



PR 2007/100 - Income tax: Kiri Park Projects - pre 30 June 2008 Growers

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 This document has changed over time. This is a consolidated version of the ruling which was published on *12 December 2007*



Product Ruling

Income tax: Kiri Park Projects – pre 30 June 2008 Growers

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ⓘ This publication 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. 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.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product 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 Product Ruling.

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. Unless otherwise indicated, all legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997). In this Product Ruling the scheme is referred to as 'Kiri Park Projects: 2008 Growers' or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities:

- are subject to the taxation obligations; and
- can rely on the taxation benefits,

set out in the Ruling section of this Product Ruling.

3. The members of the class of entities who are subject to those taxation obligations and who can rely on those taxation benefits are referred to as Growers.

4. Growers will be those entities that are accepted to participate in the scheme specified below as initial participants¹ on or from the date this Product Ruling is made. They will have executed the relevant Project Agreements set out in paragraph 36 of this Ruling on or before 30 June 2008.

5. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- participate in the scheme other than as initial participants;
- are accepted into this Project before 12 December 2007, the date on which this Product Ruling is made, or after 30 June 2008;
- participate in the scheme through offers made other than through the Product Disclosure Statement (PDS);
- have elected to market and sell the timber grown on their Woodlot(s);
- enter into finance arrangements with entities associated with this Project, other than Forestry Finance Limited and Allco Management Investment Limited as trustee of the Gateway Momentum Funding Trust No 1 (Momentum);

¹ For the purposes of this Product Ruling an 'initial participant' means a participant who has obtained their interest in the scheme from the Responsible Entity or the Manager of the scheme.

- enter into finance arrangements with Forestry Finance Limited or Momentum other than the arrangements specified at paragraphs 77 and 80 of this Ruling;
- have their application conditionally accepted by Environmental Forest Farms Management Limited subject to finance for the payment of the Application Price, where the finance has not been approved by the lender and/or the funds have not been made available to Environmental Forest Farms Management Limited by 30 June 2008; or
- have not paid the Application Price by 30 June 2008, where they have not entered into a finance arrangement.

Qualifications

6. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 36 to 84 of this Ruling.

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

- this Product 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 Product Ruling may be withdrawn or modified.

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Superannuation Industry (Supervision) Act 1993

9. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this product may contravene the provisions of SISA 1993.

Date of effect

10. This Product Ruling applies prospectively from 12 December 2007, the date this Product Ruling is made. It therefore applies only to the specified class of entities that enter into the scheme from 12 December 2007 until 30 June 2008, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income years up to 30 June 2010.

11. However the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;
- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

12. 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)).

13. 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 ruling relates has not begun; and
- the scheme to which the ruling relates has not begun to be carried out.

14. 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).

Changes in the law

15. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments to the law may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to the extent of those amendments this Product Ruling will be superseded.

16. Entities who are considering participating in the scheme 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

17. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes 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 Product Ruling is issued.

Goods and Services Tax

18. All fees and expenditure referred to in this Product 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.

Ruling

Application of this Ruling

19. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who enters into the scheme described at paragraphs 36 to 84 of this Ruling.

20. The Grower's participation in the Project must constitute the carrying on of business of primary production. Provided the Project is carried out as described below, the Grower's business of primary production will commence at the time of execution of their Lease and Management Agreement.

21. 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.

Concessions for 'small business entities'²

22. From the 2007-08 income year, a range of concessions previously available under the simplified tax system (STS), will be available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

23. A 'small business entity' can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions, the application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Ruling.

² The meaning of 'small business entity' is explained in section 328-110.

Deduction for the fee for land preparation and tree planting

Section 8-1 and Division 27 of the ITAA 1997 and section 82KZMG of the Income Tax Assessment Act 1936

24. Other than where a 'CGT event'³ happens to their interest within four years of 30 June 2008 (see paragraph 25 of this Ruling), a Grower who is an initial participant in the scheme may claim tax deductions for the following amount on a **per Woodlot** basis.

| Fee Type | 2007-08 income year | 2008-09 income year | 2009-10 income year |
|--|------------------------------------|---------------------|---------------------|
| Fee for land preparation and tree planting | \$5,850 See Notes (i) & (ii) | | |

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 *Income Tax Assessment Act 1936* (ITAA 1936), the fee for land preparation and tree planting is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 103 to 108 of this Ruling) and is deductible in the income year in which it is incurred.

'CGT event' within 4 years for Growers who are 'initial participants'

Section 82KZMGA

25. A deduction for the fee for land preparation and tree planting is not allowable where a 'CGT event' happens in relation to a Grower's interest before 1 July 2012 (subsection 82KZMGA(1) of the ITAA 1936).

