

PR 2005/52 - Income tax: Australian Oak - 2006 Growers

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *13 April 2005*



Product Ruling

Income tax: Australian Oak – 2006 Growers

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Preamble

*The number, subject heading, **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 IVA 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 and how the product fits an existing portfolio. 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 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, 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.

Potential participants may wish to refer to the Tax Office website at 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.

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of persons who take part in the arrangement to which this Ruling refers. In this Ruling this arrangement is sometimes referred to as 'Australian Oak', 'Australian Oak – 2006 Growers' 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);
- section 82KZL of the ITAA 1936;
- section 82KZME of the ITAA 1936;
- section 82KZMF ITAA 1936;
- section 82KZMG ITAA 1936; and
- Part IVA of the ITAA 1936.

Goods and Services Tax

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

Changes in the Law

4. 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 who are 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 (for example being a party to the relevant agreements until their term expires) and deriving assessable income from this involvement. In this Ruling, these persons are referred to as 'Growers'.

8. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion or otherwise do not intend to derive assessable income from it. This Ruling does not apply to Growers who elect to take their own Produce under the Lease and Management Agreement ('Electing Growers').

Qualifications

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

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Date of effect

11. This Ruling applies prospectively from 13 April 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 that private ruling if the income year to which it relates has ended or has commenced but not yet ended. However if the arrangement covered by the private ruling has not commenced, and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2008. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the person's involvement in the arrangement.

Arrangement

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

- Application for Product Ruling for The Australian Oak Project, received 7 February 2005;
- Correspondence, including emails, received 16 February 2005 and 29 March 2005;
- Draft Product Disclosure Statement for Australian Oak Project, received 29 March 2005;
- Draft Constitution for The Australian Oak Project, received 7 February 2005;
- Draft **Lease and Management Agreement** between Timber Lakes (WA) Limited [the 'Responsible Entity'] and the Grower, received 29 March 2005;
- Draft Forestry Expert Report prepared for Timber Laker (WA) Limited [the 'Responsible Entity'], received 8 February 2005; and
- Draft Compliance Plan for The Australian Oak Project 2004, received 7 February 2005.

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

15. The documents highlighted in bold are those that the Growers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or an associate of the Grower will be a party to that are part of the arrangement to which this Ruling applies. All terms capitalised throughout the Product Ruling are defined terms in the documentation received for this Project.

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

Overview

17. This arrangement is called Australian Oak – 2006 Growers.

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Location	Gingin, approximately 115km north of Perth in Western Australia.
Type of business each participant is carrying on	Commercial growing and cultivation of <i>Casuarina cunninghamiana</i> (She-Oak) for the purpose of producing timber.
Number of hectares offered for cultivation	300 hectares offered under this Product Disclosure Statement, with provision for oversubscription.
Size of each interest	0.35 hectares
Number of trees per hectare	650
The term of the investment	Approximately 15 years
Initial cost per Timber Lot	\$4,950
Ongoing costs	<ul style="list-style-type: none"> • Annual Management Fee. • Rent.
Other costs	Insurance premiums arranged by the Responsible Entity for the Leased Area and the Forest Produce.
Out of Harvest Proceeds	<ul style="list-style-type: none"> • Harvesting, processing transporting and sale costs. • Potential Incentive Fee. • 3% of net harvest proceeds for part performance of ongoing services.

18. The Project is registered as a Managed Investment Scheme under the Corporations Act 2001. The Responsible Entity for this Project is Timber Lakes (WA) Limited. The Project land is situated near Gingin, approximately 115km north of Perth in Western Australia.

19. Growers accepted under the Product Disclosure Statement (PDS) will enter into a Lease and Management Agreement with the Responsible Entity. The Responsible Entity will grant a lease to the Grower to enable the Grower to carry on the business of afforestation for the commercial production of *Casuarina cunninghamiana* trees. Under the Lease and Management Agreement, Growers lease an area of land called a 'Timber Lot' for a term of approximately 15 years. Each Timber Lot consists of a minimum of one Timber Lot which is 0.35 hectares in size.

