



PR 2005/5 - Income tax: AFM 2005 Softwood Project - Pre 1 July 2005 Growers

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 This document has changed over time. This is a consolidated version of the ruling which was published on *2 February 2005*



Product Ruling

Income tax: AFM 2005 Softwood Project – Pre 1 July 2005 Growers

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Potential participants may wish to refer to the Tax Office's Internet site at <http://www.ato.gov.au> or contact the Tax Office directly to confirm the currency of this Product Ruling or any other Product Ruling that the Tax Office 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 Tax Office **does not** sanction or guarantee this product. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. 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 Tax Office 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 'AFM 2005 Softwood 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 of the ITAA 1997;
- Section 17-5 of the ITAA 1997;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Division 328 of the ITAA 1997;
- Section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- sections 82KZME to 82KZMG of the ITAA 1936; and
- Part IVA of the 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. 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 (that is, 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.

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 2 February 2005, 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 8 November 2004 as constituted by documents provided on 9 November 2004;
- additional correspondence and information provided, including emails, dated 25 November 2004, 17 January 2005 and 20 January 2005;
- Draft Product Disclosure Statement ('PDS'), received on 9 November 2004;
- Draft '**Constitution Australian Forestry Management 2005 Plantation Investment**' undated, received on 9 November 2004;

- The Draft 'Compliance Plan of the Australian Forestry Management 2005 Plantation Investment' undated, received on 9 November 2004;
- Draft '**Forestry Management Agreement**' between Arrow Capital Limited ('Arrow Capital'), Australian Forestry Management Pty Limited ('AFM') and the Grower undated, received on 9 November 2004;
- Draft 'Forestry Management Contract Australian Forestry Management 2005 Softwood Project' ('Forests NSW Agreement') between AFM and Forestry Commission of New South Wales undated, received on 9 November 2004;
- Draft 'Constitution for Australian Forestry Management 2005 Land Trust' undated, received on 9 November 2004;
- Draft 'Compliance Plan for Australian Forestry Management 2005 Land Trust', undated, received on 9 November 2004;
- Draft '**Forestry Right Agreement**' between Arrow Capital (Landowner and Responsible Entity), and the Grower undated, received on 9 November 2004; and
- Draft Finance Package from Arrow Funding Pty Limited ('Arrow Funding') which includes '**Finance Facility (Australian Forestry Management 2005 Softwood Project)**' document undated, received on 9 November 2004.

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.

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 AFM 2005 Softwood Project are as follows:

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Location	Tumut, Tumbarumba, Oberon and Walcha regions of NSW
Plantation Investment	
Type of business to be carried on by each participant	Commercial growing and cultivation of Pinus Radiata trees for the purpose of harvesting and selling the timber
Number of hectares offered for cultivation	Approximately 3500 hectares
Size of each Forestry Right Interest (FRI)	0.5 plantable hectare
Minimum allocation	1 FRI
Minimum subscription	NIL
Number of trees per FRI	500
Term of the Project	26 years approximately
Initial cost per FRI	\$5,500
Ongoing costs per FRI	First Interim Management fee of \$55 plus CPI adjustment. (payable year 13 approximately) Second Interim Management fee of \$110 plus CPI adjustment (payable year 20 approximately) Final Management fee of \$1,760 plus CPI adjustment. (payable year 26 approximately) Licence Fee calculated at 10.45% of net harvest proceeds. (Year 26 approximately)
Land Trust Investment (optional)	
Minimum Trust Unit Allocation	1 unit
Cost per unit	\$500
Term	26 years approximately
Ongoing costs	NIL

18. Under the PDS applicants are invited to participate in the AFM 2005 Softwood Project. Growers joining the Project will enter into a Forestry Management Agreement with AFM as the Manager and Arrow Capital as the Responsible Entity and have the option of investing in units in the associated land trust. Arrow Capital operates

in its role as a Responsible Entity under its Australian Financial Services Licence number 239057.

19. At the same time Growers will enter into a Forestry Right Agreement ('FRA') with Arrow Capital as Landowner and Arrow Capital as Responsible Entity. Under the FRA Growers will be allocated a specific parcel of land which is evidenced by holding the legal title to a Forestry Right Interest ('FRI'). The FRI is similar to a lease and entitles the Growers to produce from the land.

20. AFM will enter into a contract with the Forestry Commission of New South Wales ('Forests NSW') to provide the silvicultural services over the life of the Project. Forests NSW will be responsible for identifying suitable land, land preparation, planting, forest maintenance and harvesting.