26. Where deductions for these amounts have already been claimed by a Grower the Commissioner may amend their assessment at any time within two years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

27. Growers whose deductions are disallowed are still required to include in their assessable income the market value of the interest at the time of the 'CGT event' or the decrease in the market value of the interest as a result of the 'CGT event' (see paragraphs 109 to 111 of this Ruling).

³ Defined in section 995-1.

Deductions for Management Fees, Rent, loan interest and borrowing costs***Sections 8-1 and 25-25 and Division 27 of the ITAA 1997 and sections 82KZME and 82KZMF of the ITAA 1936***

28. A Grower who is an initial participant in the scheme may also claim tax deductions for the following fees and expenses on a **per Woodlot** basis, as set out in the Table below.

| Fee Type | 2007-08 income year | 2008-09 income year | 2009-10 income year |
|---|---|---|---|
| Management Fees | Must be calculated See Notes (i) & (iii) | Must be calculated See Notes (i) & (iii) | Must be calculated See Notes (i) & (iii) |
| Rent | Must be calculated See Notes (i) & (iii) | Must be calculated See Notes (i) & (iii) | Must be calculated See Notes (i) & (iii) |
| Interest on loans with Forestry Finance Limited and Momentum | | As incurred See Note (iv) | As incurred See Note (iv) |
| Loan Establishment Fee | Must be calculated See Note (v) | Must be calculated See Note (v) | Must be calculated See Note (v) |

Notes:

- (iii) The Lease and Management Agreement requires the Management Fees and the Rent to be prepaid. A Grower who acquires the minimum allocation of one Woodlot, will incur prepaid Management Fees of \$665 and prepaid Rent of \$85. These amounts will be deductible in full in the year they are incurred as they are 'excluded expenditure' being less than \$1,000. Refer to paragraphs 94 to 108 of this Ruling for a discussion of the prepayment provisions.

Where a Grower acquires more than one Woodlot, the amount of either or both of these prepaid fees may be \$1,000 or more. Where this occurs, such Growers MUST determine the relevant deduction for the prepaid Management Fee and prepaid Rent according to the formula in subsection 82KZMF(1) of the ITAA 1936.

- (iv) Interest on loans with Forestry Finance Limited and Momentum is deductible in the year in which it is incurred (section 8-1). The deductibility or otherwise of interest arising from agreements entered into with financiers other than Forestry Finance Limited and Momentum is outside the scope of this Ruling. Prepayments of interest to any lender, including Forestry Finance Limited and Momentum are also not covered by this Product Ruling. Growers who enter into agreements with other financiers and/or prepay interest may request a private ruling on the deductibility of the interest incurred (see paragraphs 101 and 102 of this Ruling).
- (v) The Loan Establishment Fee payable to Forestry Finance Limited and the application fee payable to Momentum are borrowing expenses and are deductible under section 25-25. The deduction is spread over the period of the loan or 5 years, which ever is the shorter. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than Forestry Finance Limited and Momentum is outside the scope of this Ruling.

Assessable income from 'CGT events' for Growers who are initial participants

Sections 6-10, 17-5 and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936

29. Where a 'CGT event' (other than a 'CGT event' in respect of a thinning⁴ – see paragraph 33 of this Ruling) happens to the interest held by a Grower who is an initial participant in this Project, the market value of the interest, or the decrease in the market value of the interest, is included in the Grower's assessable income (section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936), less any GST payable on those proceeds (section 17-5 of the ITAA 1997).

30. The amount is included in the Grower's assessable income in the income year in which the 'CGT event' happens (subsection 82KZMGB(2) of the ITAA 1936).

31. 'CGT events' for these purposes include those relating to:
- a **clear-fell harvest of all or part of the trees** grown on the Grower's Woodlot(s);
 - the **sale, or any other disposal** of all or part of the 'interest' in the Project held by the Grower; or

⁴ A thinning of the trees includes a selective harvest of immature trees to facilitate better outcomes at harvest. A thinning differs from a clear fell of a percentage of mature trees which may occur over two or more income years.

- any other 'CGT event' that results in a reduction of the market value of the 'interest' in the Project held by the Grower.

32. Where an amount arising from a 'CGT event' is included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936 the anti-overlap provisions in section 118-20 of the ITAA 1997 will operate to exclude that amount from the capital gains provisions in Part 3-1 of the ITAA 1997.

