



PR 2004/13 - Income tax: 2004 Timbercorp (Single Payment) Timberlot Project - Post 30 June Growers

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 This document has changed over time. This is a consolidated version of the ruling which was published on 4 February 2004



Product Ruling

Income tax: 2004 Timbercorp (Single Payment) Timberlot Project – Post 30 June Growers

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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 investment 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 law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the '2004 Timbercorp (Single Payment) Timberlot Project' or simply as 'the Project'.

Tax law(s)

2. The tax laws dealt with in this Ruling are:
- Section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - Section 8-1 (ITAA 1997);
 - Section 17-5 (ITAA 1997);
 - Section 25-25 (ITAA 1997);
 - Division 27 (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 - 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 'Post-30 June Grower' or 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 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 'Post-30 June Growers' or '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;
- persons who participate in the Project through offers made other than through the Product Disclosure Statement; and
- Timbercorp Securities Limited and its associates.

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.

10. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no Product Ruling may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

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Date of effect

11. This Ruling applies prospectively from 4 February 2004 the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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 2007. 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 persons' 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 16 January 2004;
- Draft Product Disclosure Statement ('PDS'), provided on 16 January 2004, for the 2004 Timbercorp (Single Payment) Timberlot Project, undated, prepared for Timbercorp Securities Limited A.C.N. 092 311 469 ('TSL'), ('the Responsible Entity');
- The **Constitution** of the 2004 Timbercorp (Single Payment) Timberlot Project, undated, received on 16 January 2004;
- The Draft Compliance Plan of the 2004 Timbercorp (Single Payment) Timberlot Project, undated, received on 29 October 2003;
- Draft **Management Agreement (Post 30 June Growers)** between each Grower and TSL undated, received on 16 January 2004;
- Draft Plantation Services Agreement (Post 30 June Growers) between TSL and Timbercorp Forestry Pty Ltd A.C.N. 070 952 742, undated, received on 29 October 2003;
- Draft **Sub-lease - Victoria (Post 30 June Growers)** between each Grower and TSL, undated, received on 16 January 2004;
- Draft **Sub-lease - West Australia (Post 30 June Growers)** between each Grower and TSL, undated, received on 29 October 2003;
- Draft **Sub-lease - South Australia (Post 30 June Growers)** between each Grower and TSL, undated, received on 29 October 2003;
- Draft Master Lease and Forest Property Agreement between Timbercorp Lands Pty Ltd A.C.N. 085 886 835 ('the Owner'), and TSL, undated, received on 29 October 2003;
- Draft Custody Agreement between TSL and the Custodian, received on 29 October 2003; and

- Draft Finance Package which includes the **Loan Application Form** and Loan Explanation and Loan Terms, undated, received on 29 October 2003.

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 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. In this Ruling the term 'associate' has the meaning given by section 318 of the ITAA 1936. The effect of these agreements is summarised as follows.

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

Overview

17. The salient features of the 2004 Timbercorp (Single Payment) Timberlot Project for Post 30 June Growers are as follows:

| | |
|---|--|
| Location | Victoria, South Australia, and Western Australia. |
| Type of business to be carried on by each participant | Commercial growing and cultivation of <i>Eucalyptus globulus</i> trees for the purpose of harvesting and selling the timber. |
| Number of hectares offered for cultivation | 4,000, with capacity for oversubscription. |
| Size of each 'Timberlot' | 0.33 to 0.4 hectares |
| Minimum allocation | 3 'Timberlots' (TSL may allocate less at its absolute discretion.) |
| Minimum subscription | None |
| Number of trees per hectare | Between 733 and 933 |
| Term of the Project | 8-12 years. |
| Initial cost for 3 'Timberlots' | \$9,240 |
| Initial cost per hectare | \$9,240 |