20. Under the Lease and Management Agreement, Growers appoint the Responsible Entity as Manager to manage their Timber Lot. The Manager will perform the services required under the Lease and Management Agreement and will be responsible for the establishment, cultivation, harvesting and sale of the trees.

21. Under the Product Disclosure Statement, the Responsible Entity will offer a maximum of 850 Timber Lots, with provision for oversubscription. There is no minimum subscription for the Project. Each participant may subscribe for one or more Timber Lots at the cost outlined in the table at paragraph 17.

22. Under this offer, Growers may enter the Project in either the year ended 30 June 2005 or 30 June 2006. This Ruling only applies to Growers who acquire a Timber Lot during the year ended 30 June 2006. Growers accepted on or before 30 June 2005 may be covered by Product Ruling 2005/51.

Constitution

23. The Constitution for the Project sets out the terms and conditions under which the Responsible Entity agrees to act for the Growers and to operate the Project. Application monies will be held by the Responsible Entity on trust for the Applicants. Money will be transferred from the Application Fund to the Responsible Entity where the following conditions are satisfied:

- the Lease and Management Agreement is in the form required by this Constitution and has been duly completed and executed by all parties;
- the Lessor has the capacity to grant the Lease;
- the property the subject of the Lease is not subject to any encumbrance or restriction which detrimentally affects the interest of the Applicant and which is not disclosed in the PDS; and
- there are no outstanding material breaches of any of the provisions of this Constitution which are detrimental to the interests of the Applicant whose Application Moneys are to be allocated pursuant to clause 15.

24. The Responsible Entity will keep a register of Growers (clause 20). The Lease and Management Agreement will be executed on behalf of the Grower following them being accepted into the Project.

Compliance Plan

25. The Responsible Entity has prepared a Compliance Plan in accordance with the Corporations Act 2001. Its purpose is to ensure that the Responsible Entity meets its obligations as the Responsible Entity of the Project and that the rights of the Growers are protected.

Interest in land

26. The Lease and Management Agreement commences on the date the Agreement is executed. The Responsible Entity grants a Lease to the Grower under the terms of the Lease and Management Agreement. The Agreement is terminated pursuant to the provisions of the Agreement or on the date of completion of the Project (see paragraph 28).

27. Growers are granted an interest in land in the form of a Lease to use and occupy their Timber Lot for the purpose of planting, growing, maintaining, cultivating and harvesting *Casuarina cunninghamiana* trees. Growers have full right, title and interest in the collectable produce (clause 19.1 of the Lease and Management Agreement). Growers must pay Rent to the Responsible Entity. The amount is paid annually on 30 September each year from the First Period. Rent is indexed annually from the First Period.

Lease and Management Agreement

28. Each Grower enters into a Lease and Management Agreement with the Responsible Entity. The term of the Project is from the date of execution of this agreement until the earlier of the date the harvest of the trees is completed, the termination of the Grower's interest under the Agreement or 30 June 2021, or such later date as determined by the Responsible Entity having regard to sound silvicultural practices.

29. Grower's contract with the Responsible Entity to establish, maintain and manage the Grower's Timber Lot and perform the harvest, processing and sale of the Collectable Produce from the Grower's Timber Lot. Growers must pay an Initial Management Fee on application. An Annual Management Fee is payable on or before 30 September each year after the First Period being from 1 July 2006 to 30 June 2007.

30. The Grower will engage the Responsible Entity to provide the following Initial Services during the First Period:

- carry out weed control of the Leased Area in connection with the planting of the Trees;
- plant on the Leased Area in accordance with good silvicultural and forestry practices, approximately 227 River She-oak seedlings or trees per Timber Lot; and
- cultivate, tend, fertilise, spray, maintain and otherwise care for the Trees as and when required for the establishment of the Trees.