Amounts received by Growers where the Project trees are thinned

Sections 6-5 and 17-5

33. An amount received by a Grower in respect of a thinning of the trees grown in this Project is not an amount received as a result of a 'CGT event' and is not otherwise assessable under section 82KZMGB of the ITAA 1936. The amount is a distribution of ordinary income that arises as an incident of the Grower holding an interest in the Project. Growers include amounts received for thinning the trees in their assessable income in the income year in which the amounts are derived (section 6-5 of the ITAA 1997) less any GST payable on those proceeds (section 17-5 of the ITAA 1997).

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

Section 35-55 – exercise of Commissioner's discretion

34. A Grower who is an individual accepted into the Project in the 2007-08 income year 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 Growers for the 2007-08 to 2013-14 income years. 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.

Anti-avoidance provisions

Section 82KL and Part IVA

35. For a Grower who commences participation 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:

- 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.

Scheme

36. The scheme that is the subject of this Ruling is specified below. This scheme incorporates the following:

- Application for a Product Ruling as constituted by documents provided on 24 July 2007, 29 August 2007, 13 November 2007, 15 November 2007, 19 November 2007 and 28 November 2007;
- Draft Product Disclosure Statement (PDS) for the 'Kiri Park Projects: 2008 Growers' project issued by Environmental Forest Farms Management Limited (Responsible Entity), received 28 November 2007;
- Draft **Lease and Management Agreement** between Environmental Forest Farms Management Limited (as Responsible Entity) and Powton Land Holdings Limited (the 'Lessor') and the Grower, received 13 November 2007;
- Draft **Constitution** for the Kiri Park Projects, received 24 July 2007;
- Draft Constitution Deed of Variation for the Kiri Park Projects, received 24 July 2007;
- Draft Compliance Plan for the Kiri Parks Projects, received 24 July 2007;
- Independent Foresters report for the Kiri Park Projects, dated 13 November 2007;
- Marketing Agreement between Environmental Forest Farms Management Limited and E.F.F. Limited dated 11 January 2004;
- Finance Package for Forestry Finance Limited including **Loan Agreement** and Application Form, received 28 November 2007; and
- Finance Package for Allco Managed Investment Limited (Momentum) including **Loan Agreement** and loan application documents, received 15 November 2007.

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

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

38. The documents highlighted (in bold) are those that a Grower 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. The effect of these agreements is summarised in the following paragraphs.

39. The main features of the Project are as follows:

| | |
|--|--|
| Location | Regan's Ford, Shire of Gingin, Western Australia |
| Type of business to be carried on by each Grower | Commercial growing and cultivation of <i>Paulownia fortunei</i> (Paulownia) trees for the purpose of harvesting and selling timber |
| Term of the Project | Approximately 10 years |
| Number of hectares offered for cultivation | Approximately 50 hectares |
| Size of each Woodlot | 0.108 hectares |
| Minimum allocation per Grower | 1 Woodlot |
| Minimum subscription | Nil |
| Initial cost | \$6,600 per Woodlot (this includes an amount for prepaid fees) |
| Ongoing and other costs | Annual Rent and Management Fees Annual Insurance Harvesting and Processing Fee Incentive Fee Harvest Marketing Fee |

40. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. Environmental Forest Farms Management Limited has been issued with an Australian Financial Service Licence 239635 and will be the Responsible Entity for the Project.

41. The Project involves the cultivation of Paulownia trees and the harvest and sale of the timber from the trees.

42. The Project will be conducted on land known as 'Kiri Park', at Lot M1254, Hunter Road, Regan's Ford, in the shire of Gingin, Western Australia (approximately 150 kilometres north of Perth). The land for the Project is owned by Powton Land Holdings Limited (the 'Lessor'). Powton Land Holdings Limited is in the process of identifying further suitable land which may be secured in the event of oversubscription, subject to the approval of a Forestry Expert.

43. An offer to participate in the Project will be made through a Product Disclosure Statement (PDS). The offer pertains to 460 Woodlots of 0.108 hectares each. The term of the Project is 10 years. There is no minimum subscription for the Project.

44. An entity that participates in the Project will do so by acquiring an interest in the project on or before 30 June 2008, which will consist of a minimum of one Woodlot.

45. The Woodlots will be planted at the rate of approximately 555 trees per hectares. Water for the Project is available from developed bores and a large dam on the property. The Responsible Entity holds a licence issued by the Waters and Rivers Commission for 1.7 gigalitres of water per annum.

46. The Lessor will provide or arrange to provide the irrigation system in accordance with silvicultural standards suitable for Paulownia plantations.

47. Applicants execute a power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints the Responsible Entity to execute, on behalf of the Grower, the Constitution, the Lease and Management Agreement and any other documents required to hold an interest in the Project.

