



PR 2003/12 - Income tax: Forest Enterprises Plantation Project 2003

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 This document has changed over time. This is a consolidated version of the ruling which was published on *9 April 2003*



Product Ruling

Income tax: Forest Enterprises Plantation Project 2003

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

Preamble

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

No guarantee of commercial success

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

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

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

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

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

Terms of use of this Product Ruling

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

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of persons who take part in the arrangement to which this Ruling refers. In this Ruling this arrangement is sometimes referred to as the Forest Enterprises Plantation Project 2003 or simply 'the Project'.

Tax law(s)

2. The tax laws dealt with in this Ruling are:
- Section 6-5 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
 - Section 8-1 (ITAA 1997);
 - Section 17-5 (ITAA 1997);
 - Division 27 (ITAA 1997);
 - Section 25-20 (ITAA 1997);
 - Division 35 (ITAA 1997);
 - Division 328 (ITAA 1997);
 - Section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
 - Section 82KZL (ITAA 1936);
 - Sections 82KZME - 82KZMF (ITAA 1936);
 - Section 82KZMG (ITAA 1936); and
 - Part IVA (ITAA 1936).

Goods and Services Tax

3. All fees and expenditure referred to in this Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as a 'Grower') to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

Changes in the Law

4. The Government is currently evaluating further changes to the tax system in response to the Ralph Review of Business Taxation and continuing business tax reform is expected to be implemented over a

number of years. Although this Ruling deals with the laws 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 potential participants are fully informed of any legislative changes after the Ruling is issued.

Class of persons

7. The class of persons to whom this Ruling applies is the persons more specifically identified in the Ruling part of this Product Ruling and who enter into the arrangement specified below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e. being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling, these persons are referred to as 'Growers'.

8. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it. Growers who elect to harvest and market their own produce are also excluded from the class of persons to whom this Ruling applies.

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 9 April 2003 the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not 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 2006. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the person's involvement in the arrangement.

Arrangement

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

- Application for a Product Ruling dated 19 March 2003 as constituted by documents provided on 11 December 2002, 20 December 2002, 14 February 2003, 6 March 2003 and 19 March 2003 and additional correspondence dated 14 February 2003.
- Draft Product Disclosure Statement for the Forest Enterprises Plantation Project 2003 issued by FEA Plantations Limited A.C.N. 055 969 429 (‘FEA Plantations’ the Responsible Entity), received by the Tax Office 19 March 2003;
- The draft **Constitution** establishing the Forest Enterprises Plantation Project 2003 (‘the Constitution’) received by the Tax Office 19 March 2003;
- The **Lease for Land Situate in New South Wales** and **Lease for Land Situate in Tasmania** attached as Part A and Part B of Schedule 2 of the Constitution, to be entered into by each Grower and FEA Plantations (‘the Lessor’);
- The **Management Agreement** attached as Schedule 3 of the Constitution, to be entered into by each Grower and FEA Plantations (‘the Manager’);
- The **Loan Agreement** on page 69 of the Product Disclosure Statement, which may be entered into by each Grower and Forest Enterprises Australia Limited A.C.N. 009 553 548 (‘FEA Ltd’) an entity associated with FEA Plantations;
- The Custodian Agreement between FEA Plantations and Tasmanian Permanent Trustees Limited A.C.N. 009 475 629 (‘the Custodian’) dated 6 June 2000; and
- The Draft Compliance Plan for Forest Enterprises Plantation Project 2003 issued by FEA Plantations received by the Tax Office 12 December 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. The documents highlighted are those that Growers will or may enter into. For the purposes of describing the arrangement to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are a part of the arrangement. The effect of these agreements is summarised as follows.

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16. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements. The effect of these agreements is summarised as follows.

