

# ***PR 2000/18 - Income tax: Australian Blue Gum 2000***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *21 November 2001*



# Product Ruling

## Income tax: Australian Blue Gum 2000

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### *Preamble*

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons and Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement and Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

*[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]*

### **No guarantee of commercial success**

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product as an investment. 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 investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the ‘track record’ of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below.

### **Terms of Use of this Product Ruling**

This Product Ruling has been given on the basis that the person(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

Potential investors may wish to refer to the ATO’s Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

## **What this Product Ruling is about**

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Australian Blue Gum 2000 Project, or just simply as 'the Project'.

### **Tax law(s)**

2. The tax law(s) dealt with in this Ruling are:

- section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 27-5 (ITAA 1997);
- Division 35 (ITAA 1997);
- section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- section 82KZM and sections 82KZMB - 82KZMD (ITAA 1936); and
- Part IVA (ITAA 1936).

3. On 11 November 1999, the Government announced further changes to the tax system as part of the New Business Tax System. A number of those changes, especially those to do with 'tax shelters', could affect the tax laws dealt with in this Ruling. Some of the changes apply from the date of the announcement and others are proposed to apply from nominated dates in the future.

4. Although this Ruling mentions certain of those announced changes, the information given on the treatment of expenditure which may be affected by them is not binding on the Commissioner. Legally binding advice in respect of those changes cannot be given until the relevant law(s) are enacted.

5. This Ruling does not deal with the announced changes which have not been enacted. We cannot rule on those changes until the relevant legislation is passed by Parliamentary process.

### **Class of persons**

6. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this

Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant agreements until their term expires) and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Growers'.

7. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

### **Qualifications**

8. If the arrangements described in the Ruling are materially different from the arrangements that are actually carried out:

- the Ruling has no binding effect on the Commissioner, as the arrangements entered into are not the arrangements ruled upon; and
- the Ruling will be withdrawn or modified.

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### **Date of effect**

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10. This Ruling applies prospectively from 15 March 2000, the date the Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

11. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, the Product Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

## Withdrawal

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12. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

## Arrangement

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13. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- Application for Product Ruling dated 23 December 1999;
- The Australian Blue Gum 2000 Prospectus, dated 10 February 2000;
- Constitution for Australian Blue Gum 2000, dated 22 December 1999;
- **Lease and Management Agreement for Australian Blue Gum 2000 between Australian Blue Gum Management Ltd (the 'Responsible Entity'), Australian Blue Gum Management Ltd ('the Lessor') and the Grower, undated;**
- Compliance Plan for Australian Blue Gum Management Ltd as the Responsible Entity, undated; and
- Additional correspondence dated 23 February 2000.

**Note: certain information received from Australian Blue Gum Management Ltd has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.**

14. The documents highlighted are those the Growers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of the Grower, will be a party to, with the exception of finance agreements, to which paragraphs 39 to 44 apply. The effect of these agreements is summarised as follows.

**Overview**

15. This arrangement is called the Australian Blue Gum 2000 Project.

Location	South West Region of Western Australia or the Green Triangle region of South East South Australia and South West Victoria
Type of business each participant is carrying on	Commercial growing, and cultivation of <i>Eucalyptus globulus</i> trees (Tasmanian Blue Gums) for the purpose of producing timber for woodchipping.
Number of hectares under cultivation	6,000
Names used to describe the product	Australian Blue Gum 2000 Project
Size of each Timberlot	1 hectare
Number of trees per hectare	1,000
Expected production	275 cubic metres / hectare
The term of the investment in years	11 approx.
Initial cost	\$5,000
Initial cost per hectare	\$5,000
Ongoing costs	Insurance to be provided by grower.

16. Growers applying under the Prospectus dated 10 February 2000 enter into a Lease and Management Agreement. This agreement is set out in the Schedule to the Constitution. The Agreement gives a Grower a sub-lease from Australian Blue Gum Management Ltd over an identifiable area of land called a 'Timberlot' until the Project is terminated pursuant to the provisions of the Constitution or, up until the trees are harvested and sold and net income distributed, whichever happens first. Each Timberlot is one hectare in size.

17. The Project Land is situated in the South West Region of Western Australia or the Green Triangle region of South Australia and Victoria. Norgard Clohessy Equity Group owns the property and will lease the land to Australian Blue Gum Management Ltd under a Head Lease, who will then sub-lease the land to the Growers.