48. Each Grower will use their Woodlot(s) for the purpose of carrying on a business of cultivating and harvesting Paulownia trees and selling the harvested timber.

49. This Ruling only applies in respect of '2008 Growers', that is, Growers who enter the Project from 12 December 2007, the date this Product Ruling is made, to 30 June 2008.

Constitution

50. The Constitution establishes the Project, and sets out the terms and conditions under which Environmental Forest Farms Management Limited agrees to act as Responsible Entity and manage the Project. Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

51. In order to acquire an interest in the Project, the Grower must make an application for a Woodlot(s) pursuant to the PDS.

52. Under the terms of the Constitution, Application Moneys will be paid into an Application Fund and the proceeds of the sale of Forest Produce will be paid into a Proceeds Fund.

53. The Application Moneys will be released from the Application Fund and applied towards payment of the fees payable under the Lease and Management Agreement when the Responsible Entity is reasonably satisfied that the criteria specified in clause 14 of the Constitution have been met.

Compliance Plan

54. As required by the *Corporations Act 2001*, the Responsible Entity has prepared a Compliance Plan. The purpose of the Compliance Plan 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.

Lease and Management Agreement

55. Growers participating in the scheme will enter into a Lease and Management Agreement with Powton Land Holdings Limited as the Lessor and Environmental Forest Farms Management Limited as the Responsible Entity. Growers are granted an interest in the land in the form of a Lease for a period of 10 years to use their Woodlot for the purposes of conducting their afforestation business until the final distribution of sale proceeds is made to the Grower or until the Project is terminated. Growers are specifically granted rights to harvest timber on their Woodlot for this purpose. The Lease is granted upon the terms and conditions outlined in the Lease and Management Agreement.

56. Under the Lease and Management Agreement each Grower appoints the Responsible Entity to perform the Services and the Responsible Entity accepts the appointment. The Responsible Entity will supervise and manage all silvicultural activity on behalf of the Grower in accordance with good silvicultural practice. Item 8 of the Schedule to the Lease and Management Agreement specifies the Initial Services and On-going Services to be performed by the Responsible Entity.

57. The Initial Services include:

- ploughing, ripping and other soil preparation works for each Woodlot;
- procurement of seedlings;
- tending to seedlings prior to planting;
- planting the Paulownia seedlings on the Leased Area at a rate equivalent to 60 trees per Woodlot not later than 12 months after Allotment;
- applying fertilisers, herbicides and pesticides; and

- reduction and eradication of disease, vermin and other pests.

58. The Ongoing Services include:

- cultivating, tending, pruning, fertilising, replanting, spraying and otherwise caring for the Trees as and when required;
- maintaining and keeping in good repair access laneways within the Leased Area;
- maintaining the Leased Area according to good silvicultural and forestry practices;
- replacing any Trees that fail to establish or that die during the first twelve months of the Project;
- harvesting Trees grown on the Leased Area in Years 7, 8, 9 and 10 and processing the timber in accordance with clause 17 of the Lease and Management Agreement; and
- carrying out any other obligation to be performed by the Responsible Entity pursuant to the terms of any agreement entered into by the Responsible Entity for the sale of the Forest Produce.

59. The Responsible Entity will maintain a public risk insurance policy in respect of the Plantation and arrange for insurance of the Leased Area, including the Trees and Forest Produce, on behalf of all Growers (clause 21 of the Lease and Management Agreement). This insurance is compulsory. The insurance premium will be divided proportionally over all Woodlot interests in the Project and invoiced annually to the Growers.

60. The Responsible Entity must provide to each Grower a report on or before 31 October of each year providing details of services provided and the status of the Trees on the Woodlot(s) (clause 15 of the Lease and Management Agreement).

61. Under clause 18 of the Lease and Management Agreement, a Grower may, on Application, notify the Responsible Entity that the Grower elects to collect and market the Collectable Produce, relating to the Grower's Woodlot(s). This Ruling does not apply to Growers who make such an election.

Pooling of Timber and Grower's Entitlement to Net Proceeds

62. Commercial thinning of trees is expected to occur from Years 7 to 9. In Year 10 the remaining trees will be harvested and processed. The Responsible Entity will Harvest and Process, or engage a suitably qualified person to Harvest and Process the percentage of trees as set out in the PDS, unless the Responsible Entity believes that it would be in the best interests of the Growers to defer the Harvests to a later date.

63. The Responsible Entity is appointed to market and sell the Forest Produce on behalf of the Growers who do not make an election under clause 18 of the Lease and Management Agreement (defined for the purposes of this Ruling as 'Non-Electing Growers') on such terms and conditions as the Responsible Entity considers appropriate.

