002.

23. The bamboo plantation will produce 2 annual crops, edible shoots and timber. The first shoot season will be in Year 4 of the Project, and the first timber harvest in Year 6 of the Project. The shoots will be marketed to the major consuming countries in the Northern Hemisphere as out of season shoots. The timber is a by-product of the production of shoots and will be marketed locally.

24. BPS has had independent marketing and agricultural experts prepare reports as to the agricultural aspects and market prospects for the bamboo plantations on the Atherton Tablelands. BPS manages and operates the 3 largest bamboo plantations in Australia.

25. Any one Farm Lot in the Project would be sufficiently large to enable a Grower to qualify for membership of the peak industry body, the Australian Commercial Bamboo Corporation Ltd.

Company Title

26. Growers will subscribe for a minimum parcel of 6,000 shares in MB. Each share parcel gives entitlement to a Farm Lot, comprising areas of between 0.75 and 1.0 hectares land, which will be clearly identifiable by way of reference to survey. The areas of each Farm Lot varies according to topography and each area is capable of sustaining 200 bamboo plants, planted on a 6m x 7m grid.

27. The Constitution of MB sets out the Growers' rights and entitlements in regard to their Farm Lots. The form of land ownership is called Company Title. By subscribing for the shares in MB, the Growers are agreeing to be bound by the rules of the Constitution.

28. MB is akin to a body corporate for a strata body. Its sole purpose is to hold the Land that is the subject of the Project. It will be the registered proprietor of the land. Apart from initial borrowing to fund the purchase of the land the Company is not entitled to mortgage or otherwise encumber the subject Land. Growers are not permitted to place a caveat on the title.

29. Subject to payment of levies and abiding by the Constitution, the Growers have the right to occupy their Farm Lot. Rights to a particular Farm Lot cannot be varied, restricted or released except by unanimous resolution of all shareholders.

30. The Farm Lot may only be used to carry on the business of planting, growing, harvesting and marketing edible bamboo shoots and bamboo timber.

31. Growers may carry on the business personally, appoint an approved contractor to carry on the business or appoint BPS to carry on the business. The Growers must comply with sound agricultural practices in respect to the Farm Lot. This Ruling does not apply to Growers who choose to carry on the business personally, or appoint an approved contractor.

32. Various areas of the property shown on the survey are set aside as common property over which Growers have a joint interest. The common property includes areas unsuitable for planting, access, water facilities and provision for handling and processing areas of produce. BPS has the right to exclusive occupancy of such common property areas it deems necessary in order to carry out its management duties.

33. MB is entitled to make rules and regulations for the good management of the Land.

Directors' Interests

34. Hollis Ho, or interests associated with him will receive a share allocation equivalent to 3 Farm Lots in MB for work done in relation to the proposed venture. Alexander Hopkins and Peter Topperwein, or interests associated with them will receive a share allocation equivalent to 1 Farm Lot each for work done in relation to the proposed venture. The Directors will not need to contribute to management costs in the 1st year.

35. The Directors' entitlements will be allocated regardless of the total number of Farm Lots acquired by Growers. The Directors are underwriting the development themselves and intend to fully develop the property as a bamboo plantation whether or not fully subscribed by other Growers.

Management Agreement

36. Growers may elect to appoint BPS to establish and manage their Farm Lot/s by way of a Management Agreement. The term of the Management Agreement commences upon acceptance by BPS, and expires on 14 June 2012.

37. BPS has the option of extending the term of the Management Agreement for 2 further 10 year terms.

38. BPS will, prior to 30 June 2002, carry out the preparation of land and planting of a bamboo plantation together with all duties necessary to care and nurture those plants to initial harvest. BPS will (clause 5.1) carry out:

- (i) land ripping, clearing and preparation;
- (ii) carrying out drainage works and work to prevent soil erosion;
- (iii) supply 200 bamboo plants per Farm Lot
- (iv) tend and nurture the bamboo, including periodic slashing and weeding, fertilising, watering, mulching, and culm thinning all in accordance with good practice;
- (v) carry out pest treatment where and when necessary; &
- (vi) embark on such operations as may be required to prevent or combat land degradation on the Farm Lots.