| | |
|---------------------------|---|
| Ongoing costs per hectare | Rent - 3.3% of 'Net Proceeds', defined to mean 'Proceeds' (clause 1.1 Constitution) from the sale of 'Wood' less all 'Harvesting' and 'Delivery' costs. 'Plantation Services' fee – 3.3% of 'Net Proceeds'. |
| Other costs | To the extent that they have not been deducted from the purchase price payable for the sale of the 'Wood', the prescribed proportion of the harvest, delivery and other costs; To the extent that they have not been deducted from the purchase price payable for the sale of the 'Wood', a harvest supervision fee of 3.575% of the 'Net Proceeds' payable to the Grower; An amount equal to 1/3 of net proceeds payable to the Grower in excess of net sale proceeds per Timberlot forecast in the PDS less allowance for inflation and indexed; and insurance. |

18. The Project will be registered as a managed investment scheme under the *Corporations Act 2001*. Applications to participate in the Project must be made on the Application Form shown in the PDS. There is no minimum amount that must be raised under the PDS. A Custodian will be appointed under the Custody Agreement to protect the interests of the Post 30 June Growers in their dealings with TSL.

19. Under a Power of Attorney contained on the Application Form, Applicants that are accepted to participate in the Project will enter into agreements with TSL and its associates to establish, manage and harvest *Eucalyptus globulus* (Tasmanian Blue Gum) for the purpose of sale as woodchips for paper production.

20. Applications of Growers accepted on or after 1 July 2004 and on or before 30 June 2005, will commence participation as Post 30 June Growers. **This Ruling only applies in respect of Post 30 June Growers. Note that a separate Product Ruling has been issued for Growers who are accepted before 1 July 2004.**

21. Post 30 June Growers entering into the Project will sub-lease land from TSL, in Victoria, South Australia, or in Western Australia.

The Sub-lease is for a term expiring on the earlier of 30 June 2017 or the completion of harvesting (the 'Harvest').

22. The minimum area of land that will be sub-leased by each Grower is 3 'Timberlots' of between 0.33 and 0.40 hectares, although TSL reserves the right to accept applications for less than 3 'Timberlots'.

23. At least 95% of the land to be allocated as 'Timberlots' for the Project must meet the following specifications:

- it must be within 150 km from either Bunbury or Albany, Western Australia or 200 km from Portland, western Victoria;
- it must receive more than 650mm average annual rainfall; and
- it must have been cleared and pastured for at least 5 years or previously used for plantation forestry.

24. A Post 30 June Grower will also enter into a Management Agreement with TSL to have suitable Eucalyptus seedlings planted on their 'Timberlot' for the purpose of felling and sale in approximately 8-12 years after planting. For a Post 30 June Grower, TSL will establish the 'Timberlot' during the optimal planting season on or before 30 June 2005. Under the Management Agreement TSL will also cultivate the 'Trees' and be responsible for harvesting, processing and selling Grower's 'Wood'. A Post 30 June Grower appoints TSL as its sole agent to market and sell their 'Wood'.

Constitution

25. The Constitution establishes the Project and operates as a deed binding all of the Post 30 June Growers (clause 7.6) and TSL. The Constitution sets out the terms and conditions under which TSL agrees to act as Responsible Entity and thereby manage the Project.

26. Under clause 4 of the Constitution TSL holds the Application Moneys on bare trust. TSL accounts for the Application Moneys in a special trust account and deposits the money into a bank account solely for Application Moneys for this Project. Once TSL is satisfied that all documents have been executed and any finance has been approved for an applicant, the Application Moneys are released and applied against the fees due to TSL (clause 8.3).

