



PR 2006/64 - Income tax: BioForest Dual Income Project - 2006 Growers

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 This document has changed over time. This is a consolidated version of the ruling which was published on *3 May 2006*



Product Ruling

Income tax: BioForest Dual Income Project – 2006 Growers

Contents	Para
BINDING SECTION:	
What this Ruling is about	1
Date of effect	12
Withdrawal	16
Scheme	17
Ruling	64
NON BINDING SECTION:	
Appendix 1:	
Explanation	76
Appendix 2:	
Detailed contents list	121

ⓘ This Ruling provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

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 scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document.

If the scheme 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 scheme 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 scheme has been implemented as described below and to ensure that the participants in the scheme 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 entity(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 Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'taxation provision(s)' identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Ruling this scheme is referred to as the 'BioForest Dual Income Project 2006' or simply as 'the Project'.

Relevant Taxation provision(s)

2. The taxation provisions 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;
 - section 25-25 of the ITAA 1997;
 - Division 27 of the ITAA 1997;
 - Division 35 of the ITAA 1997;
 - Subdivision 61-J of the ITAA 1997;
 - Division 328 of the ITAA 1997;
 - Division 328 of the *Income Tax (Transitional Provisions) Act 1997*;
 - section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - section 82KZL of the ITAA 1936;
 - sections 82KZME to 82KZMG of the ITAA 1936; and
 - Part IVA of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

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 taxation legislation enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering participating in the Project are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

Note to promoters and advisers

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for participants in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

Class of entities

7. The class of entities to which this Ruling applies is the entities more specifically identified in the Ruling part of this Product Ruling (refer to paragraphs 64 to 66) and who enter into the scheme specified below on or after the date this Ruling is made. They will have a purpose of staying in the scheme 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 scheme. In this Ruling, these entities are referred to as 'Growers'.

8. The class of entities to whom this Ruling applies does not include entities who:

- are accepted to participate in the Project prior to the date of this Ruling;
- are accepted to participate in the Project after 30 June 2006;
- have their application conditionally accepted by BioForest Ltd subject to finance for the payment of the application fee, where the finance has not been approved by the lender and the funds have not been made available to BioForest Ltd by 30 June 2006;
- enter into finance arrangements with financiers associated with BioForest Ltd other than Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited;
- intend to terminate their involvement in the scheme prior to the completion of the Project; or
- do not intend to derive assessable income from the Project.

Qualifications

9. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 17 to 63.

10. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

12. This Ruling applies prospectively from 3 May 2006, 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. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

13. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Withdrawal

16. This Product Ruling is withdrawn and ceases to have effect after 30 June 2009. The Ruling continues to apply, in respect of the taxation provisions(s) ruled upon, to all entities within the specified class who enter into the scheme specified below. Thus, the Ruling continues to apply to those entities, even following its withdrawal, who entered into the specified scheme prior to withdrawal of the Ruling. This is subject to there being no change in the scheme or in the entities' involvement in the scheme.

Scheme

17. The scheme that is the subject of this Ruling is described below. This scheme incorporates the following documents:

- Application for a Product Ruling as constituted by documents provided on 19 December 2005, 13 January 2006, 1 February 2006, 17 February 2006, 21 February 2006, 21 March 2006 and 19 April 2006 and additional correspondence including emails received 17 February 2006, 21 February 2006, 21 March 2006 and 19 April 2006;
- Draft Product Disclosure Statement for the BioForest Dual Income Project 2006, received 21 March 2006;
- Draft Constitution of the BioForest Dual Income Project 2006, received 17 February 2006;
- Draft **Land Sourcing and Management Agreement** for the BioForest Dual Income Project 2006 between BioForest Ltd (as Grantor and Manager) and the Grower, received 17 February 2006;
- Draft NSW Head Lease Agreement for the BioForest Dual Income Project 2006 between the Lessor and BioForest Ltd (as Lessee), received 1 February 2006;
- Draft **Lease (New South Wales)** for the BioForest Dual Income Project 2006 between BioForest Ltd (as Grantor and Manager) and the Grower, received 23 March 2006;

- Draft **Profit a Prendre (Queensland)** for the BioForest Dual Income Project 2006 between BioForest Ltd (as Grantor and Manager) and the Grower, received 23 March 2006;
- Draft Compliance Plan for the BioForest Dual Income Project 2006 received 13 January 2006;
- Forest Operations Manual December 2005, received 17 February 2006; and
- Draft **Loan Agreements** and loan documents including Application Forms.