39. Immediately after the plants have been established, and for the balance of the term of the Project, BPS will carry out the following plantation management duties (clause 5.2):

- (i) tend and nurture the bamboo, including periodic slashing and weeding, fertilising, watering, adjustment, and culm thinning in accordance with good practice and general husbandry including training the bamboo

- towards the necessary plant management system for shoot production;
- (ii) selectively cull and replace under or non-performing Plants;
 - (iii) embark on such operations as may be required to prevent or combat land degradation on the Farm Lots
 - (iv) carry out pest treatment where and when necessary;
 - (v) attend to repairs and maintenance as required;
 - (vi) (subject to the Grower's right to harvest shoots and timber) harvest shoots and timber so as to achieve the maximum sustainable yield for the Grower;
 - (vii) subject to the Grower's right to market the produce from his land, to market and sell the shoots and timber at the best prices achievable; &
 - (viii) to account to the grower for the proceeds of such sales.
40. BPS will carry out harvesting, freight, handling and marketing of the Bamboo attributable to the Farm Lots.
41. BPS may, for the better performance of its obligations under the Management Agreement, employ agents, contractors, professional advisers and other consultants (Clause 10).
42. BPS will take out public liability insurance in respect to its duties. Growers are entitled to take out crop insurance in respect to their Farm Lot.
43. Growers are entitled to terminate the Management Agreement in the following circumstances (Clause 12):
- (i) the Manager goes in to liquidation;
 - (ii) the Manager has an administrator appointed;
 - (iii) the Manager is in default of an obligation under this Agreement and receives a written notice from the Grower specifying the default and the Manager fails to rectify the default within 30 days after receipt of such notice; or
 - (iv) the Manager ceases to carry on business.
44. BPS is entitled to full and free access to the Farm Lots to enable it to carry out its duties under the Management Agreement.

Fees

45. The Growers will make the following payments, in the first 3 years of the Project:

Item	Year 1	Year 2	Year 3
Plant establishment expenses	\$1,040	-	-
Management fees and levies Including:	\$35,260	\$7,150	\$7,150 (see Note (2) below)
Landcare	Nil	\$195	\$145
Shares	\$6,000		
Total	\$42,300	\$7,150	\$7,150

Notes:

- (1) Plant establishment expenses represent 3% of the costs and accordingly 3% of the overheads and administration costs, being \$100, are attributed to such.
- (2) Management and administration fees are increased after year 2 by Brisbane CPI.
- (3) BPS will complete all Year 1 services by 30 June 2002. No applications will be accepted after 31 May 2002.
- (4) Fees for Year 2 and subsequent years are payable on 31 July each year. These fees will be based on the Manager's estimates of costs. In each following year the Manager shall account to the Grower as to its actual costs. If the fees have been overcharged there would be a reduction in the fees for the subsequent year.
- (5) Growers are liable under Rule 127 of the Constitution to pay levies in connection with their occupancy of the Farm Lots. The levies are for rates and taxes, land tax, insurances, repairs and maintenance of common property buildings, power to common areas and administration costs for MB.

46. BPS will be entitled to a profit share bonus calculated on the following incremental basis (Cl 7.3):

Net income per Farm Lot as calculated by BPS	Bonus % of Net Income payable to BPS, net of GST
Between \$10,000 - \$20,000	10%
Between \$20,001 - \$30,000	15%
Greater than \$30,001	20%

Finance

47. Growers can fund the investments themselves or borrow from an independent lender.

48. This Ruling does not apply if a Grower enters into a finance arrangement with any of the following features:

- there are split loan features of the type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements, or equivalent collateral agreements, in relation to the loan, designed to limit the borrower's risk;
- 'additional benefits' are granted to a borrower, for the purposes of section 82KL, or the funding arrangements transform the Project into a scheme' to which Part IVA may apply;
- the loan or interest is non-arm's length;
- repayments of principal and payments of interest are linked to 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 are transferred (by any means, and whether 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

Application of this Ruling

49. This Ruling applies only to Growers who are accepted in the Project on or after issue of this Ruling and on or before 31 May 2002 and who have executed Application, Election and Management Agreement before that date.