18. Australian Blue Gum Management Ltd will sub-lease the Timberlot to the Growers to enable the Growers to carry on a long term commercial afforestation business. Growers are specifically granted rights to harvest timber on their Timberlot for this purpose.

19. The Prospectus states there is no minimum subscription for this Project however applications made under the Prospectus will not be accepted after 12 months from the date of the Prospectus. Each investor may subscribe for a minimum of one Timberlot, at a cost of \$5,500 per Timberlot. Where Growers lodge their application by 30 April 2000, a minimum of 1,000 trees per Timberlot (1,000 trees per hectare) will be planted on or before 31 October, following the execution of the Lease and Management Agreement (cl 6 of the Constitution).

20. Possible projected returns for Growers are outlined on pages 12 and 13 of the Prospectus. The projected returns are based largely on judgement and expert opinion and there are inherent risks in primary production due to matters beyond the control of Australian Blue Gum Management Ltd such as adverse weather conditions and variable market conditions. Accordingly, Australian Blue Gum Management Ltd does not guarantee the performance or success of the Project, or any particular rate of return on funds invested. However, based on the example set out on page 13 of the Prospectus, a Grower could expect to achieve an after tax internal rate of return of 9.10% per Timberlot. Growers will execute a Power of Attorney enabling the Responsible Entity, Australian Blue Gum Management Ltd, to act on their behalf as required, when they make an application for a Timberlot.

## **Constitution**

21. The Constitution for the project sets out the terms and conditions under which the Responsible Entity agrees to act for the Grower and to manage the Project. The Responsible Entity will keep a register of Growers (cl 11.2). Growers are entitled to assign their Grower's Interest in certain circumstances (cl 20.1). The Lease and Management Agreement is annexed to the Constitution and will be executed on behalf of a Grower following them signing the Application and a Power of Attorney Form in the Prospectus. Growers are bound by the Constitution by virtue of their participation in the Project.

**Compliance Plan**

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

**Interest in Land**

23. A lease is granted by the Responsible Entity to the Grower under the terms of the Lease and Management Agreement (schedule). Growers are granted an interest in land in the form of a lease to use their Timberlots for the purpose of conducting their afforestation business (cl 3.3). Growers must pay rent to the Lessor of an amount equal to 5% of the Net Sales Proceeds Before Rent and Management Fees (cl 3.2). This fee will be paid by the Responsible Entity on behalf of the Grower out of the Grower's Gross Sales Proceeds. The term of a Grower's lease is up to 31 December, 13 1/2 years after planting.

**Management Agreement**

24. Each Grower enters into a Lease and Management Agreement with the Responsible Entity for each Timberlot. The termination of the project will be 31 July, 11 years after planting. Growers contract with the Responsible Entity to establish and maintain the plantation until maturity. Growers pay an Application Price and a Planting Fee for each Timberlot. The total fees payable under the Lease and Management Agreement is \$5,500 per Timberlot, payable in two instalments.

25. The Responsible Entity will initially supply the *Eucalyptus globulus* seeds and will grow and care for the seedlings, rip and mound the Leased Premises, spray the Leased Premises for the control of weeds, fumigate and poison to exterminate or control pests and vermin on the Leased Premises, fertilise, spray and otherwise care for the Leased Premises as and when required according to good silvicultural and forestry practices.

26. The Responsible Entity will harvest and sell the timber produce on the Growers' behalf, at the highest price possible for the timber produce (cl.10.4). The Grower may elect to take their own Timber Produce (cl.10.1). The Grower will be responsible for paying for the cost of annual insurance on the Timberlot (cl. 5.7).

27. The Responsible Entity may only be removed from its appointment in accordance with sections 601FL and 601FM of the Corporations Law.