64. The Lease and Management Agreement sets out provisions relating to the pooling of Growers' Timber and the distribution of proceeds from the sale of the Timber (clauses 19 and 20 of the Lease and Management Agreement). This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed Timber to the pool making up the proceeds are entitled to benefit from distributions of harvest proceeds from the pool; and
- Timber can only be pooled with the Timber of Growers who are of the same Project class.

65. The Responsible Entity must ensure that the Gross Sale Proceeds are deposited into the Proceeds Fund (clause 20 of the Lease and Management Agreement). From the Proceeds Fund the Responsible Entity will pay:

- the Grower's proportional share of Harvesting and Processing Costs;
- the Incentive Fee (if any);
- any Annual Contribution then due and payable by the relevant Grower;
- any other amounts owed to the Responsible Entity or the Lessor by the relevant Grower; and
- 5.5% of the Gross Sale Proceeds for Harvest Marketing Costs.

66. The remaining balance is to be paid to the Grower in accordance with each Grower's Proportional Share.

67. In the event that the Trees on the Grower's Woodlot(s) are destroyed (either fully or partially), the Grower's Proportional Share in the Project and in the sale proceeds will be reduced in accordance with clause 21 of the Lease and Management Agreement.

Fees

68. The Application Price payable to the Responsible Entity on application is \$6,600 per Woodlot. This amount is represented by:

- Fee for Land Preparation and Planting of Trees of \$5,850;

- Prepaid Management Fee of \$665 for services to be provided from 1 July 2008 to 30 June 2009; and
- Prepaid Rent of \$85 for the period from 1 July 2008 to 30 June 2009.

69. The Annual Contribution payable in advance on or before 30 June for the following income year and invoiced to the Grower on 1 June each year consists of the following:

- Prepaid Management Fee of \$665 for the 2009-10 to 2011-12 income years. The prepaid Management Fee for the 2012-13 and subsequent years will be the amount payable for the previous income year increased at the rate of the Consumer Price Index;
- Prepaid Rent of \$85 for the 2009-10 to 2011-12 income years. The prepaid Rent for the 2012-13 income year onwards will be the amount payable for the previous income year increased at the rate of the Consumer Price Index; and
- Insurance of the Leased Area (including the Trees and Forest Produce).

70. From 1 July 2009 onwards, the Responsible Entity may obtain the approval of a Forestry Expert to increase the Annual Contribution if the Responsible Entity estimates that the total actual cost of providing Tree Farming, including corporate overhead costs, insurance premiums and indexation is likely to exceed the amounts set out in the Schedule to the Lease and Management Agreement (clause 23.3 of the Lease and Management Agreement).

71. The Responsible Entity is also entitled to the following amounts that will be deducted from the Gross Sale Proceeds:

- the Grower's Proportional Share of Harvesting and Processing Costs;
- an amount equal to 5.5% of the Gross Sale Proceeds for Harvest Marketing Costs as per clause 17.3 of the Lease and Management Agreement; and
- an Incentive Fee equal to 27.5% of the amount by which the Net Harvest Return exceeds the Incentive Fee thresholds set out in the PDS.

Finance

72. A Grower who does not pay the Application Price in full upon application can borrow from Forestry Finance Limited or Momentum or from an independent lender external to the Project.

73. Only the finance arrangements set out below are covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with Forestry Finance Limited or Momentum that materially differs from that set out in the documentation provided to the Tax Office with the application for this Product Ruling. A Grower who enters into a finance arrangement with an independent lender external to the Project other than Momentum may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

74. Growers cannot rely on any part of this Ruling if the Application Price is not paid in full on or before 30 June 2008, by the Grower or, on the Grower's behalf, by a lending institution. Where an application is accepted subject to finance approval by any lending institution other than Forestry Finance Limited, Growers cannot rely on this Ruling if written evidence of that approval has not been given to the Responsible Entity by the lending institution and the funds have not been made available to the Responsible Entity by 30 June 2008.

Finance offered by Forestry Finance Limited

75. A Grower choosing to pay the Application Price of \$6,600 per Woodlot by entering into a finance arrangement with Forestry Finance Limited must complete the Finance Application Form in the relevant Finance Package.

76. Growers who enter into a Loan Agreement with Forestry Finance Limited are required to pay a deposit of at least 10% of the Application Price (\$660 per Woodlot) and a Loan Establishment Fee of \$300 on application.

77. The balance after the 10% deposit is repayable under the following payment options:

- 5 years principal and interest – 60 monthly payments of \$133.64;
- 8 years principal and interest – 96 monthly payments of \$98.18; or
- 12 month interest free – 12 monthly repayments of \$495.