Overview

17. The salient features of the Forest Enterprises Plantation Project 2003 arrangement are as follows:

Location	Tasmania and certain areas in New South Wales.
Type of business each participant is carrying on	Commercial growing of <i>Eucalyptus nitens</i> (Shining Gum) and similar species for the purpose of thinning at approximately 9 years and clearfell at approximately 13 years.
Number of hectares under cultivation	The total projected land area, which will be planted under this Product Disclosure Statement, will be 2,000 hectares or 4,000 Woodlots.
Minimum allocation per Grower	One Woodlot
Size of minimum leased area	An allocation of a leased area of 0.5 of a hectare ('one Woodlot').
Number of trees per Woodlot	Minimum of 600 trees
Expected production	Thinnings at about 9 years and clearfell at approximately 13 years
The term of the Project	13 years
Initial cost per Woodlot	\$2,750 fee for Establishment Services
Initial cost per hectare	\$5,500 fee for Establishment Services
Ongoing costs	Grower will pay 12% of gross Harvest Proceeds as management and lease fees.
Other costs	<ul style="list-style-type: none"> Marketing and harvesting costs will be retained from the Harvest Proceeds on a proportional basis of Grower's participation. Insurance (excluding public liability), rates and stamp duty costs.

18. The Project is registered as a managed investment scheme under the *Corporations Act 2001*. The Project is to establish, manage and harvest *Eucalyptus nitens* (Shining Gum) and similar species for the purpose of woodchip.

19. Applicants will become 2003 or 2004 Growers depending on their date of application. Growers will become 2003 Growers where an application is accepted and a Lease and Management Agreement is executed by 30 June 2003. Applications of Growers processed between a date on or after 1 July 2003 and on or before 30 June 2004, will commence participation as 2004 Growers. Following acceptance of the application FEA Plantations will allocate Woodlots to the Grower and register the land allocated in the Growers' Register.

20. The minimum area of land that can be leased by a Grower under the Project is one Woodlot of 0.5 of a hectare.

21. There is no minimum amount that must be raised under the Prospectus. Tasmanian Plantations Pty Ltd, a wholly owned subsidiary of FEA Ltd, has purchased the land for the Projects. Where additional land is required, Tasmanian Plantations Pty Ltd will acquire sufficient suitable land for the purposes of the Project.

22. Participating Growers will enter into a lease of land with FEA Plantations. The term of the agreement is from the date of signing of the application by the Lessor, until the final clearfell of the trees upon the land.

23. The Growers will also enter into a Management Agreement with FEA Plantations to have suitable Eucalyptus seedlings planted on their Woodlot for the purposes of thinning at approximately 9 years and clearfell at approximately 13 years. For a 2003 and a 2004 Grower FEA Plantations will establish the Woodlot during the optimal planting season but no later than 12 months after the acceptance of the application. Under the Management Agreement FEA Plantations will also cultivate the trees and be responsible for harvesting, processing and selling the timber. A Grower entering into the Management Agreement with FEA Plantations may within six years from the commencement date elect to collect their own forest produce (Electing Growers). This Ruling does not apply to Electing Growers. Otherwise a Grower may appoint FEA Plantations as its sole agent to market and sell the Grower's forest produce.

24. A Custodian has been appointed under the Custodial Agreement to protect the interests of the Growers in their dealings with FEA Plantations.

Constitution

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

Project. Pursuant to clause 13 of the Constitution, FEA Plantations will keep a register of Growers.

26. Under the terms of the Constitution, all moneys received from applications shall be paid to FEA Plantations. FEA Plantations shall, within a reasonable time or at time of the receipt of the application money, forward the payment to the Custodian. FEA Plantations must ensure that the Custodian deposits Application Money into an account designated as Forest Enterprises Plantation Project 2003 Application Fund Account. The Application Moneys will be released by the Custodian when it is reasonably satisfied that certain specified criteria in the relevant Constitution have been met (clause 11 of the Constitution).

Compliance plan

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

Management Agreement

28. Under the Management Agreement, Growers contract with the Manager to establish and maintain a plantation of trees upon their leased area of land until maturity (after thinning at approximately nine years). At maturity, the trees will be harvested and sold on behalf of the Grower. The Manager will provide the Establishment Services described in clause 1 of the agreement. These include:

- The completion of all preparatory work necessary for the planting of seedlings on the land including all ploughing and vermin control deemed necessary by the Manager;
- The supply and planting of healthy seedlings to an average density per hectare appropriate to the soil and climatic circumstances of the land; and
- The control of weeds and other vegetation that might inhibit the growth of the seedlings on the land.