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

18. The documents highlighted (in bold) are those that Growers may enter into. For the purposes of describing the scheme 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 scheme to which this Ruling applies.

19. 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

20. The salient features of the BioForest Dual Income Project 2006 scheme are as follows:

Location	North East Coast of New South Wales (NSW) and South East Queensland (QLD).
Type of business each participant is carrying on	Commercial growing and cultivation of: <ul style="list-style-type: none"> • Silky Oak (<i>Grevillea robusta</i>); and • She-oak (<i>Casuarina cunninghamiana</i>); for the purpose of harvesting and selling the produce.
Number of hectares offered for cultivation	2000
Size of each interest (Timberlot)	Approximately 0.5 hectares.
Minimum allocation per Grower	2 Timberlots.
Minimum subscription	200 Timberlots.

Number of trees to be established per hectare	800 Silky Oak trees and 11,400 She-oak trees.
The term of the Project	Approximately 15 years.
Initial minimum cost	\$11,000 for 2 Timberlots
Ongoing and other costs	Management and Maintenance Fees, Rent, Costs of Felling, Costs of Sale, Costs of Processing and Insurance Premiums.

The Project

21. The Project will be a Managed Investment Scheme under the *Corporations Act 2001*. BioForest Ltd (BioForest) will be the Responsible Entity for the Project. BioForest has been issued with Financial Services Licence Number 297650 by ASIC. Offers for interests in the Project will be made under a Product Disclosure Statement. Under the Product Disclosure Statement, the Responsible Entity will offer 4,000 interests of 0.5 hectares in size.

22. The Project involves establishing, cultivating and harvesting Silky Oak and She-oak plantations and the subsequent sale of the plantations' produce. The Project may also involve processing the Silky Oak produce before its sale. The term of the Project is approximately 15 years.

23. BioForest has identified suitable sites for the Project in New South Wales (NSW) and Queensland (QLD). The land was identified using BioForest's site selection criteria and site evaluation procedure, contained in the Forest Operations Manual. In NSW, BioForest has located land in the Northern Rivers Region. When the Project commences and the total land requirements are known, BioForest will purchase the land or acquire leasehold interests for land in NSW, or, for land in QLD, profits a prendre (forest rights). If required further properties in NSW and QLD will be obtained using the site selection and site evaluation procedure.

24. A Grower participating in the Project will enter into a Land Sourcing and Management Agreement with BioForest (as the Grantor). Under the agreement, the Grantor agrees to grant a lease or a profit a prendre in respect of an identifiable area of land to the Grower, within the period of 12 months commencing on the date of execution of the agreement. The area of land which will be approximately 0.5 hectares in size is called a 'Timberlot'.

25. After the lease or profit a prendre of the Timberlot has been granted to a Grower, the Land Sourcing and Management Agreement provides that BioForest (as the Manager) will be responsible for establishing and cultivating trees on the Timberlot. The Manager will plant a minimum of 400 Silky Oak and 5,700 She-oak trees on each Timberlot. The Silky Oak trees will be planted in rows that are 7.0 metres apart with a spacing of 1.8 metres between trees. The She-oak trees will be planted in double rows between the rows of Silky Oaks. The She-oak trees will be planted in double rows 1.75 metres from the Silky Oaks. The double rows will be 1.00 metres apart with a spacing of 0.5 metres between the trees. The Establishment Services must be completed within 12 months of the execution of the Land Sourcing and Management Agreement.

26. The Product Disclosure Statement states that each Grower must subscribe for a minimum of 2 Timberlots at an initial cost of \$5,500 per Timberlot. In addition, the Product Disclosure Statement states that a minimum of 200 Timberlots must be reached before the Project can commence.

27. When a Grower makes an application for Timberlots, the Grower will execute a Power of Attorney enabling BioForest to act on their behalf. This enables BioForest to enter into the Land Sourcing and Management Agreement, Lease and/or Profit a Prendre on behalf of the Grower.