21. A FRI is equivalent to 0.5 plantable hectare. The initial cost per FRI is \$5,500 with Growers being required to subscribe to a minimum of one FRI. There is no minimum number of FRIs to be subscribed in order for the Project to proceed. There will be 500 trees per FRI planted within 12 months of execution of the Forestry Management Agreement. There is a guaranteed survival rate of an average of 425 trees per 0.5 plantable hectare across the plantation for the first 12 months after planting.

22. The allotment date is on or before 30 June 2005.

23. As well as entering a Plantation Investment Growers may choose to participate in the Australian Forestry Management 2005 Land Trust ('Land Trust') which will be established to be the ultimate owner of the plantation land. Growers may subscribe to units in the Land Trust at a cost of \$500 per unit. A Grower may subscribe to a minimum of one unit. It will not be compulsory for a Grower to subscribe to the Land Trust.

Forestry Management Agreement

24. The Grower engages AFM to act as an independent contractor to perform forestry services in respect of the FRI. Growers are required to pay \$5,500 per FRI for Initial Establishment Services.

25. Initial Establishment Services are all seasonally dependent agronomic activities to be conducted prior to 30 June 2006. Services include (schedule 1 clause 24):

- site preparation within the approved Code of Practice, comprising, ripping & mounding cultivation, where appropriate, control of competing vegetation and control of noxious weeds and animals;
- provision of cuttings or seedlings equivalent to GF23+ wherever growing conditions are suitable and GF19+ otherwise, as per the Planting Program for each Plantation. Density of planting is to be consistent with

the desired silvicultural outcome (usually 1,000 stems per hectare);

- planting GF23+ equivalent or such lower quality stock approved by the Manager cuttings or seedlings in accordance with the Planting Program; and
- application of fertiliser if considered necessary by the Manager, including the application of boron.

26. The Manager is appointed to market and deal with the plantation produce at each thinning and final harvest. Ongoing forestry services will be performed at all times prior to final harvest:

- managing and maintaining the plantation;
- hazard reduction activities;
- quality control and internal audit of operations;
- assessments and reports on growth and performance as necessary;
- inventory assessments targeted at ages 1 or 2 years, at age 5 years where necessary, age 10 years and harvest;
- maintenance of roads, firebreaks, gates and related infrastructure and fences;
- identification of fire prevention and risk reduction parameters;
- maintenance and repair of roads; and
- rehabilitation of plantation land after final harvest.

27. Under clause 6.6 Growers are considered to have appointed the Manager to act as their agent to market the plantation produce. They authorise the Manager to consolidate and mix the plantation produce of their FRI with that of other growers.

28. Growers are entitled to all the proceeds from sale of the plantation produce net of all costs of harvesting and transportation (clause 6.2).

29. A Grower's share of produce will be calculated by reference to the size of the Grower's FRI compared to the overall size of the plantation land of all Growers, except where the grower is an Affected Grower.

30. An Affected Grower is defined to be a Grower who, in the reasonable opinion of the Manager, has suffered a loss of plantation produce on their FRI (clause 23.1).

31. Affected Growers will have their share of pooled plantation produce reduced by the pro rata amount of plantation produce lost or destroyed from their FRI (Clause 6.6.4).

32. The Manager, as agent for the Grower and at the cost of the Grower, will arrange fire and hail and public liability insurance on an annual basis, having regard to reasonable cost (clause 10). Growers will be required to pay the costs of insurance annually as notified by the manager. Insurance is compulsory for all Growers who obtain finance for their investment through Arrow Funding. For all other Growers insurance is optional.

33. Where the Manager makes a claim under an insurance policy the proceeds received from the claim will be distributed to the Affected Growers within 30 days of receipt by the Manager (clause 10.3).

Forestry Right Agreement ('FRA')

34. An interest in the land is provided to Growers via the FRA between the Landowner, the Responsible Entity and the Grower. The provisions of the agreement are incidental to the Forestry Right Interest ('FRI') with the intent that all the provisions are forestry covenants within the meaning of section 87A of the *Conveyancing Act 1919 (NSW)* (clause 1.1). The Responsible Entity will register each Grower's FRI under the *Real Property Act 1900*.

35. The Landowner is entitled to a one off licence fee equal to 10.45% of the harvest proceeds to which the Grower is entitled from the final harvest (clause 3.2).

36. Where a Grower receives insurance proceeds in respect of the destruction of some or all of the plantation produce on their FRI the calculation of the licence fee will include the amount of any insurance proceeds. The licence fee levied in relation to the insurance proceeds will be payable at the time they are received. The licence fee will continue to be calculated to include any entitlement to actual harvest proceeds at the time of final harvest.