50. This Ruling does not apply to persons who

- elect to tend and nurture the bamboo on their Farm Lots, and /or

- elect to have a third party tend and nurture the bamboo on their Farm Lots, and/or
- elect to have their shoots and timber harvested and stored separately from the produce from other Farm Lots, and/or
- elect to harvest and sell their own shoots and timber.

51. The Grower's participation in the Project must constitute the carrying on of a business of primary production. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced.

Minimum subscription

52. A Grower is not eligible to claim any tax deductions until the Growers application to enter the Project is accepted and the Project has commenced. Under the terms of the Information Memorandum, a Growers application will not be accepted and the Project will not proceed until the minimum subscription of 10 Farm Lots is achieved.

The Simplified Tax System ('STS')

Division 328

53. For a Grower participating in the Project, the recognition of income and the timing of tax deductions 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

54. 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**

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

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

Deductibility of the Management Fees and levies**Section 8-1**

57. A Grower who is not an ‘STS taxpayer’ may claim tax deductions for the following revenue expenses:

Fee Type	ITAA 1997 Section	Year ended 30 June 2002	Year ended 30 June 2003	Year ended 30 June 2004
Management Fees	8-1	\$35,260 See Notes(i), & (iii) below	\$6,955 See Notes(i), & (iii) below	\$7,005 (Indexed) See Notes(i), (ii) & (iii) below

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (e.g., input tax credits): Division 27. See the example at paragraph 126.
- (ii) Annual management expenses are to be increased from Year 3 by the CPI Brisbane increase.
- (iii) The Management fees shown in the Management Agreement are deductible in full in the year that they are incurred. However, if a Grower chooses to prepay fees for doing of a thing (eg, the provision of management services) that will not be wholly done in the income year the fees are incurred, the prepayment rules of the ITAA 1936 may apply to apportion those fees. In such cases, the tax deduction for the prepaid fee must be determined using the formula shown in

paragraph 99 unless the expenditure is 'excluded expenditure'. 'Excluded expenditure' is an 'exception' to the prepayment rules and is deductible in full in the year in which it is incurred. For the purposes of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000.

Deductions for capital expenditure

Division 40

58. A Grower who is not an 'STS taxpayer' will also be entitled to tax deductions relating to plant establishment. All deductions shown in the following Table are determined under Division 40.

Fee Type	ITAA 1997 Section	Year ended 30 June 2002	Year ended 30 June 2003	Year ended 30 June 2004
Establishment of horticultural plants (bamboo)	40-515	Nil See notes (iv) & (v) below	Nil See notes (iv) & (v) below	Nil See notes (iv) & (v) below
Landcare operations	40-630		\$195 - see Notes (iv) & (vi) below	\$145 - see Notes (iv) & (vi) below

- (iv) If the Grower is registered or required to be registered for GST, amounts of outgoings would need to be adjusted as relevant for GST (e.g., input tax credits): Division 27. See example at paragraph 126.
- (v) Bamboo are 'horticultural plant' as defined in subsection 40-520(2). Growers own the plants and a deduction is available for their decline in value under subsection 40-515(1)(b). The deduction for the bamboo is determined using the formula in section 40-545 and is based on the capital expenditure incurred by the Grower that is attributable to their establishment. The bamboo has an effective life over 30 years. This results in a straight line write-off at a rate of 7%. The deduction is allowable when the bamboo enter their first commercial season (section 40-530(2)). BPS will inform Growers of when the bamboo enter their first commercial season.

- (vi) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630.

Tax outcomes for Growers who are 'STS taxpayers'

Assessable Income

Section 6-5 and section 328-105

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

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

Deductibility of the Management Fees and levies

Section 8-1 and section 328-105

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

Fee Type	ITAA 1997 Section	Year ended 30 June 2002	Year ended 30 June 2003	Year ended 30 June 2004
Management Fees	8-1	\$35,260 See Notes (vii), (ix) & (x) below	\$6,955 See Notes (vii), (ix) & (x) below	\$7,005 (Indexed) See Notes (vii), (viii) (ix) & (x) below

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 (e.g., input tax credits): Division 27. See the example at paragraph 126.
- (viii) Annual management expenses are to be increased in Year 3, and thereafter, by the CPI Brisbane increase.
- (ix) 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.