29. The Manager will complete all Establishment Services during the optimal planting season but no later than 12 months after acceptance of applications.

30. The Manager will also provide the Management Services described in clause 3 of the agreement. These include:

- The replanting of any seedlings which die during the first year after planting, to 90% of the average initial planting density, where such death is caused by planting technique or vermin destruction;
- The general maintenance of the plantation including control of weeds, suckers, vermin or other pests which may impede the growth of the seedlings;
- The maintenance in good condition and repair of all fire breaks and access roads in and about the Land;
- The application of fertiliser to the land in such form and in such quantities as to maintain satisfactory growth;
- The provision of a written report in relation to the progress of the plantation to the Grower annually; and
- The provision of advice and assistance to the Grower generally in relation to the thinning and pruning of the plantation and the general management thereof in accordance with the best practices of the forestry industry.

31. The Manager will provide the services of Harvesting and Marketing the trees, which involves the Manager determining the appropriate time for the thinning and clearfelling of trees on the land, and the marketing and selling of the trees which have been grown on the land, on behalf of the Grower.

Lease

32. Growers grant a Power of Attorney to FEA Plantations to execute a Lease on their behalf. This Lease is for a specified area of land upon which their plantation will be established.

33. Under this Lease the Grower agrees to pay to the Lessor the specified Rent for the lease of the specified area of land for the term of the lease period. The term of the Lease is from the date of signing of the application by the Lessor, until the final clear fell of the trees upon the land.

Fees

34. Under the Management Agreement and the Agreement to Lease a Grower will pay the following fees per Woodlot:

- An initial fee for Establishment Services of \$2,750 per Woodlot is payable for services provided in the first 12 months after acceptance of the application;

- A Lease fee of 10% of the gross Harvest Proceeds received by the Grower, payable by retention from the gross Harvest Proceeds;
- A Management fee of 2% of the gross Harvest Proceeds received by the Grower, payable by retention from the gross Harvest Proceeds;
- A fee for Harvesting, payable by retention from the Harvest Proceeds;
- Marketing costs will be retained from the Harvest Proceeds on a proportional basis of Grower's participation; and
- In addition to the above, Growers will be invoiced for any legal costs, stamp duty and insurance in relation to their participation, and for the portion of land taxes represented by the value attributed to their standing trees.

Finance

35. Growers can fund their involvement in the Project by borrowing from FEA Ltd (a lender associated with FEA Plantations), or borrow from an independent lender.

36. Growers are able to borrow from FEA Ltd an amount equal to their full application fee less a deposit of 10%. Standard terms for the finance are, as follows:

- One year interest free - repayable by 12 monthly instalments;
- Two to four years at fixed interest of 9% per annum, repayable by monthly instalments over the term of the loan; and
- Five to ten years at fixed interest of 10% per annum, repayable by monthly instalments over the term of the loan.

37. The security for the loan is provided by the assignment to FEA Ltd, over the term of the loan, of the Grower's rights and interest in the Management Agreement and the trees planted under it, and every other document, interest or right held in connection with the cultivation of the trees, including the Agreement to Lease.

38. The loan is provided by FEA Ltd on a full recourse basis and recovery action will be taken in respect of any default by the borrower. Overdue repayments will incur interest at the default rate of 15% per annum.

39. This Ruling will not apply to Growers who enter into finance arrangements with FEA Ltd or its associates, with terms and conditions that differ in any way from those set out in paragraphs 35 to 38 above.

40. 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 other than FEA Ltd are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

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

- On or before 30 June 2003 and who have executed a Management Agreement and a Lease on or before that date (a '2003 Grower'); and/or
- On or after 1 July 2003 and before 12 months from acceptance, such date being no later than 30 June 2004 where the Grower has executed a Lease and

Management Agreement on or between those dates
(a '2004 Grower').

The Grower's participation in the Project must constitute the carrying on of a business of primary production.

42. 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.

43. This Ruling does not apply to Growers who:

- elect, under clause 5.2 of the Constitution, to harvest and market the trees on the Grower's Woodlot; or
- are otherwise excluded from the Ruling by paragraphs 7, 8 or 39 of this Product Ruling.