78. Except for the interest free option, the interest rate is fixed at 12% per annum for loans less than \$5,000 or 12.5% per annum for loans greater than \$5,000 (up to a maximum of \$50,000). The interest payable from the date of Application to 30 June 2008 is included in the Principal Sum. Repayments of principal and interest (or principal only in the case of the 12 month interest free option) are made monthly in advance commencing on 1 July 2008.

79. Forestry Finance Limited will only provide loans to Growers where it has sufficient funds to do so.

Finance offered by Momentum

80. Subject to the terms and conditions of the Loan Agreement, a Grower can finance the cost of the Application Price by borrowing that amount from Momentum under the following arrangements:

- 5 years Principal and Interest at an interest rate of 11%;
- 2 years Interest Only followed by 6 years Principal and Interest at an interest rate of 11.25%; and
- 8 years Principal and Interest at an interest rate of 11.25%.

81. The following conditions apply to the above loan arrangements:

- monthly payments of interest only or monthly repayments of principal and interest payable on the first Business Day of each month commencing on the first business day of the month following the loan drawdown date;
- application fee of \$250 plus 0.5% of the loan amount (may be added to the loan);
- maximum loan size of \$250,000; and
- stamp duty, as applicable.

82. The interest rates mentioned above (in paragraphs 78 and 80 of this Ruling) are only indicative. The actual interest rate for the loans will be set by the lender on the loan drawdown date.

83. The loans from Forestry Finance Limited and Momentum are made on a full recourse commercial basis and normal debt recovery procedures, including legal action, will be taken in the case of defaulting borrowers. The loans will be secured by a charge over the Grower's interest(s) in the Project.

84. This Ruling does not apply if the finance arrangement entered into by the Grower includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL 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 or rate of interest is non-arm's length;

- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Forestry Finance Limited and Momentum, are involved or become involved in the provision of finance to Growers for the Project.

Commissioner of Taxation12 December 2007

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?

85. For the amounts set out in paragraphs 24 and 28 of this Ruling 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.

86. Two Taxation Rulings are relevant in determining whether a Grower will be carrying on a business of primary production.

87. The general indicators used by the Courts are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

88. Taxation Ruling TR 2000/8 Income tax: investment schemes, particularly paragraph 89, is more specific to arrangements such as the Project. As TR 2000/8 sets out, the relevant principles have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

89. Having applied these principles to the arrangement set out above, a Grower in the Project is accepted to be carrying on a business of growing and harvesting Paulownia trees for sale.

Deductibility of the fee for land preparation and tree planting, Management Fees, Rent and loan interest

Section 8-1

90. The fee for land preparation and tree planting, Management Fees and Rent are deductible under section 8-1 (see paragraphs 43 and 44 of TR 2000/8). A ‘non-income producing’ purpose (see paragraphs 47 and 48 of TR 2000/8) is not identifiable in the arrangement and there is no capital component evident in the fee for land preparation and tree planting, Management Fees or Rent (see paragraphs 49 to 51 of TR 2000/8).

91. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. Subject to the prepayment provisions (see paragraphs 94 to 108 of this Ruling) a deduction for these amounts can be claimed in the year in which they are incurred. (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7.)

92. Some Growers may finance their participation in the Project through a Loan Agreement with Forestry Finance Limited or Momentum. Applying the same principles as that used for the above mentioned fees and expenses, interest incurred under such a loan has sufficient connection with the gaining of assessable income to be deductible under section 8-1.

93. Other than where the prepayment provisions apply (see paragraphs 94 to 108 of this Ruling), a Grower can claim a deduction for such interest in the year in which it is incurred.

Prepayment provisions

Sections 82KZL to 82KZMG

94. 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 income year, then it is not expenditure to which the prepayment rules apply.

95. For this Project, the prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME, 82KZMF and 82KZMG of the ITAA 1936 (operative provisions).

96. The prepayment provisions may apply to the prepaid Management Fees and the prepaid Rent for Growers who acquire more than one Woodlot (refer to paragraphs 99 and 100 of this Ruling).

Application of the prepayment provisions to this Project

Sections 82KZME and 82KZMF

97. The expenditure incurred by a Grower in the Project for the prepaid Management Fees and the prepaid Rent for the 2008-09 income year onwards, meets the requirements of subsections 82KZME(1) and (2) of the ITAA 1936 and is incurred under an 'agreement' as described in subsection 82KZME(3) of the ITAA 1936. Therefore, unless one of the exceptions to section 82KZME of the ITAA 1936 applies, the amount and timing of tax deductions for those fees are determined under section 82KZMF of the ITAA 1936.