28. Growers 'Applications' accepted on or after the date of this ruling and on or before 30 June 2006 will commence participation as '2006 Growers'. This Ruling only applies in respect of '2006 Growers'. Note that Product Ruling PR 2006/65 may apply to Growers who enter into the Project during the period 1 July 2006 to on or before 31 January 2007.

Constitution

29. The Constitution establishes the Project and operates as a deed binding on all of the Growers and BioForest as the Responsible Entity. The Constitution sets out the terms and conditions under which BioForest agrees to act as the Responsible Entity for the Project. Growers are bound by the Constitution by virtue of their participation in the Project.

30. Under the terms of the Constitution, all moneys received from Growers on application shall be paid to the Responsible Entity. The Responsible Entity shall deposit the moneys into the Application Fund (clauses 3.3 and 5 of the Constitution). The application moneys will be released when the Responsible Entity is reasonably satisfied that certain specified criteria in the Constitution have been met (clauses 5, 7 and 8 of the Constitution).

31. The Responsible Entity will also:

- prepare the Land Sourcing and Management Agreement, Lease and/or Profit a Prendre (clause 6);
- keep a register of Growers (clause 27);
- deposit the proceeds of sale of the timber products into a Proceeds Fund and after the amounts listed in clause 31 are deducted, distribute the Net Proceeds of Sale in accordance with clause 30; and
- provide growers with copies of reports that review the condition of the plantations (clauses 33.6, 33.7 and 33.8).

Compliance Plan

32. As required by the Corporations Act, a Compliance Plan has been prepared for the Project. Its purpose is to ensure that the Responsible Entity manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

Land Sourcing and Management Agreement

33. A Land Sourcing and Management Agreement (Management Agreement) will be entered into between BioForest (as the Grantor and Manager) and the Grower.

34. Under the Management Agreement, the Manager agrees to determine the location of areas of land or Timberlots that will be used by the Grower to carry on a long term commercial afforestation business. The Timberlots will be located in NSW and/or QLD. After the Timberlots are located and within 12 months of the execution of the Management Agreement, the Grantor will grant to the Grower:

- a Lease of the Timberlots, for the Timberlots located in NSW; and/or
- a Profit a Prendre (forest right) for the Timberlots, located in QLD.

35. Under the Management Agreement the Grower appoints BioForest to manage the Grower's Timberlots. The Manager must provide the 'Establishment Services' and 'Services' as specified in the Management Agreement (clauses 1.1 and 5 of the Management Agreement). The Establishment Services that the Manager will provide include:

- ripping and mounding the Timberlots;
- otherwise preparing the Timberlots for planting;

- procurement of sufficient She-oak and Silky Oak seedlings or trees of appropriate size as is reasonably required to complete the Planting Services, described immediately below;
- the Planting Services, where 400 Silky Oak seedlings or trees and 5,700 She-oak seedlings or trees are planted on each Timberlot;
- fertilising the Timberlots;
- spraying the Timberlots; and
- maintaining the Timberlots according to good silvicultural and forestry practices.

36. The Establishment Services will be completed during the 12 month period commencing from the date of execution of the Management Agreement (the Establishment Period). However, these services will only be conducted after a Lease and/or a Profit a Prendre is granted to the Grower for the Timberlots.

37. The Services will be provided from the expiry of the Establishment Period. These include (see the definition of 'Services' in Clause 1.1 of the Management Agreement):

- cultivating, tending, culling, fertilising, replanting, spraying and otherwise caring for the Trees;
- keeping access roads in good repair and condition;
- undertaking pest control measures as required on the Timberlots;
- keeping in good repair and condition adequate firebreaks within the Plantation;
- obtaining reports from an independent forester and forwarding them to the Grower, within 4 months after planting, then every 6 months for the next year and then yearly;
- organising and arranging for the Trees to be clearfelled when they have reached maturity or have otherwise become marketable;
- organising and arranging for the Trees to be thinned and with respect to Silky Oak, if the thinning results in a marketable quantity of forest produce, carrying out any other services as if that thinned forest produce had been clearfelled;
- organising and arranging for the Trees to be pruned as and when the Manager considers appropriate having regard to good silvicultural practice;
- organising and arranging for the Trees to be fertilised as and when the Manager considers appropriate having regard to good silvicultural practice;

- subject to clauses 7 and 8 of the Management Agreement, organising and arranging for the Silky Oak Trees to be processed after they have been clearfelled;
- carrying out any other obligation to be performed by the Manager pursuant to the terms of any agreement entered into by the Manager for the sale of forest produce;
- obtaining all necessary approvals and consents required in relation to the provision of the services listed above; and
- carrying out Land Rehabilitation after clearfell.