The Simplified Tax System ('STS')

Division 328

44. 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

45. 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

46. 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.

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

Deductions for Establishment Fee, Lease fees, and Interest

Section 8-1

48. A Grower who is not an 'STS taxpayer' may claim tax deductions for the revenue expenses set out in the following table. For '**2003 Growers**', deductions shown for Years 1, 2 and 3 are those deductions allowable in the income years ended 30 June 2003, 2004 and 2005 respectively. For '**2004 Growers**', deductions shown for Years 1, 2 and 3 are those deductions allowable in the income years ended 30 June 2004, 2005 and 2006 respectively.

Fee Type	ITAA 1997 Sections	Year 1	Year 2	Year 3
Establish't Fee	8-1	\$2,750 See Notes (i) & (ii) (below)		
Interest on loans with FEA Ltd	8-1	As incurred See Note (iii) (below)	As incurred See Note (iii) (below)	As incurred See Note (iii) (below)
Insurance, Land Tax and Rates	8-1	As incurred See Note (iv) (below)	As incurred See Note (iv) (below)	As incurred See Note (iv) (below)
Stamp duty on lease	25-20	As incurred See Note (v) (below)	Nil	Nil

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (e.g. input tax credits): Division 27. See Example at paragraph 112.
- (ii) The Establishment fee is for 'seasonally dependent agronomic activities' and is deductible in the income year in which it is incurred;
- (iii) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than FEA Ltd, the internal financier, is outside the scope of this Ruling. However all Growers, including those who finance their participation in the Project other than with FEA Ltd, should read the discussion of the prepayment

rules in paragraphs 75 to 81 (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;

- (iv) The insurance, land tax and rates associated with the afforestation activities relate to the gaining of income from the Grower's business of afforestation, and hence have a sufficient connection to the operations by which income is to be gained from this business. They will thus be deductible under the first limb of section 8-1; and
- (v) The stamp duty incurred in relation to the Lease is deductible under section 25-20. The expenditure is incurred in preparing, registering or stamping a lease over property used solely for the purpose of producing assessable income.

Tax outcomes for Growers who are 'STS taxpayers'

Assessable Income

Section 6-5 and section 328-105

49. 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.

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

Deductions for Establishment fee, Lease fees, and Interest

Section 8-1 and section 328-105

51. A Grower who is an 'STS taxpayer' may claim tax deductions for the revenue expenses set out in the following table. For '**2003 Growers**', deductions shown for Years 1, 2 and 3 are those deductions allowable in the income years ended 30 June 2003, 2004 and 2005 respectively. For '**2004 Growers**', deductions shown for Years 1, 2 and 3 are those deductions allowable in the income years ended 30 June 2004, 2005 and 2006 respectively.

Fee Type	ITAA 1997 Sections	Year 1	Year 2	Year 3
Establish't Fee	8-1	\$2,750 See Notes (vi), (vii) & (viii) (below)		
Interest on loans with FEA Ltd	8-1	As incurred See Note (vii) & (ix) (below)	As incurred See Note (vii) & (ix) (below)	As incurred See Note (vii) & (ix) (below)
Insurance, Land Tax and Rates	8-1	As incurred See Note (vii) & (x) (below)	As incurred See Note (vii) & (x) (below)	As incurred See Note (vii) & (x) (below)
Stamp duty on lease	25-20	As incurred See Note (xi) (below)	Nil	Nil

Notes:

- (vi) 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). See Example at paragraph 112;
- (vii) 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;
- (viii) The Establishment fee is for 'seasonally dependent agronomic activities' and is deductible in the income year in which it is incurred;
- (ix) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than FEA Ltd, the internal financier, is outside the scope of this Ruling. However all Growers, including those who finance their participation in the Project other than with FEA Ltd, should read the discussion of the prepayment rules in paragraphs 75 to 81 (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;

- (x) The insurance, land tax and rates associated with the afforestation activities relate to the gaining of income from the Grower's business of afforestation, and hence have a sufficient connection to the operations by which income is to be gained from this business. They will thus be deductible under the first limb of section 8-1; and
- (xi) The stamp duty incurred in relation to the Lease is deductible under section 25-20. The expenditure is incurred in preparing, registering or stamping a lease over property used solely for the purpose of producing assessable income.