31. The Grower will engage the Responsible Entity to perform the following Ongoing Services:

- cultivate, tend, cull, prune, fertilise, replant, spray, maintain and otherwise care for the Trees as and when required;
- keep in good repair an access road or roads to Leased Area;

- use all reasonable measures by fumigating and poisoning for exterminating and keeping the Lease Area free from rabbits and other vermin and to comply with the provisions of all statutes regulations and by laws and all amendments thereto with respect to the same and any other statutes rules regulations and by laws relating to or affecting the Leased Area of the Grower in respect thereof;
- maintain in good repair and condition adequate fire-breaks in and about the Leased Area;
- maintain the Leased Area according to good silvicultural and forestry practices;
- furnish to the relevant Grower reports as and when required by this Lease and Management Agreement and the Constitution;
- carry out or arrange to be carried out the Harvest and Processing of the Trees in a manner which maximises the return for the relevant Grower; and
- maintain in good repair and condition access to the Timber Lot.

Planting

32. Under the Lease and Management Agreement, the Responsible Entity is required to prepare the land for planting and supply the necessary seedlings or cuttings of *Casuarina cunninghamiana*. The Grower will engage the Responsible Entity to provide these services and to plant the seedlings or cuttings on the Timber Lots by 30 June 2007. Each Timber Lot will be planted with seedlings or cuttings at the rate of 650 per hectare.

Harvesting

33. The Responsible Entity must Harvest and Process or procure a suitably qualified person to Harvest and Process the trees at market rates (clause 16, Lease and Management Agreement). A Grower may elect to sell and market their Collectable Produce. This election must be made within six months of the Commencement Date of the Lease and Management Agreement. An Electing Grower must collect their Collectable Produce on the day specified by the Manager. This Product Ruling does not apply to Electing Growers.

34. All other Growers irrevocably appoint the Responsible Entity to sell the Forest Produce. The Responsible Entity will use all reasonable endeavours to arrange for the sale of the Forest Produce from the clearfelling of the Timber Lot (clause 18, Lease and Management Agreement).

35. The Responsible Entity will place into the Proceeds Fund Bank Account the Gross Proceeds from the sale of the Trees. The Responsible Entity is entitled to deduct from the Proceeds Fund prior to a Grower receiving a distribution:

- costs of Harvesting and Processing;
- costs of Sale;
- the Managers fees of 3% of Gross Proceeds of Sale);
- any outstanding rent;
- Managers Incentive Fee; and
- any other amounts owed to the Manager or Lessor.

36. Upon, the winding up of the Project, the Responsible Entity may retain from the proceeds of realisation of Project Property money to meet future payment obligations which the Responsible Entity reasonably believes will fall due after a distribution is made to Growers and to pay its own remuneration and expenses for work to be done following the realisation of Project Property.

37. The net amount available for each Grower, after all deductions are made by the Responsible Entity under the Constitution and the Lease and Management Agreement, must be paid to the Growers within 15 working days of receipt of the Gross Proceeds of Sale.

Fees

Initial Management Fee

38. All Growers must pay an Initial Management Fee of \$4,950 on application for Initial Services. The amount is payable by cheque to the Responsible Entity in full on application (page 14 of the Draft PDS).

Annual Fee

39. In part consideration for the performance by the Manager of the Ongoing Services, the Grower must pay the Annual Fee of \$330 on or before 30 September each year. This fee is first payable and will be indexed annually commencing in the year after the First Period.

Rent

40. Rent is payable under the Lease and Management Agreement by all Growers. The amount is \$198 for the First Period and then for each subsequent year \$198 indexed from the First Period. The amount is payable on or before 30 September each year.

Other Fees

41. All Growers must pay a fee of 3.3% of the Gross Sale Proceeds, in part performance of the Manager for the Ongoing Services. This fee is payable at any time after the Gross Harvest Proceeds have been paid into the Proceeds Fund and the Net Harvest Proceeds have been determined.