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

- invitations and offers under the PDS (clause 2);

- appointment of TSL as the Grower's irrevocable agent, representative and attorney (clause 3);
- procedures relating to Applications (clause 5);
- the discretion of TSL to refuse an Application within 15 days of receipt of the Application (clause 6);
- the effect of an Applicant's Application being accepted by TSL (clause 7);
- preparation and execution of the Sub-lease, and Management Agreement by TSL and release of the Application Moneys (clause 8);
- entry by TSL into a Wood Purchase Agreement on behalf of the Grower (clause 9);
- preparation and issuing of 'Timberlot Statements' to Growers and the setting up and maintenance of a Register of Growers (clause 10);
- TSL's powers and covenant (clause 11);
- the keeping of a separate agency account for the holding of 'Proceeds and any other money', apart from Application Money and interest thereon, that TSL may hold for the Grower (clause 12);
- the right of TSL to be paid fees and other expenses (clauses 13 and 16);
- the status, the retention by TSL, and termination by TSL or the Growers, of the Management Agreement or Sub-lease (clause 16A). This includes the right of Growers to obtain a copy of the above agreements by written request to TSL (clause 16A.1);
- the right of Growers to inspect certain documents related to their participation in the Project and to offer and give opinions to TSL (clause 17.1);
- the assignment and transmission of 'Timberlots' (clause 18) and restrictions on such assignments and transmissions (clause 19);
- distributions from the 'Agency Account' of 'Proceeds' to Growers and to 'Insured Growers' and pooling of amounts (clause 23);
- resolution of complaints made by the Grower in relation to the Project or TSL (clause 24); and
- termination of the Project (clause 25).

28. Although Clause 5.4 provides that Growers may pay the Application Moneys by instalments **this Product Ruling does not apply to any Grower who enters into an arrangement to pay their Application Moneys by instalments.**

Compliance Plan

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

Head Lease and Forest Property Agreement

30. Land for the Project will either be owned by a Timbercorp Limited subsidiary and leased to TSL or leased directly to TSL by an unrelated land owner. In either case, the owner and TSL will enter into a Lease and Forest Property Agreement which will set out the terms and conditions under which the Owner leases this land to TSL.

Sub-lease

31. Growers enter into a Sub-lease with TSL. Under clause 3 TSL grants a Sub-lease to the Grower of a 'Timberlot'(s) for the purpose of growing, tending and harvesting a plantation(s) of eucalyptus trees.

32. There are three alternative Sub-lease Agreements depending on whether the land is located in South Australia, Western Australia or Victoria. Each is conditional upon the Grower entering into the Management Agreement (clause 4.2). It is also conditional upon TSL receiving approval from the Western Australian Planning Commission (in respect of land in Western Australia) and any local, state or Commonwealth government approvals, if required (clause 4.1).

33. Under sub clause 13 of each Sub-lease Agreement TSL acknowledges that the 'Trees' are the property of the Grower during the Term of the Sub-lease and under sub clause 13.2 TSL grants the Grower certain other rights. The rights and interests granted to the Grower under clauses 13.1 and 13.2 constitute a proprietary interest in the Growers 'Timberlot(s)' (clause 13.3).

34. The Sub-lease also sets out:

- its Term (Part 3 of the Schedule);
- the Rent payable by Growers (Part 4 of the Schedule);

- the obligations and rights of the Grower (clauses 6 and 8) and the obligations and rights of TSL (clause 7 and 9); and
- provisions relating to early termination of the Sub-lease by the Grower or TSL (clause 11) and the rights and obligations of the parties following such termination (clause 12).

Management Agreement

35. Under clause 3 of the Management Agreement a Grower engages TSL as an independent contractor to provide the 'Plantation Services' and, as an agent, to 'Harvest' and sell the 'Wood' on their behalf.

36. Clause 6 of the Management Agreement specifies the 'Plantation Services' that will be carried out by TSL during the term of the Project as being the services and duties as are set out in the Management Plan and as relate to the acquisition of seedlings. These include:

- acquisition of seedlings that will remain the property of the relevant Grower and which, prior to planting, will be separately identifiable as being acquired on behalf of that Grower;
- establishment, tending and maintenance of the 'Trees' in accordance with the Management Plan;
- ensuring the maintenance of appropriate firebreaks on the relevant 'Timberlots';
- ensuring that all reasonable steps are taken to control any plants and animals on or about the relevant 'Timberlots' in accordance with all relevant laws;
- repairing promptly all damage done to any roads, tracks or fences on the relevant 'Timberlots' or on 'Neighbouring Land' resulting from the actions of the Responsible Entity or its contractors or their respective employees;
- embarking on such operations as may be required primarily and principally to prevent or combat land degradation in relation to the relevant 'Timberlots';
- taking all reasonable steps to avoid interfering with the activities carried out on any 'Neighbouring Land' by the owner or occupier of that land;