37. The Grower must use the FRI only for approved purposes and must establish, maintain, manage and harvest the plantation in accordance with sound forestry practice (clause 6.1).

38. The FRA grants the Grower the right to maintain, manage and harvest a crop of trees on the FRI (clause 5.1.1). The Grower may also construct roads, tracks, bridges and other facilities on the land with the written consent of the Landowner (clause 5.3). The FRA gives the Grower ownership of all trees on their FRI and all plantation produce from the land (clause 4.1).

39. The Grower must bear the harvesting costs (clause 9.6).

40. The Grower is responsible for rehabilitating the FRI following final harvest (clause 9.1).

41. The Landowner must not do anything on the FRI or on the adjacent land which would materially or adversely affect the plantation (clause 7.8).

Forests NSW Agreement

42. AFM will subcontract with Forests NSW to provide the silvicultural services for the life of the Project (part 1 G) and to act as marketing agent for the Project (clause part 1 H).

43. AFM acknowledges that Forests NSW is not entering into an exclusive arrangement. Forests NSW intends to enter into agreements and arrangements with others in relation to the establishment and maintenance of forests (clause 3.2).

44. Schedule 1 details the forestry services to be provided by Forests NSW under the agreement. Schedule 2 specifies the management fee payable to Forests NSW for the provision of services. An initial management fee is payable at the time the Project is established.

45. Interim management fees are payable at the time of the first and second thinning (years 13 and 20 respectively). A final management fee will be payable after the final harvest (year 26).

Constitution Australian Forestry Management 2005 Plantation Investment ('Plantation Constitution')

46. The Plantation Constitution establishes the Project and operates as a deed binding on all of the Project's Growers and the Responsible Entity (clause 1.3). The Plantation Constitution sets out the terms and conditions under which Arrow Capital agrees to act as Responsible Entity. Growers are bound by the Plantation Constitution by virtue of their participation in the Project. The Responsible Entity is required to establish and maintain a register of Growers (clause 1.6).

47. Under the terms of the Plantation Constitution, until an application is accepted, all application money received will be placed into a bank account in the name of the Responsible Entity and held in accordance with the requirements of the *Corporations Act 2001* (clause 2.5.1). After acceptance the money will be held by the Responsible Entity as an agent, for and on behalf of, each applicant (clause 2.5.2).

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

- applications to be on the form attached to the PDS (clause 2.1);
- appointment of Arrow Capital as the Grower's irrevocable agent, representative and attorney (clause 3.6);
- procedures relating to applications (clauses 2 to 5);
- the discretion of Arrow Capital to refuse an application (clause 3.1);

- the effect of an applicant's application being accepted by Arrow Capital (clause 3.5);
- preparation and execution of the FRA and Forestry Management Agreement by Arrow Capital (clause 3.5);
- establishment and maintenance of a register of Growers (clause 16);
- Arrow Capital's duties, powers and obligations (clause 9);
- the right of Arrow Capital to be paid certain expenses (clause 22);
- resolution of complaints made by the Grower in relation to the Scheme or Arrow Capital (clause 26); and
- termination of the Scheme (clause 25.1).

Compliance Plan Australian Forestry Management 2005 Plantation Investment ('Plantation Compliance Plan')

49. As required by the Corporations Act, Arrow Capital has prepared a Plantation Compliance Plan. The purpose of the Plantation Compliance Plan is to ensure that Arrow Capital manages the Scheme in accordance with its obligations and responsibilities contained in the Plantation Constitution and that the interests of Growers are protected.

Constitution Australian Forestry Management 2005 Land Trust ('Land Trust Constitution')

50. The Land Trust is a unit trust that will be a registered managed investment scheme under Chapter 5C of the Corporations Act. Arrow Capital will act as the trustee for the Land Trust.

51. The Land Trust will acquire from Arrow Capital the land on which the Project will be carried out.

Compliance Plan Australian Forestry Management 2005 Land Trust Investment ('Land Trust Compliance Plan')

52. As required by the Corporations Act, Arrow Capital has prepared a Land Trust Compliance Plan. The purpose of the Land Trust Compliance Plan is to ensure that Arrow Capital manages the Scheme in accordance with its obligations and responsibilities contained in the Land Trust Constitution and that the interests of the unit holders are protected.

Fees

53. The following fees, per **FRI**, are set out in the Forestry Management Agreement and FRA:

- \$5,500 for 'Initial Establishment Services' to be provided by the year ended 30 June 2006, payable on application;
- First Interim Management fee \$55 plus CPI adjustment, payable at the time of first thinning, approximately year 13;
- Second Interim Management fee \$110 plus CPI adjustment, payable at the time of the second thinning approximately year 20;
- Final Management fee \$1,760 plus CPI adjustment, payable at the time of the final harvest, approximately year 26. The Final Management fee will be increased by \$55 per year, plus CPI adjustment, for a maximum of four years where final harvest is delayed beyond year 26; and
- Licence fee on The FRI equal to 10.45% of harvest proceeds.

