



Product Ruling

Income tax: W.A. Blue Gum Project 2021

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❗ Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

No guarantee of commercial success

The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives 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. The Commissioner recommends 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 apply to the defined class of entities that takes part in the scheme to which this Product Ruling relates. In this Product Ruling, the scheme is referred to as W.A. Blue Gum Project 2021, or simply as the Project.

2. All legislative references in this Product Ruling are to the *Income Tax Assessment Act 1997* unless otherwise indicated. Where used in this Product Ruling, the word 'associate' has the meaning given in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936). Capitalised terms in this Product Ruling take their meaning from the documents referred to in paragraph 47 of this Product Ruling.

Class of entities

3. 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.

4. The members of the class of entities that are subject to those taxation obligations and can rely on those taxation benefits are referred to in this Product Ruling as 'Growers'.

5. Growers are those entities that:

- meet the definition of 'initial participant' in subsection 394-15(5), and
- are accepted to take part in the Project described in paragraphs 47 to 95 of this Product Ruling on or before 30 June 2021.

6. A Grower will have executed the relevant Project Agreements on or before 30 June 2021 and will hold a forestry interest¹ in the Project.

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

- that are accepted into this Project before the date of this Product Ruling or after 30 June 2021
- that participate in the scheme through offers made other than through the W.A. Blue Gum Project 2021 Combined Product Disclosure Statement and Financial Services Guide (PDS), or that enter into an undisclosed arrangement with
 - the promoter or a promoter associate, or
 - an independent adviserthat is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits or Harvest returns) in any way
- whose Establishment Fee, including all loan monies, are not paid in full to W.A. Blue Gum Limited by

¹ A forestry interest is defined in subsection 394-15(3) as a right to benefits produced by a forestry managed investment scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not).

30 June 2021, either by the Grower and/or on the Grower's behalf by a lending institution

- that enter finance agreements with Albany Financial Pty Ltd outside the terms specified in paragraphs 91 to 95 of this Product Ruling
- that take part in the Project as a 'subsequent participant'²
- that enter into a Joint Growers Agreement, or
- that intend to terminate their involvement in the Project prior to its completion.

Superannuation Industry (Supervision) Act 1993

8. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA). The Commissioner gives no assurance that the scheme 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 scheme may contravene the provisions of the SISA.

Qualifications

9. 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 47 to 95 of this Product Ruling.

10. 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
- may be withdrawn or modified.

Date of effect

11. This Product Ruling applies prospectively from 9 June 2021, the date it is published. It applies only to the specified class of entities that enter into the scheme from 9 June 2021 until 30 June 2021, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified

² A subsequent participant is an entity that does not meet the definition of initial participant in subsection 394-15(5).

class of entities for the income years up to 30 June 2031, being its period of application. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

12. 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.

Changes in the law

13. Although this Product Ruling deals with the income tax laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

14. 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

15. 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 Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has issued.

Goods and services tax

16. All amounts and percentages referred to in this Product Ruling exclude the goods and services tax (GST) unless otherwise specified. The transactions in respect of this scheme may, where appropriate, have GST implications. Those GST implications are outside the scope of this Product Ruling.

17. In order for 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

Structure of the Project

18. The W.A. Blue Gum Project 2021 is a forestry managed investment scheme as defined in subsection 394-15(1). Its purpose is the Establishment (by way of planting and/or Coppicing) and tending of *Eucalyptus Globulus* (Tasmanian Blue Gum) trees for felling in Australia.

Carrying on an enterprise

19. Although not relevant for the purposes of Division 394, Growers that enter into the Project will be carrying on an enterprise for the purposes of subsection 9-20(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), subject to the exclusions listed in subsection 9-20(2) of the GST Act.

Carrying on a business

20. Although not relevant for the purposes of Division 394, a Grower that stays in the Project until it is completed will be considered to be carrying on a business of primary production. Such Growers who are individuals (whether carrying on that business alone or in partnership) will be subject to the operation of Division 35 (see paragraphs 42 to 45 and 139 to 145 of this Product Ruling).

Small business concessions

21. A range of concessions are available to an entity if it carries on a business and satisfies the \$10 million aggregated turnover test under Subdivision 328-C (a small business entity).³

22. 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 that qualify as a small business entity is not able to be dealt with in this Product Ruling other than as specified.

The 70% DFE rule and the Establishment of the Trees – section 394-35 and subsection 394-10(4)

23. On the basis of the information provided to the Commissioner by W.A. Blue Gum Limited, the Commissioner has decided that on 30 June 2021 it will be reasonable to expect that the '70% DFE rule'⁴ will be satisfied. The ATO may undertake review activities during the term of the Project to verify the information relied on for the purposes of the 70% DFE rule.

24. This Product Ruling will only apply if W.A. Blue Gum Limited Establishes all of the Trees that were intended to be Established under the Project within 18 months of the end of the income year in which an amount is first paid under the Project by a 'participant' in the Project.⁵ For this Project, the Trees must be Established by 31 December 2022.

³ The \$10 million threshold has been increased to \$50 million for certain concessions.

⁴ See paragraph 394-10(1)(c). The 70% DFE rule is set out in section 394-35.

⁵ See paragraph 394-10(1)(f) and subsection 394-10(4).

25. In the context of this Project, the Trees will be Established when they are planted and/or Coppiced on the Land acquired for the purposes of the Project at the average rate of 900 Trees per hectare. W.A. Blue Gum Limited is required by section 394-10 of Schedule 1 to the *Taxation Administration Act 1953* to notify the Commissioner if all of the Trees are not Established by 31 December 2022.

Allowable deductions

Sections 8-5, 394-10, 394-20 and paragraph 394-40(d)

26. A Grower in the Project can claim deductions for the amounts shown in the following table that are paid to W.A. Blue Gum Limited as the Responsible Entity for the Project (sections 8-5 and 394-10).