- securing the entryways to the relevant ‘Timberlots’ in order to prevent trespassers entering the relevant ‘Timberlots’ and to take such other security measure as it considers appropriate; and
- keeping the specified insurance policies current with a reputable insurer.

37. Under clause 7(a) the Grower engages TSL to act as agent for the sale of their ‘Wood’ for as high a price as it can reasonably achieve. Growers are entitled to receive a proportion of the purchase price payable to all Growers in the Project for the ‘Wood’ sold (clause 7(d)).

38. The ‘Trees’ will be harvested between 30 September 2013 and 30 September 2017 (Part 2 of the Schedule). TSL is responsible for arranging the marketing, harvesting and sale of the ‘Wood’, with the Grower kept informed of the details, including proposed purchase price and harvesting and delivery costs (clause 8).

39. The Management Agreement also sets out:

- the duties and rights of TSL, certain mutual obligations, and the rights of each Grower (clauses 9, 10, and 11);
- the requirement for TSL to provide an annual report to Growers no later than 30 November during each year of the Project. The report must set out the state of the Project and the ‘Trees’ (clause 14);
- provisions dealing with damage to or reduction in the viability of the Grower’s ‘Timberlots’ (clause 17); and
- dispute resolution procedures (clause 19).

Pooling of amounts and distribution of ‘Proceeds’

40. Both the Constitution (sub clause 23.5) and the Management Agreement (sub paragraph 7(d)) set out provisions relating to the pooling of amounts from the sale of the Growers’ ‘Wood’ and the distribution of ‘Proceeds’ from that sale or from insurance proceeds. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed ‘Wood’ or insurance proceeds to the pool making up the ‘Proceeds’ are entitled to benefit from distributions from those ‘Proceeds’; and
- any pooled ‘Wood’ or other ‘Proceeds’ must consist only of ‘Wood’ or other ‘Proceeds’ contributed by ‘Prepayment Growers’ or ‘Post 30 June Growers’

participating in the 2004 Timbercorp (Single Payment) Timberlot Project.

Fees

41. The following fees, **per ‘Timberlot’**, are set out in the Management Agreement and the Sub-leases:

- \$3,080 for ‘Plantation Services’, payable on application;
- Rent of 3.3% of ‘Net Proceeds’;
- ‘Plantation Services’ fee of 3.3% of ‘Net Proceeds’; and
- Other fees and costs are shown above in the Table at paragraph 17.

Plantation Services Agreement (Post 30 June Growers)

42. Under the Plantation Services Agreement TSL sub-contracts to Timbercorp Forestry Pty Ltd the provision of the ‘Plantation Services’ (clause 6). Timbercorp Forestry Pty Ltd must carry out the provision of these services in accordance with an ‘Establishment and Maintenance Plan’ that will be attached to the Plantation Services Agreement (clause 9 and Part 1 of the Schedule).

Finance

43. Growers can fund their involvement in the Project by borrowing from independent sources or from Timbercorp Finance Pty Ltd (‘the Financier’), a lender associated with the Responsible Entity.