## **Fees**

28. The initial fee payable under the Lease and Management Agreement is \$5,000 per Timberlot being the Application Price for establishing the plantation (cl.7.1 of Lease and Management Agreement). Where growers lodge their applications by 30 April 2000, this service will be carried out by 30 June 2000.
29. For applications received during the period 1 May 2000 to 31 May 2000, the applications will only be executed if the Responsible Entity can guarantee that these establishment services can be provided by 30 June 2000.
30. All applications received on or after 1 June 2000 will not be executed by the Responsible Entity until at least 1 July 2000 and the plantation establishment services will not be carried out until after 1 July 2000.
31. A further amount of \$500 for the Planting Fee is payable by 31 October 2000 for planting services to be carried out during the period 1 July 2000 and 31 October 2000. For applications received after 31 October 2000, the planting services will not be carried out until the period 1 July 2001 to 30 October 2002.
32. After harvest, Growers must pay the Responsible Entity a Management Fee of 5% of their Net Sale Proceeds before Rent and Management Fees and 5% of their Net Sale Proceeds Proceeds before Rent and Management Fees for rental on their Timberlot over the life of the project. These amounts will be withheld by the Responsible Entity from the Grower's Gross Sales Proceeds before the harvest proceeds are paid out to the Growers.
33. The Independent Forester has stated, at page 50 of the Prospectus, that the project is sound. The land acquisition criteria and the proposed forestry regime are appropriate, and provided they are professionally applied and climatic conditions are favourable, good plantations will result. The eventual profitability of the project will depend largely on the price that can be obtained by the Manager at the time.
34. The Application Monies will be banked in the Application Fund trust bank account formed under the Project's Constitutions (cl 3.3).

## **Planting**

35. During the period up to 31 October 2000, the Responsible Entity will be responsible for planting *Eucalyptus globulus* trees on the leased area. After 31 October 2000, the Responsible Entity will maintain the trees in accordance with good silvicultural practice. The

services to be provided by the Responsible Entity over the term of the Project are outlined in the Lease and Management Agreement (items 5.2 and 5.3 of schedule).

36. For applications received after 31 October 2000, the planting services will not be carried out until the period 1 July 2001 to 30 October 2002.

37. The Responsible Entity will be responsible for arranging the marketing and sale of the timber produce. The Harvest shall take place when the forest produce equals or exceeds an average of 275m<sup>3</sup>/ha during the 11<sup>th</sup> year.

38. The Proceeds of Sale of the Timber produce will be paid into the Proceeds Fund Bank Account. Proceeds received by the Responsible entity are to be distributed in the following order of priority:

- to the Responsible Entity for a Grower's proportional share of the cost in relation to harvesting, logging, processing, transporting, insurance, marketing and loading the timber of participating growers and Rent on the Timberlot and the Management fee; then
- to the Growers under the Lease and Management Agreement and the Constitution. (cl 31.1 of Constitutions).

### **Finance**

39. Growers can fund their investment in the Projects themselves, borrow from an independent lender or borrow through finance arrangements offered by Australian Agribusiness Finance Pty Ltd, an associate company of the Norgard Clohessy Equity Group.

40. This Ruling does not apply if a Grower enters into a finance agreement that includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers, for the purposes of section 82KL, or the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- terms or conditions are non-arm's length;

- repayments of the principal and payments of interest are linked to the derivation of income from the Projects;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender, or any associate of the lender; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

41. Australian Agribusiness Finance Pty Ltd will offer Growers two options to finance the Lease and Management Fees.

42. Under the first option, finance will be provided at a fixed interest rate and all principal and interest must be paid within 5 years of the first drawdown.

43. Under the second option, finance will be provided on a 12 months interest only basis. All loans will be made on a full recourse basis, and Australian Agribusiness Finance Pty Ltd will pursue legal recovery action against defaulting borrowers.

44. The Events of Default are specified in the Facility Provisions which form part of the finance arrangements and include the borrowers failing to pay secured moneys on or before the due date for payment. In the event of a Default by the Borrower, the Lender has an unfettered discretion to demand immediate payment of the secured moneys (cl.8.2). The borrowers agree to assign their interest in the Project to Australian Agribusiness Finance Pty Ltd as security for the loan and declare under the Finance Package application form that the application is for a full recourse loan. If for any reason returns from the venture are insufficient to meet payment obligations under the loan, then the borrowers must source the loan payments from other funds or resources available to them.

## **Ruling**

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### **Section 8-1**

45. For a Grower who invests in the Project by 30 April 2000, the following deductions will be available for the years ended 30 June 2000 to 30 June 2002:

**Deductions available each year**

Fee Type	ITAA 1997 Section	Year 1 30/6/2000	Year 2 30/6/2001
Plantation Expense Fee	8-1	\$5,000	
Planting Expense Fee	8-1		\$500

46. For a Grower who invests during the period 1 May 2000 to 31 May 2000, the following deductions will be available for the years ended 30 June 2000 to 30 June 2002 provided the Responsible Entity can guarantee to undertake the plantation establishment work by 30 June 2000.