Fee/expense	Amount	Timing of deduction
Establishment Fee	\$4,909.09 per forestry interest (\$24,545.45 for the minimum of five forestry interests)	Income year ended 30 June 2021 See Note (i)
Tending fee	\$136.36 per forestry interest per annum, Indexed annually (\$681.82 for the minimum of five forestry interests)	The income years in which the tending fee is paid See Notes (i) and (ii)
Rent	\$454.55 per forestry interest per annum, Indexed annually (\$2,272.73 for the minimum of five forestry interests)	The income years in which Rent is paid See Notes (i) and (iii)
Harvesting, transportation and supervision fees	As paid	The income years in which such expenses are paid See Note (i)
Incentive fee	(15% of (net proceeds from the sale of Wood per hectare* – \$18,000**) × (number of hectares)) – GST * inclusive of GST ** inclusive of GST and Indexed annually	The income year in which an incentive fee is paid See Note (iv)

Unforeseen expenses	As paid	The income years in which such expenses are paid See Note (i)
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Notes:

- (i) The amounts shown are GST-exclusive. A Grower cannot treat the GST component as a payment under a forestry managed investment scheme (paragraph 394-40(d)).
- (ii) The tending services will commence from when the Trees are Coppiced or planted and continue until the Trees have been Harvested. No tending fee is payable in respect of any income year ended 30 June for any hectare upon which no Trees have been Coppiced or planted.
- (iii) Rent is payable under the terms of the Sub-lease W.A. Blue Gum Project 2021 which will commence on or after execution of the respective head lease held by W.A. Blue Gum Limited. Where the head lease and subsequent Sub-leases have not been executed, no deduction can be claimed for Rent in the income year.
- (iv) The incentive fee, excluding GST, is the amount deductible to the Grower. A Grower cannot treat the GST component as a payment under a forestry managed investment scheme (paragraph 394-40(d)).

27. The deductibility of these amounts remains subject to a requirement that:

- the Responsible Entity Establishes all of the Trees that were intended to be Established under the Project within 18 months of the end of the income year in which an amount is first paid under the Project by a 'participant'⁶ in the Project (see paragraph 24 of this Product Ruling), and
- a CGT event does not happen in relation to the Grower's forestry interest before 1 July 2025 (see paragraphs 31 to 34 of this Product Ruling).

28. The amount is deductible in the income year in which it is paid or is paid on behalf of the Grower (subsection 394-10(2) and section 394-20). This requires cash to flow from the Grower, or from another entity on the Grower's behalf, to W.A. Blue Gum Limited's bank account in the year in which the deduction is claimed. Any form of payment that does not involve the movement of cash into W.A.

⁶ The term 'participant' is defined in subsection 394-15(4).

Blue Gum Limited's bank account will not qualify for a deduction under subsection 394-10(2).

29. Where an amount is not fully paid by a Grower, or on their behalf, in an income year, the amount is deductible only to the extent to which it has been paid. Any unpaid amount is then deductible in the year or years in which it is actually paid.

30. Amounts that are allowable deductions under Division 394 cannot also be claimed as deductions under section 8-1 (section 8-10).

CGT event within four years for Growers that are initial participants – subsections 394-10(5), 394-10(5A), 394-10(6) and section 394-25

31. Deductions for the Establishment Fees, the tending fees, the Rent and the unforeseen expenses in relation to fertiliser and/or insect issues are not allowable where a CGT event happens in relation to the forestry interest of a Grower before 1 July 2025 (subsection 394-10(5)).

32. 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 CGT event (subsection 394-10(6)). The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936.

33. Growers whose deductions are disallowed because of subsection 394-10(5) are still required by section 394-25 to include in assessable income the market value of the forestry interest at the time of the CGT event, or any decrease in the market value of the forestry interest as a result of the CGT event.

34. However, deductions will not be affected where the CGT event happens because of circumstances outside the Grower's control and the Grower could not reasonably have foreseen the CGT event happening when they acquired the forestry interest (subsection 394-10(5A)).

Interest on loans to finance the forestry interest, credit card merchant fees, and fire insurance costs of a Grower – section 8-1

35. Interest incurred by a Grower on a loan with Albany Financial Pty Ltd to fund their investment in the Project is deductible in the income year in which the interest is incurred provided the interest is not prepaid (subsection 8-1(1)). Growers that borrow from other financiers or that prepay their interest with Albany Financial Pty Ltd may apply for a private ruling on the deductibility of the interest incurred.

36. Credit card merchant fees incurred by a Grower in paying any fees under the Project will be deductible under section 8-1. The

deduction is allowable in the year in which the merchant fee is incurred.

37. Fire insurance costs paid to the Responsible Entity are deductible under section 8-1 in the income year in which they are incurred.

Assessable income

CGT events and the forestry interests of Growers that are initial participants – sections 6-10, 17-5 and 394-25

38. Where a CGT event (other than a CGT event that happens in respect of thinning⁷) happens to a forestry interest held by a Grower in this Project, the market value of the forestry interest, or any decrease in the market value of the forestry interest, is included in the assessable income of the Grower (sections 6-10 and 394-25), less any GST payable on those proceeds (section 17-5).

39. The relevant amount is included in the Grower's assessable income in the income year in which the CGT event happens (subsection 394-25(2)).

40. CGT events for these purposes include those relating to:

- a clear-fell Harvest of all or part of the Trees grown under the Project
- the sale, or any other disposal of all or part of the forestry interest held by the Grower, or
- any other CGT event that results in a reduction of the market value of the forestry interest held by the Grower.

Amounts received by Growers for carbon or other environmental credits, and insurance proceeds – sections 6-5 and 17-5

41. An amount received by a Grower in respect of sales of carbon or other environmental credits, or the receipt of insurance proceeds, constitutes ordinary income that arises as an incident of the Grower holding an interest in the Project. Growers should include their share of any such amounts received in their assessable income in the income year in which those amounts are derived (section 6-5), less any GST paid on those proceeds (section 17-5).

⁷ Thinning of the Trees includes a selective Harvest of immature Trees to facilitate better outcomes at Harvest. Thinning differs from a clear-fell of a percentage of mature Trees which may occur over two or more income years.