38. The Establishment Services are paid for by the Establishment Services fees and the Services are paid for by Management and Maintenance fee (Item 3 in the Schedule to the Land Sourcing and Management Agreement).

Harvesting and Sale

39. The Grower will appoint the Manager to arrange for the harvest and sale of the Forest Produce grown on the Grower's Timberlots (clauses 7 and 8 of the Management Agreement).

40. The Silky Oak trees are expected to be thinned when they are 10 years of age producing a commercial harvest of small sawlogs. They will be clear-felled at approximately 15 years of age. The She-oak trees which re-grow after harvest will be harvested at 2 to 3 yearly intervals until the final harvest at approximately 9 years (a total of 4 harvests).

41. The Manager will use its best endeavours to arrange for the processing of the Silky Oak produce and the sale of all the produce (whether processed or not). In determining whether to process the Silky Oak produce, the Manager will have regard to what is in the best interests of the Growers and consider all other relevant factors (clause 8 of the Management Agreement).

42. The unprocessed produce and if applicable the processed produce from each Grower's Timberlots will be pooled with other Growers' produce from the Project and sold by the Manager on behalf of the Growers. However, the produce will not be pooled with produce from the plantations of other growers outside this Project (clause 30 of the Constitution). The Manager will use its best endeavours to negotiate the sale of the produce for the maximum practicable price available, having regard to relevant factors such as marketable volumes, terms of contract and stability of purchaser (clause 8 of the Management Agreement).

43. The Growers' proceeds from the sale of Forest Produce will be paid into a Proceeds Fund bank account (clause 3.3 of the Constitution). A Grower's Proportional Interest in these proceeds will be distributed to the Grower after deducting the amounts referred to in clause 10 of the Management Agreement. These deductions include:

- the Grower's Proportional Interest of the Costs of Felling, the Costs of Sale and if applicable the Costs of Processing; and
- Rent and Management and Maintenance fees due by the Grower to the Manager.

44. In the event of a partial or total destruction of the Trees on a Grower's Timberlots, and any successful claim made pursuant to a policy of insurance, the Manager will hold the Grower's insurance proceeds in the Proceeds Fund on trust for the Grower. On receipt by the Manager of insurance proceeds, the Manager must determine the Grower's Proportional Interest of the insurance proceeds and as soon as practicable after receipt, the Manager must pay to the Grower any Proportional Interest less any deductions and costs as stipulated under clause 12 of the Lease/Profit a Prendre Agreement (clause 10(e) of the Management Agreement).

45. In the case of partial destruction of a Grower's Timberlot(s) and the remaining Trees being of sufficient quality and quantity to warrant the Project continuing, the Grower's Proportional Interest in the Forest Produce will be reduced to reflect a smaller number of Trees to be harvested by the Manager on the Grower's behalf (clause 12(i) of the Lease/Profit a Prendre).

46. If the Manager determines that amounts in the Proceeds Fund are too small to be distributed, the Manager may postpone distribution of those amounts until it determines that a reasonable amount is available for distribution (clause 30.5 of the Constitution).

Lease and Deed of Profit a Prendre

47. Where the Manager makes a determination under the Management Agreement that a Grower's Timberlots will be located in NSW, the Manager will execute a Lease on behalf of the Grower to lease the Timberlots to the Grower. Where the Manager determines that a Grower's Timberlots will be located in QLD, it will execute a Profit a Prendre on behalf of the Grower to grant a Profit a Prendre of the Timberlots to the Grower. The Manager may also determine that the Grower's Timberlots will be located in both NSW and QLD. In this situation, both a Lease and a Profit a Prendre will be executed on behalf of the Grower.

48. Both the Lease and the Profit a Prendre will give the Grower full right and interest in the Forest Produce and the right to have the produce sold. (clause 11.3 of both the Lease and Deed of Profit a Prendre). The Lease or Profit a Prendre will terminate on the date that the final distribution of the sale proceeds is made to the Grower or on the date the Project is terminated, pursuant to the terms of the Constitution.