Tax outcomes that apply to all Growers

Deferral of losses from non-commercial business activities

Division 35

Section 35-55 – Commissioner's discretion

52. For a Grower who is an individual and who enters the Project as a 2003 Grower or a 2004 Grower the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. For both 2003 and 2004 Non-Electing Growers, under paragraph 35-55(1)(b) the Commissioner will decide for the income years ending **30 June 2003 to 30 June 2015** 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.

53. 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 99 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
- a 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)).

54. 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.

55. 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 subsection 35-55(1) as an indication that the Tax Office sanctions or guarantees the Project or the product to be commercially viable. An assessment of the Project or the product from this perspective has not been made.

Section 82KL, and Part IVA

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

- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Explanations

Is the Grower carrying on a business?

57. For the amounts set out in the Tables above to constitute allowable deductions the Grower's afforestation activities as a participant in the Forest Enterprises Plantation Project 2003 must amount to the carrying on of a business of primary production.

58. Where there is a business, or a future business, the gross proceeds from the sale of the wood produce will constitute gross assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income.

59. For schemes such as that of the Forest Enterprises Plantation Project 2003, 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* 84 ATC 4929.

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

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

61. In this Project, each Grower enters into a Management Agreement and a Lease.

62. Under the Lease each individual Grower will have rights over a specific and identifiable area of 0.5 of a hectare of land. The Lease provides the Grower with an ongoing interest in the specific trees on the leased area for the term of the Project. Under the lease the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose. The lease allows the Manager come on to the land to carry out its obligations under the Management Agreement.

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

64. The Manager is also engaged to harvest and sell, on the Grower's behalf, the wood produce grown on the Grower's Woodlot.

65. 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.

66. 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 the wood produce 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.

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

68. The Manager's services are also consistent with general silvicultural practices. They are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses. While the size of a Woodlot is relatively small, it is of a size and scale to allow it to be commercially viable (see Taxation Ruling IT 360).

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

70. The afforestation activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. For the purposes of this Ruling, the Growers' afforestation activities in the Forest Enterprises Plantation Project 2003 will constitute the carrying on of a business.

The Simplified Tax System

Division 328

71. 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.

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

Deductibility of Establishment and Lease Fees

Section 8-1

73. Consideration of whether the initial Establishment fee is 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.

74. The fees payable under the Management Agreement and Lease are associated with the afforestation activities. The fees will relate to the gaining of income from the Grower's business of afforestation (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of wood produce) is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fees are identifiable from the arrangement. The fees appear to be reasonable. The Establishment Fee has no capital component. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Prepayment provisions

Sections 82KZL to 82KZMG

75. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (e.g. the performance of management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

76. For this Project, only section 82KZL (an interpretive provision) and sections 82KZME, 82KZMF and 82KZMG are relevant. Subject to section 82KZMG, if the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for

prepaid expenditure under section 82KZMF using the formula in subsection 82KZMF(1). These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

Sections 82KZME and 82KZMF

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

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

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

79. 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 other than FEA Ltd. 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.

80. 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.

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

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

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

Section 82KZMG

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

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

- incurred on or after 2 October 2001 and on or before 30 June 2006; and
- the eligible service period must be 12 months or shorter and must end on or before the last day of the year of income after the expenditure year; and
- for the doing of a thing under the agreement that is not to be wholly done within the expenditure year.

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

- it must be an agreement for planting and tending trees for felling; and
- be an agreement where the taxpayer does not have day to day control over the operations arising out of the agreement. (A right to be consulted or to give

directions does not equate to day to day control for the purposes of this requirement); and

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

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

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

Application of the prepayment provisions to this Project

88. Under the Management Agreement, a Grower incurs an Establishment Fee in Year 1 consisting of expenditure of \$2,750 per Woodlot for 'seasonally dependent agronomic activities'.