Deferral of losses from non-commercial business activities and annual exercise of Commissioner's discretion – Division 35

42. For each of the income years ended 30 June 2021 to 30 June 2031, the Commissioner will exercise the discretion in subsection 35-55(1) for a Grower who is an individual (alone or in partnership) once the following conditions are satisfied for the year concerned:

- the Grower carried on their business of forestry during the income year
- the business activity carried on is not materially different to the scheme described in this Product Ruling, and
- the Grower has incurred a taxation loss for the income year from carrying on that business activity.

43. If the conditions in paragraph 42 of this Product Ruling are met for a given year, the Commissioner will exercise the discretion for that year under:

- paragraph 35-55(1)(b) for a Grower in the Project who satisfies the income requirement in subsection 35-10(2E), and
- paragraph 35-55(1)(c) for a Grower in the Project who does not satisfy the income requirement in subsection 35-10(2E).

44. If the Commissioner determines that the discretion will not be exercised for a particular year or years, the Grower will be informed of that decision and the reasons. In any year where the discretion is not exercised, losses incurred by a Grower will be subject to the loss deferral rule in section 35-10 and the Grower will not be able to offset the losses from the Project against other assessable income.

45. The issue of this Product Ruling, of itself, does not constitute the exercise of the Commissioner's discretion in subsection 35-55(1) for any income year.

Prepayment provisions and anti-avoidance provisions – sections 82KZM, 82KZMA, 82KZMD, 82KZME, 82KZMF, 82KL and Part IVA of the ITAA 1936

46. Where a Grower is accepted to participate in the Project described in paragraphs 47 to 95 of this Product Ruling, the following provisions of the ITAA 1936 have application as indicated:

- interest paid by a Grower to Albany Financial Pty Ltd (see paragraphs 94 and 95 of this Product Ruling) does not fall within the scope of sections 82KZM, 82KZMA, 82KZMD, 82KZME and 82KZMF

- 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 Product Ruling.

Scheme

47. The scheme that is the subject of this Product Ruling is identified and described in the following documents:

- application for a Product Ruling as constituted by documents and information received on 9 April 2021, 23 April 2021, 11 May 2021, 12 May 2021 and 24 May 2021
- draft Combined Product Disclosure Statement and Financial Services Guide for the W.A. Blue Gum Project 2021, received on 11 May 2021
- draft Constitution for the W.A. Blue Gum Project 2021, received on 9 April 2021
- draft Compliance Plan for the W.A. Blue Gum Project 2021, received on 9 April 2021
- draft **Project Management Contract** for the W.A. Blue Gum Project 2021 entered into by a Grower and W.A. Blue Gum Limited (as Project Manager), received on 9 April 2021
- draft Plantation Services Agreement for the W.A. Blue Gum Project 2021 entered into by W.A. Blue Gum Limited (as Project Manager) and WACAP Treefarms Pty Ltd (as Forestry Contractor), received on 9 April 2021
- example lease between a land owner and W.A. Blue Gum Limited as the lessee, received on 9 April 2021
- draft **Sub-lease** for the W.A. Blue Gum Project 2021 between a Grower and W.A. Blue Gum Limited (as Landholder), received on 24 May 2021
- draft **Agreement to Sub-lease** for the W.A. Blue Gum Project 2021 between a Grower and W.A. Blue Gum Limited, received on 9 April 2021
- draft **Wood Purchase Agreement** for the W.A. Blue Gum Project 2021 between each Grower and W.A. Blue Gum Limited and W.A. Chip & Pulp Co. Pty Ltd (as Purchaser), received on 9 April 2021

- draft **Loan Agreement** for the W.A. Blue Gum Project 2021 between a Grower and Albany Financial Pty Ltd (as Financier), received on 9 April 2021
- Custody Agreement between W.A. Blue Gum Limited and Sandhurst Trustees Limited (as the Custodian) dated 16 February 2016, and
- draft Guarantee and Indemnity for W.A. Blue Gum Limited (as Project Manager) and draft Guarantee and Indemnity for Albany Financial Pty Ltd (as Financier), received on 9 April 2021.

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

48. The documents highlighted are those that a Grower may enter into. For the purposes of describing the scheme to which this Product Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, to which a Grower, or any associate of a Grower, will be a party, that are a part of the scheme.

49. All Australian Securities and Investments Commission requirements are, or will be, complied with for the term of the agreements.

Overview

50. The main features of the W.A. Blue Gum Project 2021 are:

Location	In the southwest of Western Australia, between Bunbury and Albany
Species of Trees to be planted and/or Coppiced under the scheme	<i>Eucalyptus Globulus</i> (Tasmanian Blue Gum)
Term of the Project	Approximately 10 years
Date all Trees are due to be planted and/or Coppiced on scheme Land	31 December 2022
Number of Trees per hectare	800-1000 Trees per hectare with an average of 900, whether Coppiced or planted (approximately two-thirds of the Trees will be Established by way of Coppice)
Number of hectares offered for cultivation	Approximately 800, subject to land being available

Size of each forestry interest	One hectare
Minimum allocation of forestry interests per Grower	Five forestry interests
Minimum subscription	None
Initial cost	\$5,400 Establishment Fee per forestry interest (GST-inclusive) \$27,000 for the minimum allocation (GST-inclusive)
Ongoing annual costs	Tending fee of \$150 per forestry interest, Indexed annually (GST-inclusive) (\$750 for the minimum allocation (GST-inclusive)) Rent of \$500 per forestry interest, Indexed annually (GST-inclusive) (\$2,500 for the minimum allocation (GST-inclusive))
Other costs	Harvest, transportation and supervision fees Incentive fee Unforeseen expenses Insurance costs Transfer of interest fee

51. The Project will be a registered managed investment scheme under the *Corporations Act 2001*. W.A. Blue Gum Limited has been issued with Australian Financial Services Licence No. 246264 and will be the Responsible Entity for the Project.

52. The Project will involve the planting and growing of Tasmanian Blue Gums in the southwest region of Western Australia for the purpose of Harvest and sale of the Wood.

53. An offer to participate in the Project will be made through the PDS. The offer under the PDS is for up to 800 hectares, which corresponds to 800 forestry interests in the Project.

54. An entity that participates in the Project as a Grower will do so by acquiring a minimum of five forestry interests in the Project on or before 30 June 2021, each one hectare in size.