49. Each Grower must pay Rent to the Manager for the leasehold interest and/or profit a prendre being an amount as specified in the Schedule to the Lease and the Schedule to the Profit a Prendre.

50. Under both the Lease and Profit a Prendre, among other things, the Grower:

- must not use the Timberlots for any purpose other than commercial silviculture;
- must cultivate and work the Timberlots for the purpose of commercial silviculture;
- shall keep the Timberlots reasonably free of noxious weeds, scrub and undergrowth and prevent erosion or degradation of the Timberlots; and
- shall comply will all laws and regulations relating to the use and occupancy of the Grower's Timberlots.

51. The Manager will arrange for insurance that will be paid for by the Grower, to insure against destruction or damage to each Timberlot. In addition, the Grower may take out additional insurance cover for each of the Grower's Timberlots, at the Grower's own expense (clause 5.4 and clause 12 of both the Lease and Deed of Profit a Prendre).

52. If all or substantially all of the Trees on the Grower's Timberlots are destroyed by fire or other cause, the Management Agreement and Lease/Profit a Prendre will terminate with effect from the time the event causing the destruction or damage occurs. However, the rights of the Manager and Grower will continue until all amounts required to be paid to the Grower out of the Proceeds Fund have been paid.

Fees

53. The Grower must pay the following amounts to the Manager for each Timberlot:

- **Establishment Services fee** of \$5,500 payable on application (item 3 of the Schedule to the Management Agreement);
- **Management and Maintenance fee** of 11% of Net Proceeds of Sale (Item 3 of the Schedule to the Management Agreement).

- Annual **Rent** at the rate of \$192.50 per annum from the date of signing the Lease/Profit a Prendre payable from the Net Proceeds of Sale. The Rent will be indexed annually in accordance with the Consumer Price Index (item 6 of the Schedule to the Lease and Profit a Prendre);
- **Costs of Felling, Costs of Sale** and if applicable the **Costs of Processing** equal to the Grower's Proportional Interest of these costs. These costs are deducted from the Grower's Gross Proceeds of Sale (clause 10 of the Management Agreement);
- Annual **Insurance Premiums** that are applicable to the Timberlot and payable when advised by the Manager (clause 5.4 of both the Lease and Deed of Profit a Prendre).

54. In the event of total destruction of the Grower's Trees on their Timberlots, where the destruction is caused by an event which is not covered by an insurance policy or against which insurance is not available, the Grower will be required to pay annual rent of \$192.50 up to the time of the event plus 11% of the current insurable value of the Timberlots to cover the accrued Management and Maintenance fees at the time the Timberlots are destroyed (clause 12(h)(3) of the Lease/Profit a Prendre).

Finance

55. Growers can fund their involvement in the Project themselves or borrow from an independent lender. All Growers may also choose to borrow from preferred lenders Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited who have entered into arrangements with the Responsible Entity and have agreed to consider applications for finance from prospective Growers.

56. Growers can apply to borrow the Establishment Services fee of \$5,500 per Timberlot from Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited, by completing the relevant Finance Application Form. An application Fee of \$250 plus 0.5% of the amount of the loan is payable on application. This fee may be added to the loan.

57. Momentum Investment Finance Pty Limited will lend on a full-recourse commercial basis under the following arrangements:

- Facility 1 – monthly instalments of principal and interest over 5 years commencing on the first business day of the month following the loan drawdown date
- Facility 2 – monthly payments of interest only for 2 years plus monthly instalments of principal and interest over 3 years commencing on the first business day of the month following the loan drawdown date

- Facility 3 – monthly payments of interest only for 3 years plus monthly instalments of principal and interest over 7 years commencing on the first business day of the month following the loan drawdown date

58. Facilities 1 and 2 are subject to an interest rate of 10.75% per annum and Facility 3 is subject to an interest rate of 11.0% based on current interest rates. The maximum amount of finance that can be received by any Grower is \$250,000. Interest will accrue on the unpaid balance of the loan and is charged monthly in arrears.