89. As the requirements of section 82KZMG have been met, a deduction is allowable in the same income year in which the expenditure is incurred under the Management Agreement for 'seasonally dependent agronomic activities'.

Interest deductibility

Section 8-1

(i) Growers who use FEA Ltd as the finance provider

90. Some Growers may finance their participation in the Project through a loan facility with FEA Ltd. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of fees incurred under the Management Agreement and the Lease.

91. The interest incurred for the year ended 30 June 2003 or 30 June 2004, for 2003 and 2004 Growers respectively, and in subsequent years of income will be in respect of a loan to finance the Grower's business operations - the cultivation and growing trees and the lease of the land on which the trees will have been planted - that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

92. In the absence of any application of the prepayment provisions (see paragraphs 75 to 81), the timing of deductions for interest will again depend upon whether a Grower is an 'STS taxpayer' or is not an 'STS taxpayer'.

93. If the Grower is not an 'STS taxpayer', interest is deductible in the year in which it is incurred.

94. If the Grower is an 'STS taxpayer' interest is not deductible until it has been both incurred and paid, or is paid for the Grower. If interest 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.

(ii) Growers who DO NOT use FEA Ltd as the finance provider

95. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than FEA Ltd 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.

96. While the terms of any finance agreement entered into between relevant Growers and such financiers are subject to commercial negotiation, those agreements may require interest to be prepaid. Alternatively, a Grower may choose to prepay such interest. Unless such prepaid interest is 'excluded expenditure' any tax deduction that is allowable will be subject to the prepayment provisions of the ITAA 1936 (see paragraphs 75 to 81).

Deferral of losses from non-commercial business activities

Division 35

97. 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.

98. 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.

99. 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.

100. 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.

101. 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).

102. 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

the activity of a Grower who acquires the minimum allocation of one Woodlot in the Project will not pass one of the tests. Growers who acquire more than one interest in the Project may however, find that their activity meets one of the tests.

103. Therefore, 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.

104. 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.

105. Information provided with this Product Ruling indicates that a 2003 Grower and a 2004 Grower who acquires the minimum investment of one Woodlot in the Project is expected to be carrying on a business activity that produce a taxation profit, for the income years ended 30 June 2012 and 30 June 2016.

106. The Commissioner will decide for such a 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 2015. The taxation profit that is projected in the income year ended 30 June 2012 for a 2003 Grower and a 2004 Grower does not affect the period of the Commissioner's discretion as it is considered to be a 'one-off' events that is specific to the afforestation industry.

107. 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 52), in the manner described in the Arrangement (see paragraphs 14 to 40). If so, this Ruling, and specifically the decision in relation to subsection 35-55(1), 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) will apply in such changed circumstances.

108. 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 FEA Plantations; and
- independent, objective, and generally available information relating to the afforestation industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by FEA Plantations.

Losses and Outgoings incurred under Certain Tax Avoidance Schemes

Section 82KL - recouped expenditure

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

Part IVA - general tax avoidance provisions

110. 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).

111. The Forest Enterprises Plantation Project 2003 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 48 and 51 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.

112. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the wood produce. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There 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

Example - Entitlement to GST input tax credits

113. 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 2002, 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 1/1/2003 to 30/6/2003	\$4,400*
Carrying out of upgrade of power for your vineyard as quoted	<u>\$2,200*</u>
Total due and payable by 1 January 2003 (includes GST of \$600)	<u>\$6,600</u>

*Taxable supply

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

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

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

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

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

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

In preparing her income tax return for the year ended 30 June 2003, Susan is aware that the management fee is deductible in the year incurred. She calculates her management fee deduction as \$4,000 (not \$4,400).

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

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Commissioner of Taxation**9 April 2003***Previous draft:*

Not previously issued in draft form

Related Rulings/Determinations:

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

Subject references:

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

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZME
- ITAA 1936 82KZME(1)
- ITAA 1936 82KZME(2)
- ITAA 1936 82KZME(3)
- ITAA 1936 82KZME(4)
- ITAA 1936 82KZME(7)
- ITAA 1936 82KZMF
- ITAA 1936 82KZMF(1)
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NO: 2002/01785

ISSN: 1441-1172