98. For a Grower who acquires the minimum of one Woodlot, the prepaid Management Fee and the prepaid Rent, being amounts each of less than \$1,000 in each expenditure year, constitute 'excluded expenditure' as defined in subsection 82KZL(1) of the ITAA 1936. Under Exception 3 (subsection 82KZME(7) of the ITAA 1936) 'excluded expenditure' is specifically excluded from the operation of section 82KZMF of the ITAA 1936. Therefore a Grower who acquires one Woodlot may claim deductions for the prepaid Management Fees and Rent in the income year in which the expense is incurred.

99. Growers who acquire more than one Woodlot may incur prepaid Management Fees or prepaid Rent exceeding \$1,000. Those Growers will need to calculate the deduction for each year using the formula in subsection 82KZMF(1) of the ITAA 1936. Section 82KZMF of the ITAA 1936 will apportion the deduction for prepaid fees over the eligible service period which commences on 1 July of the year following the year of payment and ends on 30 June of that year.

100. Therefore, any prepaid Management Fee or prepaid Rent exceeding \$1,000 incurred in an income year, will be deductible in the following income year.

101. Sections 82KZME and 82KZMF of the ITAA 1936 may also have relevance if a Grower in this Project chooses or is required to prepay interest under a loan agreement (including loan agreements with lenders other Forestry Finance Limited and Momentum).

102. As stated in Note (iv) of paragraph 28 of this Ruling, prepayments of interest are not covered by this Product Ruling and Growers who make such prepayments may instead request a private ruling on the tax consequences of the prepaid interest.

Section 82KZMG

103. Expenditure that meets the requirements of section 82KZMG of the ITAA 1936 is excluded from the application of the prepayment rules in sections 82KZME and 82KZMF of the ITAA 1936 that would otherwise apply.

104. Section 82KZMG of the ITAA 1936 provides a '12 month rule' that, in effect, facilitates an immediate deduction for certain prepaid expenditure⁵ incurred under an 'agreement for planting and tending trees for felling' (subsection 82KZMG(3) of the ITAA 1936).

105. The 12 month rule applies to expenditure for 'seasonally dependent agronomic activities' that will be carried out during the establishment period of a particular planting of trees (subsection 82KZMG(4) of the ITAA 1936). Seasonally dependent agronomic activities are explained in Taxation Determination TD 2003/12.

106. Whilst the establishment period itself may exceed 12 months, each seasonally dependent agronomic activity must be completed within 12 months of commencement of its eligible service period (as defined in subsection 82KZL(1) of the ITAA 1936), and by the end of the income year following the 'expenditure year' (see subsections 82KZMG(1) and (2) of the ITAA 1936).

107. Under the Lease and Management Agreement each Grower incurs a fee for land preparation and tree planting of \$5,850 per Woodlot in the 2007-08 income year for 'seasonally dependent agronomic activities' that will be carried out during the 'establishment period' of the Trees.

⁵ The expenditure must be incurred on or before 30 June 2008 (subsection 82KZMG(2)).

108. The expenditure for 'seasonally dependent agronomic activities' meets all other requirements of section 82KZMG of the ITAA 1936 and, therefore, other than where section 82KZMGA of the ITAA 1936 applies (see paragraphs 109 to 111 of this Ruling), a deduction is allowable in the 2007-08 income year for the full amount of expenditure incurred by the Grower for the fee for land preparation and tree planting.

'CGT event' within 4 years for Growers who are initial participants

Section 82KZMGA

109. A Grower who is an initial participant in the Project cannot deduct an amount that meets the requirements of section 82KZMG of the ITAA 1936 if a 'CGT event' happens in relation to the Grower's interest within 4 years of 30 June 2008 (subsection 82KZMGA(1) of the ITAA 1936). In this Project, only the fee for land preparation and tree planting meets the requirements of section 82KZMG of the ITAA 1936. Accordingly, the deduction of \$5,850 per 'interest' for the fee for land preparation and tree planting will not be allowable if a 'CGT event' happens to the Grower's interest within the 4 year period.

110. Where subsection 82KZMGA(1) of the ITAA 1936 applies, the Commissioner may amend any affected Grower's assessment within 2 years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

111. A Grower whose deduction for the fee for land preparation and tree planting is disallowed because of section 82KZMGA, is still required to include in their assessable income the market value of the interest at the time of the 'CGT event' or the decrease in the market value of the interest as a result of the 'CGT event' (section 82KZMGB of the ITAA 1936).