**Deductions available each year**

Fee Type	ITAA 1997 Section	Year 1 30/6/2000	Year 2 30/6/2001
Plantation Expense Fee	8-1	\$5,000	
Planting Expense Fee	8-1		\$500

Where the plantation establishment work cannot be undertaken by 30 June 2000, no deduction will be available in Year 1.

47. For Growers who invest on or after 1 June 2000, the following deductions will be available for the years ended 30 June 2000 to 30 June 2002

**Deductions available each year**

Fee Type	ITAA 1997 Section	Year 1 30/6/2000	Year 2 30/6/2001
Plantation Expense Fee	8-1		\$5,000
Planting Expense Fee	8-1		*\$500

\* Where Growers invest after 31 October 2000, the Planting Expense Fee will be deductible in Year 3, not Year 2.

48. Section 27-5 of the ITAA 1997 will apply to fees incurred after 1 July 2000 to deny a deduction that would otherwise be allowable under section 8-1 to the extent that the fee includes an amount relating to a GST input tax credit to which a Grower is entitled.

### **Division 35 – Deferral of losses from non-commercial business activities**

#### **Section 35-55 – Commissioner’s discretion**

48.1 For a Grower who is an individual and who entered the Project between 15 March 2000 and 10 February 2001 the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner has decided for the income years ended 30 June 2001 to 30 June 2010 that the rule in section 35-10 does not apply to this business activity provided that the Project has been, and continues to be, carried on in a manner that is not materially different to the arrangement described in this Ruling.

48.2 This exercise of the discretion in subsection 35-55(1) will not be required where, for any year in question:

- the exception in subsection 35-10(4) applies;
- a Grower’s business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45;
- the Grower’s business activity produces assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsection 35-10(2)); or
- the Commissioner is precluded from exercising the discretion under paragraph 35-55(1)(b) because of subsection 35-55(2).

48.3 Where, the exception in subsection 35-10(4) applies, or the Grower’s business activity satisfies one of the tests, or the discretion in subsection 35-55(1) is exercised section 35-10 will not apply. This means that a Grower will not be required to defer any excess of deductions attributable to their business activity in excess of any assessable income from that activity, i.e., any ‘loss’ from that activity, to a later year. Instead, this ‘loss’ can be offset against other assessable income for the year in which it arises.

48.4 Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner’s decision to exercise the discretion in paragraph 35-55(1)(b) as an indication that the Tax Office sanctions or

guarantees the Project or the product to be a commercially viable investment. An assessment of the Project or the product from such a perspective has not been made.

### **Section 82KZM**

49. For a Grower who invests in the Projects the following provisions of the ITAA 1936 have application as indicated:

- (i) the expenditure by the Growers does not fall within the scope of section 82KZM;
- (ii) the expenditure by the Growers does not fall within the scope of sections 82KZMB-82KZMD;
- (iii) section 82KL does not apply to deny the deductions otherwise allowable; and
- (iv) the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

## **Explanations**

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### **Section 8-1**

50. Consideration of whether lease and management fees are deductible under section 8-1, begins with paragraph 8-1(1)(a), on the following basis:

- the outgoings in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under paragraph 8-1(1)(b) if they are incurred when the business has not commenced; and
- where all that happens in a year of income is a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the paragraph 8-1(1)(b) applies. However, that does not preclude the application of paragraph 8-1(1)(a), and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

51. An afforestation scheme can constitute the carrying on of a business. Where there is a business, or a future business, the gross

sale proceeds from the timber's sale from the scheme will constitute gross assessable income under section 6-5. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income. These operations will be the planting, tending, maintaining and harvesting of the trees.

52. Generally, an investor will be carrying on a business of afforestation where:

- the investor has an identifiable interest in specific growing trees coupled with a right to harvest and sell the timber;
- the afforestation activities are carried out on the investor's behalf; and
- the weight and influence of the general indicators of a business as used by the Courts point to the carrying on of a business.

53. For this Project Growers have, under the Lease and Management Agreement, rights in the form of a lease over an identifiable area of land consistent with the intention to carry on a business of growing trees. Under the Lease and Management Agreement, Growers appoint Australian Blue Gum Management Ltd, as Responsible Entity, to supply the *Eucalyptus globulus* seeds and grow and care for seedlings, rip and mound the Leased Premises, spray the Leased Premises for the control of weeds, fumigate and poison to exterminate or control pests and vermin on the Leased Premises, fertilise, spray and otherwise care for the Leased Premises as and when required according to good silvicultural and forestry practices. Growers are considered to control their investment. The specific cost of these services provided by 30 June 2000 is \$5,000 per hectare (or Timberlot) with the balance of these services provided by 31 October 2000 at a cost of \$500.