59. United Pacific Finance Pty Limited will lend on a full-recourse commercial basis at an interest rate of 10.95% (based on current interest rates) under the following arrangements:

- Facility 1 – monthly instalments of principal and interest over 5 years commencing one month after loan drawdown date
- Facility 2 – monthly payments of interest only for 2 years plus monthly instalments of principal and interest over 5 years commencing one month after loan drawdown date
- Facility 3 – monthly payments of interest only for 3 years plus monthly instalments of principal and interest over 7 years commencing one month after loan drawdown date

60. Interest will accrue on the unpaid balance of the loan and is charged monthly in arrears.

61. The above loans are secured by a registered charge over the Grower's interest in the Project. Normal debt recovery procedures, including legal action, will be taken in the case of defaulting borrowers.

62. This Ruling will not apply to Growers who enter into finance arrangements with Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited, with terms and conditions that differ in any way from those set out in paragraphs 56 to 61.

63. This Ruling also does not apply if a Grower enters into an agreement that 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' will be granted to the borrowers for the purpose of section 82KL of the ITAA 1936, or the funding arrangements transform the Project into a 'scheme' to which Part IVA of the ITAA 1936 may apply;
- the loan terms are of a non-arm's length nature;

- repayments of the principal and 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) back to the lender or any associate;
- 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 the Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited are involved or become involved, in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

64. This Ruling applies only to Growers who:

- are accepted to participate in the Project on or before 30 June 2006; and
- have executed a Land Sourcing and Management Agreement on or before 30 June 2006.

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

66. The Ruling does not apply to:

- Growers whose application has been conditionally accepted by the Responsible Entity subject to finance for the payment of the application fee, where the finance has not been approved by the lender and the funds have not been made available to BioForest by 30 June 2006; or
- Growers who enter into finance arrangements with entities associated with the Responsible Entity other than the finance arrangements described at paragraphs 56 to 61 with Momentum Investment Finance Pty Limited and United Pacific Finance Pty Limited.

Minimum Subscription

67. 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. Under the terms of the Product Disclosure Statement, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 200 interests is achieved.

The Simplified Tax System (STS)***Division 328***

68. To be an 'STS taxpayer', a Grower must be eligible to be an 'STS taxpayer' and must have elected to be an 'STS taxpayer' (Division 328). For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower who was an 'STS taxpayer' prior to 1 July 2005 continues to use the cash accounting method (called the 'STS accounting method') – see sections 328-120 and 328-125 of the *Income Tax (Transitional Provisions) Act 1997*.

69. For such Growers, a reference in this Ruling to an amount being deductible when 'incurred' will mean that amount is deductible when paid and a reference to an amount being included in assessable income when 'derived' will mean that amount is included in assessable income when received.

25% Entrepreneurs tax offset***Subdivision 61-J***

70. For the first income year starting on or after 1 July 2005, Subdivision 61-J provides a 25% tax offset of income tax liability related to the business income of a business in the STS with annual group turnover of less than \$75,000. Entitlement to the offset varies depending on the type of entity and is therefore outside the scope of this Ruling.

Assessable income***Section 6-5***

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

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

Deductions for Establishment Services Fee, Interest and Borrowing Expenses**Section 8-1 and section 25-25**

73. A Grower may claim tax deductions for the revenue expenses specified in the following Table on a per Timberlot basis.

Fee Type	ITAA 1997 Section	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Establishment Services Fee	8-1	\$5,500 See Notes (i) & (ii)		
Interest	8-1	As incurred See Note (iii)	As incurred See Note (iii)	As incurred See Note (iii)
Borrowing Expenses	25-25	See Note (iv)	See Note (iv)	See Note (iv)

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.
- (ii) Under section 82KZMG of the ITAA 1936, the fee for Establishment Services is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 107 to 111) and is deductible in the income year in which it is incurred.
- (iii) Interest paid under a loan agreement with Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited (as described at paragraphs 57 to 61) is deductible in the year in which it is incurred. 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 other than Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited is outside the scope of this Ruling. However, all Growers who finance their participation in the Project should read carefully the discussion of the prepayment rules in paragraphs 99 to 106 as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.

- (iv) The Loan Application Fee (and stamp duty, if applicable) is a borrowing cost and is deductible under section 25-25. It is incurred for borrowing funds that are used or are to be used during the income year solely for income producing purposes. The deduction is spread on a straight line basis, over the period of the loan or 5 years, whichever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited is outside the scope of this ruling.