55. Applicants execute a Power of Attorney contained in the PDS. The Power of Attorney irrevocably appoints W.A. Blue Gum Limited to enter into, on behalf of the Grower, an Agreement to Sub-lease (if relevant), a Sub-lease, a Project Management Contract, a Wood Purchase Agreement and a Loan Agreement (if applied for with Albany Financial Pty Ltd).

56. For the purposes of this Product Ruling, Applicants that are accepted to participate in the Project and execute the Agreement to Sub-lease or the Sub-lease, the Project Management Contract and the Wood Purchase Agreement, on or before 30 June 2021, will become Growers in the Project.

57. The Responsible Entity is currently seeking Land for the Project within the relevant geographic part of Australia. Land utilised by the Project must meet the requirements set out by the Independent Forestry Expert in the draft PDS referred to in paragraph 47 of this Product Ruling.

58. The PDS advises that where the Land for the Project is not available on or before 30 June 2021, acceptance of Applications is subject to Land being acquired and a Sub-lease being entered into on behalf of the Grower by 30 September 2022.

Constitution

59. The Constitution for the Project establishes the Project and operates as a deed binding all Growers and W.A. Blue Gum Limited. The Constitution sets out the terms and conditions under which W.A. Blue Gum Limited agrees to act as Responsible Entity and thereby manage the Project. Upon acceptance into the Project, Growers are bound by the Constitution by virtue of their participation in the Project.

60. In order to acquire an interest in the Project, an entity must make an Application for forestry interests in accordance with clause 4 of the Constitution. Among other things, the Application must be completed in a form approved by the Responsible Entity and accompanied by payment of the Application Money to the Responsible Entity.

61. Under clause 6 of the Constitution, the Responsible Entity will open an Application Fund with an Australian bank or financial institution into which all Application Money received from Applicants will be deposited.

62. Once the Responsible Entity has accepted the Application and issued an Interest to a Grower, an amount equal to the Application Money in the Application Fund will be transferred to the Responsible Entity or at the direction of the Responsible Entity (clause 6.4 of the Constitution).

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

- the purpose of the Project (clause 2.2)
- the holding of the Project Property (clause 5)
- refunds of Application Money (clause 6.5)

- distribution of income to Growers (clause 7)⁸
- the keeping of a Register of Growers (clause 10)
- assignment of Grower Interests (clause 11)
- termination and expiry of the Project (clause 24), and
- the winding up of the Project (clause 25).

Compliance Plan

64. As required by the *Corporations Act 2001*, W.A. Blue Gum Limited as the Responsible Entity has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure the Responsible Entity manages the Project in accordance with its obligations and responsibilities contained in the Constitution and the interests of Growers are protected.

Project Management Contract

65. In consideration of the Growers paying the fees set out in Schedule 2 to the Project Management Contract, W.A. Blue Gum Limited as Project Manager agrees to provide the Plantation Services to the Growers (clauses 3 and 14 of the Project Management Contract).

66. The Fees payable under Schedule 2 are:

- the initial fee for the Establishment of the Plantation
- the annual tending fee (once Trees are Coppiced or planted)
- unforeseen expenses in relation to fertiliser and/or insect issues (if approved by Growers)
- Harvest of the Plantation, Delivery and other expenses arising out of the sale of the Wood, and
- an incentive fee.

67. The Plantation Services to be provided by the Project Manager are set out at clause 4 and the Plantation Development and Tending Plan (at Schedule 1) of the Project Management Contract, and include:

- the Establishment of the Plantation no later than 31 December 2022
- Coppicing activities to achieve the stocking rate/spacing set out in the Plantation Development and Tending Plan

⁸ Discussed at paragraph 83 of this Product Ruling.

- provision of sufficient healthy seedlings to achieve the stocking rate/spacing set out in the Plantation Development and Tending Plan, and
- keeping third-party public liability insurance and fire insurance (the latter at the cost of the Grower).

68. Clause 5 of the Project Management Contract explains that the term of the contract starts on the Commencement Date and terminates when the whole of the Plantation has been Harvested.

69. Clause 7 of the Project Management Contract details that any insurance proceeds following fire or other damage to the Plantation will be pooled and distributed proportionally to affected Growers.

70. Clause 11 of the Project Management Contract explains that Harvesting will be conducted in accordance with the Wood Purchase Agreement.

Plantation Services Agreement

71. The Project Manager will engage WACAP Treefarms Pty Ltd as Forestry Contractor to carry out the Plantation Services required to Establish and tend the Plantation in accordance with the Plantation Development and Tending Plan.

Head leases

72. The Responsible Entity will secure the Project Land by entering into a head lease or sub-lease (or a number of such leases) with lessors on or before 30 September 2022.

Sub-lease

73. Each Grower will execute a Sub-lease with W.A. Blue Gum Limited, as the Landholder, either at the time their Application is accepted or prior to 30 September 2022.

74. The Schedule to the Sub-lease will identify the Leased Area, the Establishment Area, the Rent payable by the Grower, the commencement date of the Sub-lease, the Term of the Sub-lease and details of the relevant head lease(s).

75. The Grower shall reimburse the Landholder for stamp duty in respect of the Sub-lease (clause 9.11(b) of the Sub-lease).

76. Carbon, environmental or other credits derived from the Plantation are the property of the Grower until the end of the Term (clause 9.17 of the Sub-lease).

77. The Sub-lease can be terminated if the whole or a substantial part of the Plantation is damaged, for example, by fire, such that the Plantation is no longer commercially viable. Alternatively, if only part

of the Plantation is destroyed, the Establishment Area will be reduced (clause 10 of the Sub-lease).

78. Both the Landholder and the Grower shall be excused from performance of or liability under the Sub-lease if prevented by Force Majeure (clause 12 of the Sub-lease).

Agreement to Sub-lease

79. Where there is no (or insufficient) Project Land available for a Grower on or before 30 June 2021, the Grower will be required to enter into an Agreement to Sub-lease with W.A. Blue Gum Limited.