44. The Financier will provide Growers with loans on a full recourse basis and will pursue legal action against any defaulting borrowers. Details of the loans that will be offered to Growers by the Financier are set out in the ‘Loan Application Form’ and ‘Loan Explanation and Loan Terms’. These documents are summarised as follows:

- the Financier will lend up to 90% of the Grower’s application amount but, at its discretion, may lend up to 100% of the Grower’s application amount;
- the Financier will provide Growers who subscribe to the minimum subscription amount of three ‘Timberlots’ with a minimum ‘Loan Amount’ of \$5,000;

- the Grower will pay a loan application fee of \$250 to accompany the 'Application Form';
- the Grower may choose from a 3, 4, 5 or 7 year 'Loan Term' with an interest rate, which is fixed for the 'Loan Term';
- The fixed rate of interest will depend on whether the Grower chooses a 3, 4, 5 or 7 year loan;
- the loan is repayable over the 'Loan Term' by equal monthly instalments of principal and interest;
- in the event that any amount is overdue, the Financier may charge interest at the 'Default Rate';
- the Grower is entitled to repay the whole or any part of the 'Total Amount Owed' without penalty for early repayment;
- during the 'Loan Term' the Grower will assign and transfer over to the Financier by way of fixed charge all its rights, title and interest at any time in the Project including 'Timberlots' and the Project Agreements; and
- during the 'Loan Term' the Grower must maintain fire, wind and storm insurance over the 'Timberlots' on a full replacement basis.

45. Growers cannot rely on this Product Ruling if they enter into a finance agreement with the Financier that materially differs from that set out in the 'Loan Application Form' and 'Loan Explanation and Loan Terms' provided to the Tax Office by TSL with the application for this Product Ruling.

46. Growers also cannot rely on this Product Ruling if Application Moneys otherwise remain unpaid by 30 June 2005. Where an application is accepted subject to finance approval by any lending institution, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by 30 June 2005.

47. This Ruling does not apply if the finance arrangement entered into by the Grower with the Financier or any other lender 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 Timbercorp Finance Pty Ltd, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

48. This Ruling applies only to Post-30 June Growers who are accepted to participate in the Project:

- on or after 1 July 2004 and on or before 30 June 2005;
- who have executed a Management Agreement and a Sub-lease Agreement on or between those dates; and
- whose ‘Timberlots’ are established by 30 June 2005.

49. 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.

The Simplified Tax System (‘STS’)

Division 328

50. For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower is an ‘STS taxpayer’. To be an ‘STS taxpayer’ a Grower:

- must be eligible to be an ‘STS taxpayer’; and
- must have elected to be an ‘STS taxpayer’.

Qualification

51. This Product Ruling assumes that a Grower who is an ‘STS taxpayer’ is so for the income year in which their participation in the Project commences. A Grower may become an ‘STS taxpayer’ at a later point in time. Also, a Grower who is an ‘STS taxpayer’ may choose to stop being an ‘STS taxpayer’, or may cease to be eligible to be an ‘STS taxpayer’, during the term of the Project. These are contingencies relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

Assessable Income***Section 6-5 and section 328-105***

52. 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.

53. A Grower who is not an ‘STS taxpayer’ recognises ordinary income from carrying on the business of afforestation at the time that income is derived.

54. A Grower who is an ‘STS taxpayer’ recognises ordinary income from carrying on the business of afforestation at the time that income is received (paragraph 328-105(1)(a)).

Deductions for fees for Plantation Services, Borrowing Costs, and Interest***Section 8-1, section 328-105, and section 25-25***

55. A Grower may claim, on a per ‘Timberlot’ basis, tax deductions for the amounts set out in the Table below.

| Fee Type | Year ended 30 June 2005 | Year ended 30 June 2006 | Year ended 30 June 2007 |
|--|------------------------------------|------------------------------------|------------------------------------|
| Plantation Services | \$3,080 See Note (i) below | | |
| Interest paid to Timbercorp Finance Pty Ltd | As incurred (Non-STS taxpayers) | As incurred (Non-STS taxpayers) | As incurred (Non-STS taxpayers) |