- (x) Where a Grower who is an 'STS taxpayer', pays the Management fees shown in the Management Agreement are deductible in full in the year that they are paid. However, if a Grower chooses to prepay fees for doing of a thing (e.g., the provision of management services) that will not be wholly done in the income year the fees are incurred, the prepayment rules of the ITAA 1936 may apply to apportion those fees. In such cases, the tax deduction for the prepaid fee must be determined using the formula shown in paragraph 99 unless the expenditure is 'excluded expenditure'. 'Excluded expenditure' is an 'exception' to the prepayment rules and is deductible in full in the year in which it is incurred. For the purposes of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000.

Deductions for capital expenditure

Subdivision 328-D and Subdivisions 40-F and 40-G

62. A Grower who is an 'STS taxpayer' will also be entitled to tax deductions relating to plant establishment and a 'landcare operation'. An 'STS taxpayer' may claim deductions in relation to plant establishment under Subdivision 40-F and in relation to a 'landcare operation' under Subdivision 40-G. If the 'landcare operation' expenditure is on a 'depreciating asset' used to carry on the business, they may choose to claim deductions under Division 328.

63. The deductions shown in the following Table assume, for representative purposes only, that a Grower has either chosen to or can only claim deductions for expenditure on a 'landcare operation' under Subdivisions 40-F or 40-G and not under Division 328. If the expenditure has been incurred on 'depreciating assets' and is claimed under Division 328, the deduction is determined as discussed in Note (xii) below.

64. Under Division 328, if the 'cost' of a 'depreciating asset' at the end of the income year is less than \$1000 (a 'low-cost asset'), it can be claimed as an immediate deduction when first used or 'installed ready for use'. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and the income

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year in which it first uses the asset or has it 'installed ready for use' to produce assessable income.

Fee Type	ITAA 1997 Section	Year ended 30 June 2002	Year ended 30 June 2003	Year ended 30 June 2004
Establishment of horticultural plants (bamboo)	40-515	Nil See notes (xi) & (xii) below	Nil See notes (xi) & (xii) below	Nil See notes (xi) & (xii) below
Landcare operations	40-630		\$195 - see Notes (xi) & (xiii) below	\$145 - see Notes (xi) & (xiii) below

- (xi) If the Grower is registered or required to be registered for GST, amounts of outgoings would need to be adjusted as relevant for GST (e.g., input tax credits): Division 27. See example at paragraph 126.
- (xii) Bamboo are 'horticultural plant' as defined in subsection 40-52(2). Growers own the plants and a deduction is available for their decline in value under subsection 40-515(1)(b). The deduction for the bamboo is determined using the formula in section 40-545 and is based on the capital expenditure incurred by the Grower that is attributable to their establishment. The bamboo has an effective life over 30 years. This results in a straight line write-off at a rate of 7%. The deduction is allowable when the bamboo enter their first commercial season (section 40-530(2)). BPS will inform Growers of when the bamboo enter their first commercial season.
- (xiii) Any capital expenditure incurred for a 'landcare operation' (as defined in section 40-635) is fully deductible in the year it is incurred under Subdivision 40-G, section 40-630. If the expenditure is on a 'depreciating asset' (the underlying asset), the Grower may choose to claim a deduction under either Division 328 or Subdivision 40-G (although expenditure on some items of plant can only be deducted under Division 328). For the purposes of Division 328, each Grower's interest in the underlying asset is itself deemed to be a 'depreciating asset'. If the 'cost' apportionable to that deemed 'depreciating asset' is less

than \$1000, the deemed asset is treated as a 'low-cost asset' and that amount is deductible in full when the underlying asset is first used or 'held' ready for use. This is so provided the Grower is an 'STS taxpayer' for the income year in which it starts to 'hold' the asset and the income year in which it first uses the asset or has it 'installed ready for use' to produce assessable income. If the deemed asset is not treated as a 'low-cost asset', the tax deduction allowable is determined by multiplying its 'cost' by half the relevant STS pool rate. At the end of the year, it is allocated to the relevant STS pool and in subsequent years, the full pool rate will apply. If the expenditure is not on a 'depreciating asset', the expenditure is fully deductible under Subdivision 40-G.