80. Pursuant to the terms of the Agreement to Sub-lease, the parties undertake to enter into a Sub-lease of the Land on or before 30 September 2022, which will allow the Establishment of the Plantation by 31 December 2022 in accordance with the Project Management Contract.

Wood Purchase Agreement

81. This agreement is between the Growers, W.A. Blue Gum Limited, and W.A. Chip & Pulp Co. Pty Ltd as Purchaser.

82. W.A. Blue Gum Limited and the Purchaser will agree on a Harvest Plan not less than six months out from the date on which the Purchaser requires Delivery of the Wood to commence. Not less than two months before Harvest, the Purchaser will give notice of the Proposed Purchase Price, including Harvest and Delivery costs. W.A. Blue Gum Limited may seek alternative pricing from third parties, but the Purchaser retains the right to match the price offered by the third parties.

Pooling of money from the Harvest of Wood and Grower's entitlement to a distribution

83. Clause 7 of the Constitution provides that:

- Harvest Income comprising all money received from the Harvest of Wood on a Plantation Allotment (including thinnings) shall be pooled and deposited in a Proceeds Fund (clauses 7.1 and 7.2)
- to the extent that any part of a Grower's Plantation Allotment is destroyed, it shall not be taken into account in determining the entitlements of the Growers (clause 7.1(a))
- for Growers whose interest in the Project is terminated because of default under a Project Agreement, their income will not form part of Harvest Income (clause 7.1(b)), and

- after deduction of (outstanding) fees payable by Growers under the Project Management Contract, the Sub-lease, and the Wood Purchase Agreement (as set out in the Schedule to the Constitution), Growers shall be presently entitled to the balance of the Harvest Income (clause 7.4).

84. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements:

- only Growers that have contributed Wood from their Leased Area to the pool making up the relevant Harvest Income are entitled to benefit from distributions from those proceeds, and
- Wood is only pooled with the Wood of Growers accepted to participate in the W.A. Blue Gum Project 2021.

Custody Agreement

85. W.A. Blue Gum Limited, as the Responsible Entity, has engaged Sandhurst Trustees Limited to act as the Custodian of the Property. The Property includes all Application Money and Harvest Income until disbursed or distributed in accordance with the Constitution but does not include property legally vested in a Grower.

Fees

86. Under the terms of the Project Management Contract and the Sub-lease, a Grower will make payments as described in paragraphs 87 to 90 of this Product Ruling on a per forestry interest basis.

Fees payable under the Project Management Contract

87. The Application Money of \$5,400 (GST-inclusive) is to be paid by each Grower on Application for the Establishment of the Plantation.

88. Following the Application Year, the following ongoing fees and expenses are payable to W.A. Blue Gum Limited:

- an annual tending fee of \$150 (GST-inclusive), Indexed, first payable on 30 November 2021 and thereafter on 30 September each year, but not payable in any income year ended 30 June for any hectare upon which no Trees have been Established
- unforeseen expenses in relation to fertiliser and/or insect issues, if approved by a meeting of all Growers
- the Growers' proportion of Harvest (including roading and supervision), Delivery and other expenses arising

out of the sale of the Wood, to be deducted from the Harvest Income

- fire insurance charged to the Grower at cost plus 10% (no insurance premium is payable in respect of any area in which Trees have not been Established), and
- an incentive fee calculated as 15% of [the amount due per hectare to the Grower from the Harvest of the Plantation less \$18,000 (GST-inclusive and Indexed) per hectare of Establishment Area, multiplied by the number of hectares of Establishment Area].

Fees payable under the Sub-lease

89. Where the Sub-lease Commencement Date is on or before 30 June 2021, Rent for the period from the Sub-lease Commencement Date to 30 June 2021 will be nil. Rent of \$500 (GST-inclusive) for the year ending 30 June 2022, Indexed from 30 June 2021, will be payable on 30 November 2021, and then Indexed annually for each subsequent year and payable on 30 September during the relevant year (clause 6 and Schedule 1 of the Sub-lease).

90. Where the Sub-lease Commencement Date is after 30 June 2021, Rent for the period from the Sub-lease Commencement Date to 30 June 2022 will be nil. Rent of \$500 (GST-inclusive) for the year ending 30 June 2023, Indexed from 30 June 2021, will be payable on 30 November 2022, and then Indexed annually for each subsequent year and payable on 30 September during the relevant year (clause 6 and Schedule 1 of the Sub-lease).

Finance

91. To finance all or part of the cost of their forestry interest a Grower can enter into a finance arrangement with Albany Financial Pty Ltd or, alternatively, borrow from an independent lender external to the Project.

92. Only the finance arrangement set out in paragraph 94 of this Product Ruling is covered by this Product Ruling. A Grower cannot rely on this Product Ruling if they enter into a finance arrangement with Albany Financial Pty Ltd that materially differs from that set out in the documentation provided with the application for this Product Ruling. A Grower that enters into a finance arrangement with an independent lender external to the Project may request a private ruling on the deductibility or otherwise of interest incurred under finance arrangements not covered by this Product Ruling.

93. A Grower cannot rely on any part of this Product Ruling if the Application Monies are not paid in full on or before 30 June 2021 by the Grower or, on the Grower's behalf, by a lending institution.

Finance offered by Albany Financial Pty Ltd

94. Subject to Albany Financial Pty Ltd accepting the Grower's Application, the Grower will be bound by the terms and conditions of the Loan Agreement, which include:

- a Principal Sum of up to 80% of the Application Money
- loan interest payable at the fixed rate of 12.15% per annum
- a loan term of five years
- repayment of principal and interest by equal monthly instalments on the fifteenth day of each month by direct debit, commencing 15 July 2021 and ending 15 June 2026
- if any part of the Principal Sum is not repaid when due, additional fixed interest at the rate of 16.4% per annum is due and payable from the date the unpaid part of the Principal Sum fell due until the date the same is paid
- by way of security, the Grower assigns all rights title and interest in the Plantation Management Contract, the Sub-lease (and any Agreement to Sub-lease), and the Wood Purchase Agreement to Albany Financial Pty Ltd, and
- upon repayment of the principal and interest, the assignment to Albany Financial Pty Ltd of all rights title and interest in the Plantation Management Contract, the Sub-lease (and any Agreement to Sub-lease), and the Wood Purchase Agreement shall be void and of no further effect.