Assessable income from 'CGT events' for Growers who are initial participants

Sections 6-10, 10-5 and 118-20 of the ITAA 1997 and section 82KZMGB of the ITAA 1936

112. Section 6-10 of the ITAA 1997 includes in assessable income amounts that do not constitute ordinary income. These amounts, called statutory income, are listed in the table in section 10-5 of the ITAA 1997 and include amounts that are included in the assessable income of a Grower by section 82KZMGB of the ITAA 1936.

Section 82KZMGB

113. Where a 'CGT event' (other than for a 'CGT event' in respect of a thinning)⁶ happens to an interest held by a Grower who is an initial participant in this Project, section 82KZMGB of the ITAA 1936 includes an amount in the assessable income of the Grower if:

- the Grower can deduct or has deducted the fee for land preparation and tree planting (shown in paragraph 24 of this Ruling); and
- subsection 82KZMG(1) of the ITAA 1936 applies to the timing of the deduction for the fee for land preparation and tree planting (or would apply if section 82KZMGA of the ITAA 1936 were disregarded – see above).

Market value rule applies to 'CGT events'

114. If, as a result of the 'CGT event' the Grower either:

- no longer holds the interest; or
- otherwise – where the Grower continues to hold the 'forestry interest' but there is a decrease in the market value of the interest,

then the market value of the interest at the time of the event, or the decrease in market value of the interest as a result of the event, is included in the assessable income of the Grower (subsection 82KZMGB(2) of the ITAA 1936). A market value rule applies rather than the amount of money actually received from the CGT event (subsection 82KZMGB(3) of the ITAA 1936). However, the market value and the actual amount of money received may be the same.

115. The market value amount included in the assessable income of a Grower is the value of the interest just before the 'CGT event', or where the Grower continues to hold their interest after the 'CGT event', the amount by which the market value of the interest is reduced by the 'CGT event' (subsection 82KZMGB(2)).

116. This provision will apply where the interest is sold, is extinguished, or ceases, and will include 'CGT events' such as a full or partial sale of the interest or from a full or partial clear-fell harvest of the trees grown under the Project.

⁶ A thinning under this scheme is not a 'CGT event'.

Anti-overlap provisions**Section 118-20**

117. Generally, where as a result of a 'CGT event' a capital gain would otherwise be included in a taxpayer's assessable income, section 118-20 will apply to reduce the capital gain if, because of the event, a provision of the ITAA other than the CGT provisions includes an amount in the taxpayer's assessable income.

118. In the case of interests held by Growers who are initial participants in this Project, the market value, or the reduction in the market value of the interest from a CGT event is included in assessable income by section 6-10 of the ITAA 1997 and section 82KZMGB of the ITAA 1936. Therefore, section 118-20 of the ITAA 1997 will operate to reduce to nil any capital gain that would otherwise be assessable under the CGT provisions in Part 3-1 of the ITAA 1997.

Amounts received by initial participants where the Project trees are thinned**Section 6-5**

119. Section 82KZMGB of the ITAA 1936 specifically excludes from its operation a 'CGT event' that happens in respect of a thinning (see paragraph 82KZMGB(1)(d) of the ITAA 1936).

120. Thinning amounts received by a Grower who is an initial participant in this Project do not arise as a result of a 'CGT event' and are not otherwise assessable under section 82KZMGB of the ITAA 1936. The receipt of an amount arising from a thinning of the Project trees is a distribution that arises as an incident of the Grower holding an interest in the Project. It is an item of ordinary income and is assessable under section 6-5 of the ITAA 1997 in the year in which it is derived.

Borrowing costs**Section 25-25**

121. A deduction is allowable for expenditure incurred by a Grower in borrowing money to the extent that the borrowed money is used for the purpose of producing assessable income (subsection 25-25(1)).

122. In this Project, the Loan Establishment Fee payable to Forestry Finance Limited and the loan application fee payable to Momentum are incurred to borrow money that is used or is to be used solely for income producing purposes during each income year over the term of the loan.

123. The deduction for the borrowing expense is spread over the period of the loan or 5 years, whichever is the shorter (subsection 25-25(4)).

Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner’s discretion

124. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the 2007-08 to 2013-14 income years, the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 Income tax: non-commercial business losses: Commissioner’s discretion. Based on the evidence supplied, the Commissioner has determined that for those income years:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- 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.

125. 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.

126. 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

127. 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 of the ITAA 1936. It will not apply to deny the deduction otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA - general tax avoidance provisions

128. 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).

129. 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 paragraphs 24 and 28 of this Ruling 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.

130. 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 Trees. 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.

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 97/7; TR 97/11; TR 98/22;
TR 2000/8; TD 2003/12;
TR 2007/6

Subject references:

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

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZLA
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- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
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