Tax outcomes that apply to all Growers

Interest deductibility

65. The deductibility or otherwise of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or other financier is outside the scope of this Ruling. Product Rulings only rule on the deductibility of expenditure where all details and related documentation have been provided to, and examined by the Tax Office. However all Growers who borrow funds in order to participate in the Malanda Bamboo Project, should read the discussion of the prepayment rules in paragraphs 65 and 83 to 105 (below) as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.

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

Section 35-55 – Commissioner's discretion

66. For a Grower who is an individual and who enters the Project during the year ended 30 June 2002 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 2002 to 30 June 2006 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.

67. 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 114 in the Explanations part of this ruling, below); or
- a Grower’s business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the Grower’s business activity produces assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsection 35-10(2)); or

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

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

Section 82KZME – 82KZMF, 82KL and Part IVA

70. For a Grower who participates in the Project and incurs expenditure as required by the 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- 82KZMF (but see paragraphs 83 to 105)
- 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.

Explanations

Corporations Act 2001

71. For this Ruling to apply, an offer for an interest in the Project which qualifies as a small scale offering as defined in section 1012E of the *Corporations Act 2001* must have been made to, and accepted by a Grower. Small scale offers do not require a prospectus or product disclosure statement.

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

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

Is the Grower carrying on a business?

74. For the amounts set out in the Tables above to constitute allowable deductions the Grower's horticultural activities as a participant in the Malanda Bamboo Project must amount to the carrying on of a business of primary production. These horticultural activities will fall within the definitions of 'horticulture' and 'commercial horticulture' in section 40-535 of the ITAA 1997.

75. For schemes such as that of the Malanda Bamboo 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 *FCT v. Lau* (1984) 16 ATR 55; 84 ATC 4929.

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

- the Grower has an identifiable interest (by lease or by licence) in the land on which the Grower's bamboo are established;
- the Grower has a right to harvest and sell the shoots and timber each year from those bamboo;
- the horticulture activities are carried out on the Grower's behalf;

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- the horticulture activities of the Grower are typical of those associated with a horticulture business; and
- the weight and influence of general indicators point to the carrying on of a business.

77. In this Project, each Grower enters into a Management Agreement and is bound by the Constitution of MB.

78. Under the Constitution of MB each individual Grower will have rights over a specific and identifiable area of land. The interests that the Growers acquire in MB are referred to as company title land interests. The Grower has, subject to the rules of the Constitution, an ongoing interest in the bamboo on an identifiable Farm Lot for the term of the Project. Under the Constitution the Grower must use the land in question for the purpose of carrying out commercial bamboo activities and for no other purpose. Under the Constitution and Management Agreement, BPS has the right to access all Farm Lots and to exclusively occupy such part of the common property as are necessary to carry out its management duties.

79. Under the Management Agreement BPS is engaged by the Grower to establish and maintain at least 200 bamboo on the Grower's Farm Lot. The Management Agreement is for an initial term of 10 years. BPS has the option to extend the term for another two 10 year terms. BPS has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the bamboo plantation on the Grower's behalf.

80. In establishing the bamboo plantation, the Grower engages BPS to acquire and plant bamboo on the Grower's Farm Lot. The Farm Lots have been cleared and all capital works carried out and the land is ready to be planted. During the term of the Project, the Grower's Farm Lot will be used wholly to carry out the Grower's horticulture activities. BPS is also engaged to harvest and sell, on the Grower's behalf, the shoots and timber grown on the Grower's Farm Lot .

81. 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.

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

83. The pooling of shoots and timber of other Growers is consistent with general horticulture practices. Each Grower's

proportionate share of the sale proceeds of the pooled shoots and timber will reflect the proportion of the shoots and timber contributed from their Farm Lot.