42. All Growers must pay an Incentive Fee to the Responsible Entity if the distributions paid and payable to the Grower exceed the amount defined in Lease and Management Agreement.

Finance

43. Growers may fund their participation in the Project themselves. 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;
- entities involved with the project are involved in the provision of finance to the Grower for this project;
- 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; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

Ruling

Application of this Ruling

44. This Ruling applies only to Growers who are accepted to participate in the Project between 1 July 2005 and 30 June 2006 and who have executed a Lease and Management Agreement by this date. 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. This Ruling does not apply to Electing Growers.

The Simplified Tax System (STS)

Division 328

45. For a Grower participating in the Project, the recognition of income and the timing of tax deductions, including those related to capital allowances, 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

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

Tax outcomes for Growers who are not 'STS taxpayers'

Assessable income

Section 6-5

47. That part of the gross 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.

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

Deductions for Initial Management Fee, Annual Fee and Rent**Section 8-1**

49. A Grower who is not an 'STS taxpayer' may claim tax deductions for the following revenue expenses on a per Timber Lot basis:

Fee Type	ITAA 1997 Section	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Initial Management Fee	8-1	\$4,950.00 See Notes (i) & (ii)		
Annual Fee	8-1			\$330.00 indexed See Notes (i) & (iii)
Rent	8-1		\$198.00 See Notes (i) & (iii)	\$198.00 indexed See Notes (i) & (iii)

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 (for example, input tax credits): Division 27. See Example 1 at paragraph 95.
- (ii) The Initial Management Fee is expenditure for 'seasonally dependent agronomic activities' and is deductible in the income year in which it is incurred (see paragraphs 81 to 88 in the Explanation).
- (iii) Where a Grower who is not an 'STS taxpayer' incurs the Annual Fee and the Rent in the relevant income years shown in the Lease and Management Agreement, those fees are deductible in full in the year they are incurred.

Tax outcomes for Growers who are 'STS taxpayers'**Assessable income****Section 6-5**

50. That part of the gross 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.

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

Deductions for Initial Management Fee and the Annual Fee

Section 8-1 and section 328-105

52. A Grower who is an 'STS taxpayer' may claim tax deductions for the following revenue expenses on a per Timber Lot basis:

Fee Type	ITAA 1997 Sections	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Initial Management Fee	8-1 & 328-105	\$4,950.00 See Notes (iv), (v) & (vi)		
Annual Fee	8-1 & 328-105			\$330.00 indexed See Notes (iv) & (vii)
Rent	8-1 & 328-105		\$198.00 See Notes (iv) & (vii)	\$198.00 indexed See Notes (iv) & (vii)

Notes:

- (iv) 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 95.
- (v) If a Grower pays the Initial Management Fee other than in full on application (see paragraph 88), then the Initial Management Fee will only be deductible to the extent it is paid or has been paid for the Grower, in the year in which it is actually paid.
- (vi) The Initial Management Fee is expenditure for 'seasonally dependent agronomic activities' and is deductible in the income year in which it is paid (see paragraphs 81 to 88 in the Explanation).
- (vii) Where a Grower who is an 'STS taxpayer', pays the Annual Fee and the Rent in the relevant income years shown in the Lease and Management Agreement, those fees are deductible in full in the year that they are paid.

Tax outcomes that apply to all Growers

Interest

53. The deductibility or otherwise of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or other financier is outside the scope of this Ruling. However all Growers who borrow funds in order to participate in the Project, should read the discussion of the prepayment rules in paragraphs 74 to 80 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.

Section 35-55 – Commissioner's discretion

54. A Grower who is an individual and enters the Project during the year ended 30 June 2006 may have losses arising from their participation in the Project that would be deferred to a later income year under the 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 the years ending 30 June 2006 to 30 June 2019. 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 losses arise.

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

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

- expenditure by a Grower does not fall within the scope of sections 82KZME and 82KZMF (but see paragraphs 76 to 80);
- 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?