Other qualifications relating to finance

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

- split loan features of a type referred to in Taxation Ruling TR 98/22 *Income tax: the taxation consequences for taxpayers entering into certain linked or split loan facilities*
- indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk
- additional benefits that are or will be granted to the Grower for the purpose of section 82KL of the ITAA 1936, or funding arrangements which transform the Project into a scheme to which Part IVA of the ITAA 1936 may apply

- terms that are non-arm's length
- repayments of the principal and payments of interest that 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
- the lender does not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrower, or
- an entity associated with the Project, other than Albany Financial Pty Ltd, is involved or becomes involved in the provision of finance to the Grower for the Project.

Commissioner of Taxation9 June 2021

Appendix 1 – Explanation

① *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.*

Structure of the Project

96. In return for payment of the fee for the Establishment of the Plantation and the other fees and expenses required under the Plantation Management Contract, Sub-lease and Wood Purchase Agreement during the term of the Project, Growers will hold a forestry interest in a forestry managed investment scheme. The Project qualifies as a forestry managed investment scheme because its purpose is for establishing and tending trees for felling in Australia (see subsection 394-15(1)).

97. Under the Constitution of the Project and the other supporting agreements, the holding of a forestry interest in the Project gives each Grower a right to a share in the proceeds of the Harvest and share of the proceeds of any thinning of the Trees grown on the Project Land. That share of proceeds is determined using the number of forestry interests held by a Grower as a proportion of all forestry interests held by participants in the Project.

Is the Grower carrying on an enterprise?

98. An entity may be registered for GST if it is carrying on an enterprise (section 23-10 of the GST Act).

99. The term 'enterprise' is defined in section 9-20 of the GST Act and includes an activity, or series of activities, done in the form of a business (paragraph 9-20(1)(a) of the GST Act). The use of the phrase 'in the form of' has been interpreted to indicate a wider meaning than the word 'business' in isolation.

100. However, subsection 9-20(2) of the GST Act provides that the term enterprise does not include an activity, or series of activities, done by an individual or partnership without a reasonable expectation of profit or gain.

101. Miscellaneous Taxation Ruling MT 2006/1 *The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number* sets out the Commissioner's views on when an entity is carrying on an enterprise for the purposes of section 9-20 of the GST Act.

102. Application of the principles set out in MT 2006/1 to the scheme set out in this Product Ruling leads to the conclusion that a Grower (as described in paragraphs 3 to 7 of this Product Ruling) will be carrying on an enterprise for the purpose of section 9-20 of the GST Act where there is a reasonable expectation of profit or gain from their participation in the Project.

Is the Grower carrying on a business?

103. The general indicators used by the courts in determining whether an entity is carrying on a business are set out in Taxation Ruling TR 97/11 *Income tax: am I carrying on a business of primary production?*

104. In relation to a managed investment scheme similar to that which is the subject of this Product Ruling, the Full Federal Court in *Hance v Commissioner of Taxation* [2008] FCAFC 196 at [90] applied these principles to conclude that the participants in that scheme were carrying on a business of producing almonds.

105. Application of these principles to the scheme set out in this Product Ruling leads to the conclusion that Growers (as described in paragraphs 3 to 7 of this Product Ruling) that stay in the Project until its completion will be carrying on a business of primary production involving forestry activities.

Allowable deductions**Sections 8-5, 12-5 and 394-10**

106. Section 8-5 allows certain specific deductions to be claimed against the assessable income of a taxpayer. The list of specific deductions is shown in a table in section 12-5 and includes payments under a forestry managed investment scheme that meet the requirements of subsection 394-10(1).

107. Payments that relate to processing are not deductible to Growers as a payment under a forestry managed investment scheme. However, a deduction will be available under section 8-1 as Growers will be carrying on a business activity.

The 70% DFE rule – paragraph 394-10(1)(c) and section 394-35

108. The threshold test for Growers in the Project to be entitled to deductions under subsection 394-10(1) is the 70% DFE rule in paragraph 394-10(1)(c). Under that rule it must be reasonable to expect that on 30 June 2021 the amount of 'direct forestry expenditure'⁹ under the scheme will be no less than 70% of the amount of payments under the scheme.¹⁰

109. The amount of direct forestry expenditure under the scheme is the amount of the net present value (on 30 June 2021) of all direct forestry expenditure under the scheme that the Responsible Entity, as the 'forestry manager'¹¹ of the Project, has paid or will pay under the scheme (subsection 394-35(2)).

⁹ See section 394-45.

¹⁰ See subsection 394-35(1) and section 394-40.

¹¹ Defined in subsection 394-15(2).

110. The 'amount of payments under the scheme' is the amount of the net present value (on 30 June 2021) of all amounts (that is, the fees and expenses) that all current and future participants in the scheme have paid or will pay under the scheme (subsection 394-35(3)).

111. The amounts described in paragraphs 109 and 110 of this Product Ruling are determined as at 30 June 2021 taking into account:

- the timing requirements in subsections 394-35(4) and 394-35(5)
- any amounts that can reasonably be expected to be recouped (subsection 394-35(6))
- the discount rate in subsection 394-35(7), and
- the market value rule in subsection 394-35(8) for the purposes of subsection 394-35(2).

112. Based on the information provided by the Responsible Entity of the Project, the Commissioner has determined that the Project will satisfy the 70% DFE rule on 30 June 2021.

Other elements for deductibility under subsection 394-10(1)

113. The requirements of paragraphs 394-10(1)(a) and (b) are met as a Grower will hold a forestry interest in the Project (see paragraph 6 of this Product Ruling) and will pay an amount under the Project. The requirement of paragraph 394-10(1)(d) is met as it is clear from the Project Agreements that Growers in the Project do not have day-to-day control over the operation of the Project. The requirement of paragraph 394-10(1)(e) relating to the number of Growers in the scheme and the Responsible Entity's role in other managed investment schemes is also met.