84. BPS's services on the Grower's behalf are also consistent with general horticulture practices. While the size of a Farm Lot is relatively small, it is of a size and scale to allow it to be commercially viable, (see Taxation Ruling IT 360). Any one Farm Lot in the Project would be sufficiently large to enable a Grower to qualify for membership of the peak industry body, the Australian Commercial Bamboo Corporation Ltd.

85. The horticulture activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. For the purposes of this Ruling, the Grower's horticulture activities in the Malanda Bamboo Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

86. 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.

87. 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 the Management Fees and levies

Section 8-1

88. Consideration of whether the initial management fees, annual management fees and levies 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.

89. The management fees and levies associated with the horticultural activities will relate to the gaining of income from the Grower's business of horticulture (see above), and hence have a sufficient connection to the operations by which income (from the regular sale of shoots and timber) is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. There is no capital component of the management fees. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Possible application of prepayment provisions

90. Under the Management Agreement none of the management fees are for things to be done beyond 30 June in the year in which the relevant amounts are incurred. In these circumstances, the prepayment provisions in sections 82KZME and 82KZMF have no application to these fees.

91. However, where a Grower chooses to prepay these fees for a period beyond the income year in which the expenditure is incurred, the prepayment provisions (see paragraphs 83 to 105) will apply to determine the amount and timing of the deductions regardless of whether the Grower is an 'STS taxpayer' or not. These provisions apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes 'STS taxpayers' from the operation of section 82KZMF. This is subject to the 'excluded expenditure' exception. For the purpose of this Ruling 'excluded expenditure' refers to an amount of expenditure of less than \$1,000.

Timing of deductions

92. In the absence of any application of the prepayment provisions, the timing of deductions for the management fees will depend upon whether a Grower is an 'STS taxpayer' or is not an 'STS taxpayer'.

93. If the Grower is not an 'STS taxpayer', the management fees are deductible in the year in which they are incurred.

94. If the Grower is an 'STS taxpayer' the management fees are deductible in the income year in which they are paid, or are paid for the Grower (paragraph 328-105(1)(b)). If any amount that is properly incurred in an income year remains unpaid at the end of that income year, the unpaid amount is deductible in the income year in which it is actually paid or is paid for the Grower.

Interest Deductibility Section 8-1

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

Prepayment provisions

Sections 82KZL to 82KZMF

96. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (e.g., the performance of management services) 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.

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

Sections 82KZME and 82KZMF

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

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is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1)).

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

100. the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year; and

101. the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the arrangement are managed by someone other than the taxpayer; and

- either :
 - (a) there is more than one participant in the agreement in the same capacity as the taxpayer; or
 - (b) the person who promotes, arranges or manages the agreement (or an associate of that person) promotes similar agreements for other taxpayers.

102. For the purpose of these provisions, the agreement includes all activities that relate to the agreement (subsection 82KZME(4)). This has particular relevance for a Grower in this Project who, in order to participate in the Project may borrow funds from a financier. Although undertaken with an unrelated party, that financing would be an element of the arrangement. The funds borrowed and the interest deduction are directly related to the activities under the arrangement. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF.

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

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

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

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

Application of the prepayment provisions to this Project

106. In this Project, an initial management fee of \$35,260 will be incurred on execution of the Management Agreement. The Management Fee is charged for providing management services to a Grower by 30 June of the year of execution of the Agreements. Under the Agreements, further annual expenditure is required each year during the term of the Project for the provision of management services until 30 June in those years.

107. In particular, the management fee is expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the description of the arrangement that the initial management fee has been inflated to result in reduced fees being payable for management fees in subsequent years.

108. There is also no evidence that might suggest the management services covered by the fee could not be provided within the relevant expenditure year. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial management fee, and the fees for subsequent years, is for the Project Manager doing ‘things’ that are not to be wholly done within the expenditure year.

109. On this basis, provided a Grower incurs expenditure as required under the Project agreements, as set out in paragraph 43, then the basic precondition in subsection 82KZME(2) is not satisfied and, in these circumstances, section 82KZMF will have no application.

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

110. Although not required under the Management Agreement, a Grower participating in the Project may choose to prepay fees for a period beyond the ‘expenditure year’. Similarly, Growers who use financiers may either choose, or be required to prepay interest. Where this occurs, contrary to the conclusion reached in paragraph 65 above, section 82KZMF will apply to apportion the expenditure and allow a deduction over the period in which the prepaid benefits are provided.