Finance

54. Growers can fund their involvement in the Project by borrowing from Arrow Funding (a lender associated with the Responsible Entity) or borrow from an independent lender. Finance provided by Arrow Funding will be on a full recourse basis and arm's length commercial terms.

55. Details of the loans that will be offered to Growers by Arrow Funding are set out in the Finance Facility (Australian Forestry Management 2005 Softwood Project) document. The document is summarised as follows:

- Arrow Funding will lend up to 100% of the Grower's application amount;
- Arrow Funding will pay stamp duty and registration fees in relation to the document (clause 13.3);
- the 'Loan Term' is for a period of 10 years;
- the initial interest rate is set at 7.75% fixed for the period up to the interest reset date of 30 June 2010;
- the loan is repayable over the Loan Term of ten years as interest only for the first five years and then interest plus 20% of the principal per annum for the remaining five years. Interest is payable in arrears. Payments are due by 30 June each year;

- interest will be charged on the outstanding balance calculated daily;
- Arrow Funding will obtain security for the finance facility by a mortgage over the Grower's FRIs and/or units in the Land Trust;
- where the Grower is a corporate borrower, unless otherwise advised by Arrow Funding, the directors of the entity will be required to personally guarantee the finance facility.

56. Growers cannot rely on this Product Ruling if they enter into a finance agreement with Arrow Funding that materially differs from that set out in the information provided to the Tax Office with the application for this Product Ruling or if application monies otherwise remain unpaid by 30 June 2005.

57. 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 Arrow Funding, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

58. This Ruling applies only to Growers who are accepted to participate in the Project on or before 30 June 2005 and who have executed a Forestry Management Agreement and a FRA on or before that date. The Grower's participation in the Project must constitute the carrying on of a business of primary production. Investment in the Land Trust will not constitute a business of primary production.

Minimum subscription

59. There is no minimum subscription for the Project. However, 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

60. 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

61. 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

62. That part of the harvest 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.

64. The 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)).

Section 8-1 and section 328-105

66. However, if for any reason, an amount shown or referred to in the Table below 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 below which is not paid in the year in which it is incurred will be deductible in the year in which it is actually paid.

Fee Type	Year ended 30 June 2005	Year ended 30 June 2006	Year ended 30 June 2007
Initial Establishment Services	\$5,500 See Notes (i) & (ii)		
Interest	As incurred (Non-STs taxpayers) Or as paid (STs taxpayers) See Note (iii)	As incurred (Non-STs taxpayers) Or as paid (STs taxpayers) See Note (iii)	As incurred (Non-STs taxpayers) Or as paid (STs taxpayers) See Note (iii)

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27. See Example 1 at paragraph 119.
- (ii) The Initial Establishment Services is expenditure for 'seasonally dependent agronomic activities' under section 82KZMG (see paragraphs 95 to 99) and is deductible in the income year in which it is incurred (where the Grower is **not** an 'STS taxpayer') or the year in which it is paid (where the Grower is an '**STS taxpayer**').

- (iii) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Arrow Funding, the internal financier, is outside the scope of this Ruling. However **all** Growers who finance their participation in the Project should read the discussion of the prepayment rules in paragraphs 87 to 94 (below) as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.

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

Section 35-55 – Exercise of Commissioner's discretion

67. A Grower who is an individual accepted into the Project by 30 June 2005 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for these Growers for the income years ending **30 June 2005 to 30 June 2030**. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

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

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

- 82KZME and 82KZMF do not apply;
- 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?

69. For the amounts set out in the Table above to constitute allowable deductions the Grower's afforestation activities as a participant in the AFM 2005 Softwood Project must amount to the carrying on of a business of primary production.

70. Where there is a business, or a future business, the gross proceeds from the sale of the plantation 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.

71. For schemes such as that of the AFM 2005 Softwood 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.

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

- the Grower has an identifiable interest (by lease or by licence) in the land on which the Grower's trees are established;
- the Grower has a right to harvest and sell the plantation 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.

73. In this Project, each Grower enters into a Forestry Management Agreement and a FRA.

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

75. Under the Forestry Management Agreement the Manager is engaged to provide Forestry Services on the Grower's FRI during the term of the Project. Under the Forests NSW Agreement the Manager subcontracts the Forestry Services to Forests NSW which holds the appropriate professional skills and credentials to provide the services to establish and maintain the afforestation activities on the Grower's behalf during the 'Term' of the Project.