56. For the amounts set out in the Tables above to constitute allowable deductions, the Grower's afforestation activities as a participant in the Australian Oak project must amount to the carrying on of a business of primary production.

57. Where there is a business, or a future business, the gross proceeds from the sale of the *Casuarina cunninghamiana* 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.

58. For schemes such as that of the Australian Oak 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.

59. 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 Lease) in the land 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.

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

61. Under the Lease and Management Agreement each individual Grower will have rights over a specific and identifiable area of 0.35 hectares of land. The Agreement provides the Grower with an ongoing interest in the specific trees on the licensed area for the term of the Project. Under the Lease the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose. The Lease allows the Responsible Entity to come onto the land to carry out its obligations under the Lease and Management Agreement.

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

63. The Responsible Entity is also engaged to harvest and sell, on the Grower's behalf, the wood produce grown on the Grower's Timber Lot.

64. 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.

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

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

67. The Manager's services are also consistent with general silvicultural practices. They are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses. While the size of a Timber Lot is relatively small, it is of a size and scale to allow it to be commercially viable.

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

69. 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 Australian Oak project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

70. 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.

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

Deductibility of the Initial Management Fee, Annual Fee and Rent***Section 8-1***

72. Consideration of whether the Initial Management Fee, the Annual Fee and Rent 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.

73. The Initial Management Fee, Annual Fee and Rent 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 the Initial Management Fee, the Annual Fee or Rent. 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***

74. 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 (for example, 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.

75. 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

76. 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)).

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

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

78. 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.

79. 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.

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

80. 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

81. 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).

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

- incurred on or after 2 October 2001 and on or before 30 June 2006;
- 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.

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

- it must be an agreement for planting and tending trees for felling;
- 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.

84. 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.

85. 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

86. Under the Lease and Management Agreement, a Grower incurs an Initial Management Fee of \$4,950 for 'seasonally dependent agronomic activities'.

87. As the requirements of section 82KZMG have been met, a deduction is allowable in the income year ended 30 June 2006 for the expenditure incurred under the Lease and Management Agreement for 'seasonally dependent agronomic activities'.

88. 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 if the Grower pays the Initial Management Fee in full on application (see paragraph 52). If the Initial Management Fee is not paid in full on application, it will only be deductible to the extent it is paid or has been paid for the Grower, in the year in which it is actually 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.

Deferral of losses from non-commercial business activities

Division 35

89. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years *30 June 2006 to 30 June 2019*, 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 the income year ended 30 June 2006 up to and including 30 June 2019:

- it's because of its nature, the business activity will not satisfy one of the four tests set out in Division 35;

- there is an objective expectation that within a period that is commercially viable for the afforestation industry, a Grower's 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 year is able to offset that loss against their other assessable income.

90. 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 35-35 to those changed circumstances.

Section 82KL

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

Part IVA

92. 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).

93. The Project will be a 'scheme' commencing with the issue of the Product Disclosure Statement. A Grower will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 47 and 52 that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

94. 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 their 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 are no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing with each other at arm's length, or, if any parties are not at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Example

Example 1 – entitlement to GST input tax credits

95. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her afforestation 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	\$2,200*
Total due and payable by 1 January 2004 (includes GST of \$600)	\$6,600

*Taxable supply

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

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

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; PR 2005/51;
TR 92/1; TR 92/20; TR 97/11;
TR 97/16; TR 98/22; TR 2000/8;
TR 2001/14; TD 93/34;
TD 2003/12

Subject references:

- carrying on a business
- commencement of business
- management fee expenses
- non-commercial losses
- primary production
- primary production expenses
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- taxation administration

Legislative references:

- 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 35-35
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 328

- ITAA 1997 Subdiv 328-F
- ITAA 1997 Subdiv 328-G
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- ITAA 1936 82KZL
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- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZME(1)
- ITAA 1936 82KZME(2)
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- Commissioner of Taxation v. Lau (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

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