111. For these Growers, the amount and timing of deductions for any relevant prepaid Management Fees or prepaid interest will depend

upon when the respective amounts are incurred and what the 'eligible service period' is in relation to these amounts.

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

Expenditure of a capital nature

Division 40 and Division 328

113. Any part of the expenditure of a Grower that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1. In this Project, expenditure attributable to the establishment of the bamboo plants and a 'landcare operation' is of a capital nature. This expenditure falls for consideration under Division 40 or Division 328 of the ITAA 1997.

114. The application and extent to which a Grower claims deductions under Division 40 and Division 328 depends on whether or not the Grower is an 'STS taxpayer'.

115. The tax treatment of capital expenditure has been dealt with in a representative way in paragraphs 55 and 59 (above) in the Tables and the accompanying Notes.

Deferral of losses from non-commercial business activities

Division 35

116. 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.

117. 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.

118. 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.

119. 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.

120. 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).

121. A Grower who participates in the Project will be carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling indicates that a Grower who acquires the minimum allocation of one Grower's Farm Lot in the Project is unlikely to have their activity pass one of the tests until the income year ended 30 June 2007. 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.

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

123. 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:

- (i) the business activity has started to be carried on;
- (ii) because of its nature, it has not yet met one of the tests set out in Division 35; and
- (iii) 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.

124. Information provided with the application for this Product Ruling indicates that a Grower accepted into the Project in the year ended 30 June 2002 who acquires the minimum allocation of one Grower's Farm Lot in the Project is expected to be carrying on a business activity that will either pass one of the tests, or produce a taxation profit, for the year ended 30 June 2007. The Commissioner will decide for such a Grower that it would be reasonable to exercise the second arm of the discretion until the year ended 30 June 2006.

125. This Product Ruling is issued on a prospective basis (i.e., before an individual Grower's business activity starts to be carried on). The Project, however, may fail to be carried on during the income years specified above (see paragraph 61 and 62), in the manner described in the Arrangement (see paragraphs 14 to 45). If so, this Ruling, and specifically the decision in relation to paragraph 35-55(1)(b), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) not apply, may be affected, because the Ruling no longer applies (see paragraph 9). Growers may need to apply for private rulings on how paragraph 35-55(1)(b) will apply in such changed circumstances.

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

- the report of the independent Agricultural Expert provided with the Product Ruling; and
- independent, objective, and generally available information relating to the bamboo industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application.

Section 82KL - Recouped expenditure

127. The operation of section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefits(s)'.

Insufficient ‘additional benefits’ will be provided to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1.

Part IVA - General tax avoidance provisions

128. For Part IVA to apply there must be a ‘scheme’ (section 177A), a ‘tax benefit’ (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

129. The Malanda Bamboo Project will be a ‘scheme’. A Grower will obtain a ‘tax benefit’ from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 54 to 59 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.

130. 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 bamboo shoots and timber. 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) it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Example

Entitlement to GST input tax credits

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

Management fee for period 1/1/2002 to 30/6/2002	\$4 400*
Carrying out of upgrade of power for your vineyard as quoted	<u>\$2 200*</u>

Total due and payable by 1 January 2002 \$6 600
(includes GST of \$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:

$$1/11 \times \$4400 = \$400.$$

Hence her outgoing for the management fee is effectively \$4400 *less* \$400, or \$4000.

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

$$1/11 \times \$2200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2200 *less* \$200, or \$2000.

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 \$4000 (not \$4400).

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 \$2000 only, not one tenth of \$2200).

Detailed contents list

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<i>Previous draft:</i>	- fee expenses
Not previously released in draft form	- interest expenses
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<i>Related Rulings/Determinations:</i>	- producing assessable income
IT 360; PR 1999/95; TR 92/1;	- product rulings
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	- tax avoidance
<i>Subject references:</i>	- tax benefits under tax avoidance schemes
- carrying on a business	- tax shelters
- commencement of business	

- tax shelters project

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NO T2002/4552
 ISSN: 1441-117