76. The Manager is also engaged to harvest and sell, on the Grower's behalf, the plantation produce grown on the Grower's FRI.

77. 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.

78. 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 plantation produce that will return a before-tax profit, that is, a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

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

80. The Manager and Forests NSW'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 FRI is relatively small, it is of a size and scale to allow it to be commercially viable.

81. The Grower's degree of control over the Manager as evidenced by the Forestry 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 FRI 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.

82. 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 AFM 2005 Softwood Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

83. 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.

84. 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 Initial Establishment Services**Section 8-1**

85. Consideration of whether the fee for Initial Establishment 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.

86. The fees for Initial Establishment Services associated with the afforestation activities will 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 (from the harvesting and sale of plantation 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 the fee for Initial Establishment Services. 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**

87. 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 (eg. 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.

88. 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

89. 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)).

90. 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; and
- 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.

91. 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 Arrow Funding. Although undertaken with an unrelated party, that financing would be an element of the arrangement. The funds borrowed and the resulting 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.

92. 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.

93. 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.

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

94. 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

95. 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).

96. 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.

97. 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.

98. 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. The term 'seasonally dependent agronomic activities' is explained in Taxation Determination TD 2003/12.

99. 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

100. Under the Forestry Management Agreement, a Grower incurs a fee for Initial Establishment Services consisting of expenditure of \$5,500 for 'seasonally dependent agronomic activities'.

101. As the requirements of section 82KZMG have been met, a deduction is allowable in the income year ended 30 June 2005 for the expenditure incurred under the Forestry Management Agreement for 'seasonally dependent agronomic activities'.

102. The Forestry Management Agreement also requires that a Grower incurs Interim Management fees in approximately year 13 and year 20 and a Final Management fee in year 26 for the performance of maintenance services during the term of the Project. Under the FRA a Grower incurs a licence fee of 10.45% of harvest proceeds for each FRI during the term of the Project, payable at the time of final harvest.

103. The Interim and Final Management fees incurred under the Forestry Management Agreement in Years 13, 20 and 26 and the licence fee incurred under the FRA are not prepaid. These fees are charged for providing maintenance services to a Grower until 30 June of the year in which the fees are incurred.

104. On this basis, the basic precondition in subsection 82KZME(2) is not satisfied and, in these circumstances, section 82KZMF will have no application to the Interim and Final Management fees or the Licence Fee.

105. A Grower who is an 'STS taxpayer' can, therefore, claim an immediate deduction for each of the relevant fees in the income year in which the fee is paid. A Grower who is not an 'STS taxpayer' can claim an immediate deduction for each of the relevant fees in the income year in which the fee is incurred.

Interest deductibility

Section 8-1

(i) Growers who use Arrow Funding as the finance provider

106. Some Growers may finance their participation in the Project through a loan facility with Arrow Funding. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of the licence and management fees.

107. 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 trees and the lease (or licence) 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.

108. As with the management fees, in the absence of any application of the prepayment provisions (see paragraphs 87 to 94), the timing of deductions for interest will again depend upon whether a Grower is an 'STS taxpayer' or is not an 'STS taxpayer'.

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

110. 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 Arrow Funding as the finance provider

111. 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 Arrow Funding 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.

112. 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 87 to 94).

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

Section 35-55 – Exercise of Commissioner’s discretion

113. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years **30 June 2005 to 30 June 2030** the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 *Income tax: Division 35 – non commercial business losses*. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years ended 30 June 2005 up to and including 30 June 2030:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35;
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit; and
- a Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

114. The exercise of the Commissioner’s discretion under paragraph 35-55(1)(b) is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Section 82KL – recouped expenditure

115. 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

116. 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).

117. The AFM 2005 Softwood 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 65 to 66 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.

118. 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 plantation 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

119. 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).

Detailed contents list

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Related Rulings/Determinations:

PR 1999/95; TD 93/34;
TD 2003/12; TR 92/1; TR 92/20;
TR 97/11; TR 97/16; TR 98/22;
TR 2000/8; 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

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)
- ITAA 1936 82KZMG
- ITAA 1936 82KZMG(1)
- ITAA 1936 82KZMG(2)
- ITAA 1936 82KZMG(3)
- ITAA 1936 82KZMG(4)
- ITAA 1936 82KZMG(5)
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- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 328
- ITAA 1997 328-105
- ITAA 1997 328-105(1)(a)
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- Commissioner of Taxation v Lau (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55

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- Conveyancing Act 1919 (NSW) Sec 87A
- Real Property Act 1900



ATO references

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