114. All of the Trees intended to be Established under the Project must be Established within 18 months of 30 June 2021 (see paragraph 394-10(1)(f) and subsection 394-10(4)). The planting and/or Coppicing timeline provided with the application for this Product Ruling by the Responsible Entity indicates that all the Trees required to be Established under the scheme will be planted and/or Coppiced on the Project Land by 31 December 2022.

115. Accordingly, subject to the qualifications set out in paragraphs 118 to 123 of this Product Ruling, amounts paid by Growers to the Responsible Entity in relation to their forestry interests satisfy all of the requirements of subsection 394-10(1). The amounts are allowable deductions in the income year in which they are paid (subsection 394-10(2)).

116. Amounts that are allowable deductions under Division 394 cannot also be claimed as deductions under section 8-1 (section 8-10).

117. Where a Grower does not fully pay an amount, or the amount is not fully paid on their behalf, in an income year (see section 394-20), it is deductible only to the extent to which it has been paid. The unpaid balance is then deductible in the year or years in which it is actually paid. This may occur, for example, if all or part of the amount is borrowed and the financier fails to transfer the funds to the account of the forestry manager on or before 30 June in an income year.

Loss of deductions previously allowed under subsection 394-10(1)

118. Two situations may lead to a disallowance of deductions previously allowed to Growers under subsection 394-10(1).

119. The first of these situations will occur if the condition in subsection 394-10(4) is not met in relation to the Project. That is, the Responsible Entity fails to Establish all of the Trees on the Project Land within 18 months of 30 June 2021. Where this occurs, the Responsible Entity is required to notify the Commissioner within three months of the end of the 18-month period (section 394-10 of Schedule 1 to the *Taxation Administration Act 1953*).

120. The second situation where a Grower may have deductions disallowed is where a CGT event happens to their forestry interest within four years after 30 June of the income year in which they first paid an amount under the scheme, for example, the fee for the Establishment of the Plantation (see subsection 394-10(5)).

121. For the purposes of giving effect to subsection 394-10(5), the Commissioner is able to amend the assessment of a Grower within two years after the relevant CGT event. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 394-10(6)).

122. Where a CGT event happens to the forestry interest of a Grower within four years after 30 June 2021, the market value of the forestry interest at the time of the CGT event, or any decrease in the market value of the forestry interest as a result of the CGT event, is still included in the assessable income of the Grower by section 394-25. The amount must be included in assessable income even where an amendment has disallowed, or may disallow, the deductions previously allowed under section 394-10.

123. However, subsection 394-10(5) will have no application where the CGT event happens because of circumstances outside the Grower's control and the Grower could not reasonably have foreseen the CGT event happening when they acquired the forestry interest (subsection 394-10(5A)).

Interest on loans to finance the forestry interest of a Grower – section 8-1

124. Where a Grower borrows money to fund their investment in the Project, the deductibility of the interest incurred on the loan monies falls for consideration under the general deduction provisions of section 8-1. If the interest incurred by the Grower is deductible under the first positive limb in paragraph 8-1(1)(a), there is no requirement to consider whether it is also deductible under the second positive limb in paragraph 8-1(1)(b). Court decisions show that the same basic test applies to both limbs (see *Ronpibon Tin NL v Commissioner of Taxation (Cth)* [1949] HCA 15).

125. Under the first positive limb in paragraph 8-1(1)(a), the interest incurred by a Grower will be deductible if it is incurred in gaining or producing a Grower's assessable income and is not excluded by one of the negative limbs in subsection 8-1(2), in line with the following case law:

- *Fletcher v Commissioner of Taxation (Cth)* [1991] HCA 42
 The question whether an outgoing was ... "incurred in gaining or producing the assessable income" is a question of characterization. ...
 To the extent that ... outgoings of interest ... can properly be characterized as of a kind referred to in the first limb of [section 8-1], they must draw their character from the use of the borrowed funds.
- *Commissioner of Taxation v Roberts, J.D.*
Commissioner of Taxation v Smith, V.R. [1992] FCA 543
 [T]he characterisation of interest borrowed will generally be ascertained by reference to the objective circumstances of the use to which the borrowed funds are put.

126. Growers in the Project use the borrowed funds to acquire a forestry interest in a forestry managed investment scheme. The holding of that forestry interest will give rise to assessable income of a Grower in the form of the proceeds of a full or part disposal of the forestry interest or, a proportionate share of the Harvest proceeds. Therefore, the tests of deductibility of interest under the first limb of subsection 8-1(1) are met, unless one of the exclusions in subsection 8-1(2) apply.

127. For the purposes of this Project, only the capital exclusion in paragraph 8-1(2)(a) is relevant. The use of borrowed funds to purchase a capital asset, such as a forestry interest, does not mean

that the interest outgoings are on capital account (see *Australian National Hotels Ltd v Commissioner of Taxation* [1988] FCA 470:

... interest [is] periodic payments for the use, but not the permanent acquisition, of a capital item. Therefore, a consideration of the often-cited three matters identified by Dixon J in *Sun Newspapers Limited v. Federal Commissioner of Taxation* ... assigns interest ... to revenue.

128. Therefore, the capital exclusion in subsection 8-1(2) does not apply to the interest incurred by a Grower under the loan entered into with Albany Financial Pty Ltd as described in paragraphs 94 and 95 of this Product Ruling and, subject only to the potential application of the prepayment provisions, the interest is deductible in the year in which it is incurred. (Note: The meaning of incurred is explained in Taxation Ruling TR 97/7 *Income tax: section 8-1 – meaning of ‘incurred’ – timing of deductions.*)

Prepayment provisions – sections 82KZL to 82KZMF of the ITAA 1936

129. 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 that will not be wholly done within the same year of income as the year in which the expenditure is incurred. For schemes such as this Project, the main operative provisions are sections 82KZMD and 82KZMF of the ITAA 1936.

130. However, subsection 394-10(7) specifically provides that sections 82KZMD and 82KZMF of the ITAA 1936 do not affect the timing of amounts deductible under section 394-10.

131. The conditions applying to the loans to which this Product Ruling applies do not require any prepayment of interest over the term of the loan (see paragraphs 91 to 95 of this Product Ruling). Accordingly, the prepayment provisions have no application to Growers that enter into those loans.