| | Or as paid (STS taxpayers) See Notes (ii) & (iii) below | Or as paid (STS taxpayers) See Notes (ii) & (iii) below | Or as paid (STS taxpayers) See Notes (ii) & (iii) below |
|--|--|--|--|
| Borrowing costs for loans with Timbercorp Finance Pty Ltd | Must be calculated - see Note (iv) (below) | Must be calculated - see Note (iv) (below) | Must be calculated - see Note (iv) (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 Example 1 at paragraph 101.
- (ii) This Ruling does not apply to Growers who choose or who are required to prepay interest under a loan agreement (including loans from lenders other than Timbercorp Finance Pty Ltd). Interest that is prepaid for a period that extends beyond the income year in which the interest is incurred may be subject to the prepayment provisions in sections 82KZME to 82KZMF of the ITAA 1936. Any Grower who prepays interest may request a private ruling on the taxation consequences of their participation in the Project.
- (iii) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling. Growers who borrow from lenders other than Timbercorp Finance Pty Ltd may request a private ruling on the deductibility of the interest incurred.
- (iv) The Loan Application fee payable to Timbercorp Finance Pty Ltd is a borrowing expense and is deductible under section 25-25. It is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Timbercorp Finance Pty Ltd is outside the scope of this Ruling.

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

Section 35-55 – Commissioner’s discretion

56. For a Post-30 June Grower who is an individual and who enters the Project during the year ended 30 June 2005 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 2005 to 30 June 2016 or the income year preceding the ‘Harvest’ (whichever occurs sooner) 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.

57. 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 89 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)).

58. 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.

59. 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) 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.

Sections 82KZME – 82KZMG, 82KL and Part IVA

60. For a Grower who participates in the Arrangement described above and incurs expenditure as required by the Management Agreement, the Sub-lease Agreement and any loan agreement with the

Financier, the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower who participates in the Project does not fall within the scope of sections 82KZME to 82KZMG;
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Explanation

Is the Grower carrying on a business?

61. For the amounts set out in the Table above to constitute allowable deductions the Grower's afforestation activities as a participant in the 2004 Timbercorp (Single Payment) Timberlot Project must amount to the carrying on of a business of primary production.

62. Where there is a business, or a future business, the gross proceeds from the sale of the 'Wood' 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.

63. For schemes such as that of the 2004 Timbercorp (Single Payment) Timberlot Project, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As Taxation Ruling TR 2000/8 sets out, these circumstances have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

64. 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 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 an afforestation business; and
- the weight and influence of general indicators point to the carrying on of a business.

65. In this Project, each Grower enters into a Management Agreement and a Sub-Lease Agreement.

66. Under the Sub-Lease Agreement each individual Grower will have rights over one or more specific and identifiable areas of land, known as a Timberlots. The Sub-Lease Agreement provides the Grower with an ongoing interest in the specific trees on the sub-leased area for the term of the Project. Under the Sub-lease the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose. The Sub-lease allows TSL and the 'Contractor', Timbercorp Forestry Pty Ltd, to come onto the land to carry out their obligations under the Management Agreement and Plantation Services Agreement.

67. Under the Management Agreement TSL is engaged by the Grower to provide 'Plantation Services' on the Grower's identifiable area of land during the term of the Project. Under the Plantation Services Agreement TSL subcontracts the 'Plantation Services' to Timbercorp Forestry Pty Ltd which has provided evidence that it holds the appropriate professional skills and credentials to provide the services to establish and maintain the 'Timberlot' on the Grower's behalf during the 'Term' of the Project.

68. TSL is also engaged to harvest and sell, on the Grower's behalf, the 'Wood' grown on the Grower's Timberlot(s).

69. 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.

70. 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' 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.

71. The pooling of the 'Wood' from the 'Trees' grown on the Grower's 'Timberlot' with the 'Wood' of other Growers in the 2004 Timbercorp (Single Payment) Timberlot Project is consistent with general afforestation practices. Each Grower's proportionate share of the sale proceeds of the pooled 'Wood' will reflect the proportion of the 'Trees' contributed from their 'Timberlot'.

72. Timbercorp Forestry'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 an individual 'Timberlot' is relatively small, it is of a size and scale to allow it to be commercially viable.