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

Section 35-55 – Commissioner’s discretion

74. A Grower who is an individual accepted into the Project on or before 30 June 2006 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 2006 to 30 June 2020**. 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.

Section 82KL and Part IVA

75. For a Grower who participates in the Project and incurs expenditure as required by the Land Sourcing and Management Agreement, Lease and/or Profit a Prendre the following provisions of the ITAA 1936 have application as indicated:

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

Commissioner of Taxation

3 May 2006

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Is the Grower carrying on a business?

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

77. Where there is a business, or a future business, the gross proceeds from the sale of the Forest 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.

78. For schemes such as this 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 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.

79. 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 Forest Produce from those trees;
- the afforestation activities are carried out on the Grower's behalf;
- the afforestation activities of the Grower are typical of those associated with a afforestation business; and
- the weight and influence of general indicators point to the carrying on of a business.

80. In this Project, each Grower enters into a Management Agreement and a Lease and/or a Profit a Prendre.

81. Under the Lease and/or a Profit a Prendre each individual Grower will have rights over a specific and identifiable area of a minimum of one hectare of land. The Lease and/or a Profit a Prendre provides the Grower with an ongoing interest in the specific trees on the leased (or licensed) area for the term of the Project. Under the Lease and/or a Profit a Prendre the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose. The Lease and/or a Profit a Prendre allows the Manager to come onto the land to carry out its obligations under the Management Agreement.

82. Under the Management Agreement the Manager is engaged by the Grower to establish and maintain the Timberlots 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 Timberlots on the Grower's behalf.

83. The Manager is also engaged to harvest and sell, on the Grower's behalf, the Forest Produce grown on the Grower's Timberlots.

84. 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.

85. 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 Forest 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.

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

87. 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 Timberlot is relatively small, it is of a size and scale to allow it to be commercially viable.

88. 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 Timberlots and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Manager in certain instances, such as in cases of default or neglect.

89. 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 Project will constitute the carrying on of a business.

The Simplified Tax System

Division 328

90. 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.

91. 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 Establishment Services Fee

Section 8-1

92. Consideration of whether the Establishment Services Fee is deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer is contractually committed to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

93. The Establishment Services fee 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 Forest Produce) is to be gained from this business. It 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 Establishment Services fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Interest deductibility

Section 8-1

(i) Growers who use Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited as the finance provider

94. Some Growers may finance the fee for Establishment Services through a loan facility with Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of the Establishment Services fee.

95. The interest incurred for the first year of participation and subsequent years of income will be in respect of a loan to finance the Grower's business operations 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.

96. In the absence of any application of the prepayment provisions (see paragraphs 99 to 106), interest is deductible in the year in which it is incurred.

(ii) Growers who DO NOT use Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited as the finance provider

97. 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 Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited 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.

98. 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 99 to 106).

Prepayment provisions

Sections 82KZL to 82KZMG

99. 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.

100. For this Project, only section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME, 82KZMF and 82KZMG of the ITAA 1936 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

101. Other than expenditure deductible under section 82KZMG of the ITAA 1936, if the requirements of subsections 82KZME(2) and (3) of the ITAA 1936 are met, the formula in subsection 82KZMF(1) of the ITAA 1936 (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)).

102. The requirements of subsection 82KZME(3) of the ITAA 1936 will be met where the agreement (or scheme) 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 scheme 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.

103. For the purpose of these provisions, the agreement includes all activities that relate to the agreement (subsection 82KZME(4) of the ITAA 1936). This has particular relevance for a Grower in this Project who, in order to participate in the Project may borrow funds from a financier not associated with the Project. Although undertaken with an unrelated party, that financing would be an element of the scheme. The funds borrowed and the resulting interest deductions are directly related to the activities under the scheme. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF of the ITAA 1936.

104. 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) of the ITAA 1936 is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1) of the ITAA 1936. For the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the scheme that is less than \$1,000. Such expenditure is immediately deductible.

105. Where the requirements of section 82KZME of the ITAA 1936 are met, section 82KZMF of the ITAA 1936 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.