132. If a Grower chooses to prepay interest on a loan with Albany Financial Pty Ltd, that Grower may request a private ruling on how the prepayment provisions will affect the timing of their interest deduction.

Assessable income

CGT events and the forestry interests of Growers that are initial participants – sections 6-10, 10-5 and 394-25

133. Section 6-10 includes in assessable income amounts that are not ordinary income. These amounts, called statutory income, are listed in the table in section 10-5, and include amounts that are

included in the assessable income of initial participants of a forestry managed investment scheme by subsection 394-25(2).

Subsection 394-25(2)

134. Where a CGT event (other than for a CGT event that happens in respect of thinning¹²) happens to a forestry interest held by a Grower in this Project, subsection 394-25(2) includes an amount in the assessable income of the Grower if the:

- (a) Grower can deduct or has deducted an amount for an income year under section 394-10 in relation to the forestry interest, or
- (b) Grower would have met the condition in paragraph 134(a) of this Product Ruling if subsection 394-10(5) was disregarded (subsection 394-25(1)). Paragraphs 31 to 34 and paragraphs 120 to 122 of this Product Ruling explain when deductions will be disallowed under subsection 394-10(5).

Market value rule applies to CGT events

135. The Grower's assessable income for the income year in which the CGT event happens includes:

- if, as a result of the CGT event, the Grower no longer holds the forestry interest, the market value of the forestry interest worked out at the time of the event, or
- otherwise, where the Grower continues to hold the forestry interest but there is a decrease in the market value of the forestry interest, the decrease in the market value of the forestry interest as a result of the CGT event (subsection 394-25(2)).

136. A market value rule applies, rather than the amount of money actually received being included in your assessable income, because of the CGT event (subsection 394-25(3)). However, the market value and the actual amount of money received may be the same.

137. Section 394-25 will apply where the forestry interest is sold, is extinguished, or ceases, and will include CGT events that arise upon a full or partial sale of the forestry interest or from a full or partial clear-fell Harvest of the Trees grown under the Project.

¹² A thinning under this scheme is not a CGT event.

Amounts received by Growers for carbon or other environmental credits, and insurance proceeds – section 6-5

138. Carbon and/or other environmental credit amounts and insurance proceeds received by a Grower in this Project do not arise as a result of a CGT event and are not otherwise assessable under Division 394. The receipt of such amounts is a distribution that arises as an incident of the Grower holding a forestry interest in the Project. Each amount is ordinary income and is assessable under section 6-5 in the year in which it is derived.

Deferral of losses from non-commercial business activities and the Commissioner's discretion – sections 35-10 and 35-55

139. Based on information provided with the application for this Product Ruling, a Grower who is an individual and is accepted into the Project in the year ended 30 June 2021 and who carries on a business of forestry (alone or in partnership), is expected to incur losses from their participation in the Project which will be subject to Division 35.¹³ These losses will be subject to the loss deferral rule in section 35-10 unless an exception applies or, for each income year in which losses are incurred, the Commissioner exercises the discretion in subsection 35-55(1) on 30 June of that specific income year.

140. The exceptions to the loss deferral rule depend upon the circumstances of individual Growers and are outside the scope of this Product Ruling.

141. The Commissioner will apply the principles set out in Taxation Ruling TR 2007/6 *Income tax: non-commercial business losses: Commissioner's discretion* when exercising the discretion.

142. Where a Grower with income for Division 35 purposes of less than \$250,000 (that is, a Grower who satisfies the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(b) is exercised for that year, the Commissioner will be satisfied that:

- it is because of its nature that the business activity of the Grower will not satisfy one of the four tests set out in sections 35-30, 35-35, 35-40 or 35-45, and
- there is an objective expectation that within a period that is commercially viable for the forestry industry, the Grower's business activity will satisfy one of those tests or produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and 35-10(2C)).

¹³ Division 35 does not apply to Growers that do not carry on a business or that carry on a business other than as individuals (alone or in partnership).

143. Where a Grower with income for Division 35 purposes of \$250,000 or more (that is, a Grower who does not satisfy the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(c) is exercised for that year, the Commissioner will be satisfied that:

- it is because of its nature that the business activity of the Grower will not produce assessable income greater than the deductions attributable to it, and
- there is an objective expectation that within a period that is commercially viable for the forestry industry, the Grower's business activity will produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and 35-10(2C)).

144. A Grower will satisfy the income requirement in subsection 35-10(2E) where the sum of the following amounts is less than \$250,000:

- taxable income for that year (ignoring any loss arising from participation in the Project or any other business activity, and ignoring any assessable FHSS released amount for that year)
- total reportable fringe benefits for that year
- reportable superannuation contributions for that year, and
- total net investment losses for that year.

145. In each year in which the Commissioner's discretion is exercised as set out in either paragraph 142 or 143 of this Product Ruling in relation to the business carried on by a Grower, the Grower, who would otherwise be required to defer a loss arising from their participation in the Project under section 35-10 until a later income year, is able to offset that loss against their other assessable income.

Recouped expenditure – section 82KL of the ITAA 1936

146. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of additional benefit(s). Insufficient additional benefits will be provided to trigger the application of section 82KL of the ITAA 1936. Section 82KL of the ITAA 1936 will not apply to deny the deduction otherwise allowable under section 8-1.

General anti-avoidance provisions – Part IVA of the ITAA 1936

147. For Part IVA of the ITAA 1936 to apply, there must be a scheme (subsection 177A(1) of the ITAA 1936), a tax benefit (section 177C of the ITAA 1936) and a dominant purpose of entering into the scheme to obtain a tax benefit (subsections 177A(5) and 177D(1) of the ITAA 1936).

148. The W.A. Blue Gum Project 2021 will be a scheme and a Grower will obtain a tax benefit from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 26 and 35 to 37 of this Product Ruling 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.

149. Growers to whom this Product Ruling applies will derive assessable income from holding or disposing of their forestry interest in the Project. 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 Product 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 subsection 177D(2) of the ITAA 1936, it cannot be concluded, on the information available, that Growers 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;
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