73. The Grower's degree of control over TSL as evidenced by the Constitution and Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, TSL is required to provide the Grower with regular progress reports on the Grower's 'Timberlot' and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with TSL in certain instances, such as cases of default or neglect.

74. 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 2004 Timbercorp (Single Payment) Timberlot Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

75. 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.

76. 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 fees for Plantation Services

Section 8-1

77. Consideration of whether the fees for the Plantation Services 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.

78. The fees for Plantation Services associated with the afforestation activities 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 fee is identifiable from the arrangement. The fee appears to be reasonable. There is no capital component of this fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Interest deductibility

Section 8-1

(i) Growers who use Timbercorp Finance Pty Ltd as the finance provider

79. Some Growers may finance their participation in the Project through a loan facility with Timbercorp Finance Pty 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 for Plantation Services under the Management Agreement.

80. The interest incurred for the year ended 30 June 2005 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations - the cultivation and growing of trees and the Sub-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.

(ii) Growers who DO NOT use Timbercorp Finance Pty Ltd as the finance provider

81. 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 Timbercorp Finance Pty 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.

Prepayment provisions

Sections 82KZL to 82KZMG

82. 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.

Application of the prepayment provisions to this Project

83. Under the Arrangement to which this Product Ruling applies the fee for Plantation Services is incurred upon application and is for services to be provided by 30 June 2005. Interest payable to Timbercorp Finance is incurred monthly. Accordingly, the prepayment provisions in sections 82KZME to 82KZMG have no application to this Arrangement. A Grower who is an 'STS taxpayer' can, therefore, claim an immediate deduction for each of the relevant amounts in the income year in which the amount is paid. A Grower who is not an 'STS taxpayer' can claim an immediate deduction for each of the relevant amounts in the income year in which the fee is incurred.

84. However, sections 82KZME and 82KZMF may have relevance if a Grower in this Project prepays interest under a loan agreement (including loan agreements with from lenders other than Timbercorp Finance Pty Ltd). Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

85. As noted in the Ruling section above, Growers who prepay interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

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

86. 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 satisfied; or
- if one of the tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

87. 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.

88. 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 satisfied, the discretion is exercised, or the exception applies.

89. 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.

90. 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).

91. 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 one 'Timberlot' in the Project will not have their activity satisfy one of the tests. Growers who acquire more than one 'Timberlot' may have their activity satisfy one of the tests at the time of 'Harvest'.

92. 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.

93. 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 satisfy one of the tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

94. Information provided with this Product Ruling indicates that a Grower who acquires one or more 'Timberlots' in the Project is expected to be carrying on a business activity that will produce a taxation profit, for the income year in which the wood produce is sold and the 'Harvest' takes place. The 'Harvest' will occur no later than the year ending 30 June 2017. 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 ending 30 June 2016 or the income year preceding the 'Harvest' (whichever occurs sooner).

95. 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 56), in the manner described in the Arrangement (see paragraphs 14 to 47). If so, this Ruling, and specifically the decision in relation to paragraph 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.

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

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

Section 82KL – recouped expenditure

97. 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

98. 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).

99. The 2004 Timbercorp (Single Payment) Timberlot 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 57 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.

100. 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

Entitlement to GST input tax credits

101. 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 2003, 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 1/1/2004 to 30/6/2004 | \$4,400* |
| Carrying out of upgrade of power for your vineyard as quoted | <u>\$2,200*</u> |
| Total due and payable by 1 January 2004 (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 2004, 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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PR 2004/13

Previous draft:

Not previously released in draft form

Related Rulings/Determinations:

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

Subject references:

- advance deductions and expenses for certain forestry expenditure
- carrying on a business
- commencement of business
- fee expenses
- forestry agreement
- interest expenses
- management fees
- non commercial losses
- 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

- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1936 318
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 25-25
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(3)
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(a)
- ITAA 1997 35-55(1)(b)
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Legislative references:

- ITAA 1936 Div 3 Subdiv H Pt III
- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 82KZMG
- ITAA 1936 Pt IVA

Case references:

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