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

106. In the formula 'eligible service period' (defined in subsection 82KZL(1) of the ITAA 1936) 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

107. Under section 82KZMG(1) of the ITAA 1936, 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).

108. Subsection 82KZMG(2) of the ITAA 1936 requires that the expenditure is:

- incurred on or after 2 October 2001 and on or before 30 June 2008;
- 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.

109. To satisfy subsection 82KZMG(3) of the ITAA 1936 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.

110. Under subsection 82KZMG(4) of the ITAA 1936 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.

111. Subsection 82KZMG(5) of the ITAA 1936 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

Establishment Services fee

112. Under the Management Agreement, a Grower incurs the Establishment Services fee in the first year. This fee consists of expenditure for 'seasonally dependent agronomic activities'. As the requirements of section 82KZMG of the ITAA 1936 are met, a deduction is allowable in the same income year as the expenditure is incurred.

Interest

113. Growers who borrow funds in order to participate in the Project may either choose, or be required to prepay interest. Where this occurs, section 82KZMF of the ITAA 1936 will apply to apportion the expenditure and allow a deduction over the period in which the prepaid benefits are provided.

114. However, as noted above, prepaid interest of less than \$1,000 incurred in an expenditure year will be excluded expenditure and will not be subject to apportionment under section 82KZMF of the ITAA 1936.

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

Section 35-55 – exercise of Commissioner’s discretion

115. 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 2020** 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 2006 up to and including 30 June 2020:

- 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.

116. 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

117. The operation of section 82KL of the ITAA 1936 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 of the ITAA 1997.

Part IVA – general tax avoidance provisions

118. For Part IVA of the ITAA 1936 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).

119. The 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 paragraph 73 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.

120. 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 Forest 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) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Appendix 2 – Detailed contents list

121. Below is a detailed contents list for this Product Ruling:

	Paragraph
What this Ruling is about	1
Relevant Taxation Provision(s)	2
Goods and Services Tax	3
Changes in the Law	4
Note to promoters and advisers	6
Class of entities	7
Qualifications	9
Date of effect	12
Withdrawal	16
Scheme	17
Overview	20
The Project	21
Constitution	29
Compliance Plan	32
Land Sourcing and Management Agreement	33
Harvesting and Sale	39
Lease and Deed of Profit a Prendre	47
Fees	53
Finance	55
Ruling	64
Application of this Ruling	64
Minimum Subscription	67
The Simplified Tax System (STS)	68
<i>Division 328</i>	68
25% Entrepreneurs tax offset	70
<i>Subdivision 61-J</i>	70
Assessable income	71
<i>Section 6-5</i>	71
Deductions for Establishment Services Fee, Interest and Borrowing Expenses	73
<i>Section 8-1 and section 25-25</i>	73

Division 35 – deferral of losses from non-commercial business activities	74
<i>Section 35-55 – Commissioner’s discretion</i>	74
Section 82KL and Part IVA	75
Appendix 1 – Explanation	76
Is the Grower carrying on a business?	76
The Simplified Tax System	90
<i>Division 328</i>	90
Deductibility of the Establishment Services Fee	92
<i>Section 8-1</i>	92
Interest Deductibility	94
<i>Section 8-1</i>	94
(i) Growers who use Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited as their finance provider	94
(ii) Growers who DO NOT use Momentum Investment Finance Pty Limited or United Pacific Finance Pty Limited as their finance provider	97
Prepayment provisions	99
<i>Sections 82KZL to 82KZMG</i>	99
<i>Sections 82KZME and 82KZMF</i>	101
<i>Section 82KZMG</i>	107
Application of the prepayment provisions to this Project	112
<i>Establishment Services Fee</i>	112
<i>Interest</i>	113
Division 35 – deferral of losses from non-commercial business activities	115
<i>Section 35-55 – exercise of Commissioner’s discretion</i>	115
Section 82KL – recouped expenditure	117
Part IVA – general tax avoidance provisions	118
Appendix 2 – Detailed contents list	121

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

PR 2006/65; TR 97/11; TR 98/22;
TR 2000/8, TR 2001/14; TD 2003/12;

Subject references:

- advance deductions and
expenses for certain forestry
expenditure
- borrowing expenses
- 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
- tax avoidance
- tax benefits under tax avoidance
schemes
- tax shelters
- tax shelters project
- taxation administration

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