54. The Lease and Management Agreement gives Growers the full right, title and interest in the products and the right to have the products sold for their benefit (clause 11.4) until the end of the lease term.

55. Growers have the right to use the land in question for afforestation purposes and to have the Responsible Entity come onto the land to carry out its obligation under the Lease and Management Agreement. The Growers' degree of control over the Responsible Entity, as evidenced by the Agreement and supplemented by the Corporations Law, is sufficient. Under the Project, Growers are entitled to receive regular progress reports on Australian Blue Gum Management Ltd activities. Growers are able to terminate

arrangements with the Responsible Entity in certain instances, such as where the Responsible Entity has failed to perform any of its duties with due care and diligence. The afforestation activities described in the Lease and Management Agreement are carried out on the Growers' behalf.

56. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the arrangement's description for all the indicators. Growers to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections contained in the Draft Prospectus that suggest the Project should return a 'before-tax' profit to the Growers, i.e., a 'profit' in cash terms that does not depend in its calculation, on the fees in question being allowed as a deduction. The Independent Forester's assessment was that plantation yields will be economically viable.

57. Growers will engage the professional services of a Manager with appropriate credentials. There is a means to identify which trees Growers have an interest in. These services are based on accepted silvicultural practices and are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses.

58. Growers have a continuing interest in the trees from the time they are acquired until harvest. The afforestation activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. The Growers' afforestation activities will constitute the carrying on of a business.

59. The fees associated with the afforestation activities will relate to the gaining of income from this business and, hence, have a sufficient connection to the operations by which this income (from the sale of timber) is to be gained from the business. They will, therefore, come within paragraph 8-1(1)(a). Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. No capital component is identifiable. The tests of deductibility under section 8-1 are met. The exclusions do not apply.

60. Section 27-5 operates to deny a deduction that would otherwise be available under section 8-1, to the extent that the loss or outgoing incurred (after 1 July 2000) includes an amount relating to a GST input tax credit to which a Grower is entitled.

### **Sections 82KZM and 82KZMB - 82KZMD**

61. Section 82KZM operates to spread over more than one income year a deduction for prepaid expenditure that would otherwise be immediately deductible in full under section 8-1. The section applies to certain expenditure incurred under an agreement in return for doing

of a thing under the agreement that is not wholly done within the same year of income as the execution of the relevant agreement.

62. Under the Lease and Management Agreement, fees of \$5,000 per Timberlot will be incurred on the execution of that Agreement. The fee is charged for providing services to a Grower by 30 June of the year of execution of the Agreement. The fee is expressly stated to be for a number of specified services. No explicit conclusion can be drawn from the arrangement's description that the fee has been inflated to result in reduced fees being payable for subsequent years.

63. There is also no evidence that might suggest the services covered by the fee could not be provided in the same year of income as the expenditure in question is incurred. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial fee is for the Project Manager doing 'things' that are not to be wholly done within the year of income of the fee being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditure incurred by the Grower. New sections 82KZMB, 82KZMC and 82KZMD also have no application to this Project since the services to be provided in respect of the initial fee are completed in the same year of income as the expenditure is incurred (see paragraph 82KZMA(3)(c)).

### **Section 82KL**

64. The operation of section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefits'. In the project, there may be a loan provided by Australian Agribusiness Finance Pty Ltd to the Grower. The loan is provided on a full recourse basis, and on commercial terms. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL. It will not apply to deny the deductions otherwise allowable under section 8-1.

### **Part IVA**

65. For Part IVA to apply there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C), and a dominant purpose of entering into the scheme to obtain the tax benefit (section 177D). The Project will be a 'scheme' commencing when the Prospectus is issued. The Growers will obtain an initial 'tax benefit' from entering into the scheme, in the form of the deduction for the initial fee, allowable under section 8-1, 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.

66. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the eventual harvesting of the trees. The Independent Forester's Report contained in the Prospectus states that the Project should achieve its financial objective if the forestry regimes set out in the report are followed, good marketing arrangements are put in place and the international economy and climatic factors (especially annual rainfall) are favourable. There are no features of the Project that might suggest the Project was so 'tax driven', and so designed to produce a tax deduction of a certain magnitude that it would attract the operation of Part IVA.

## **Detailed contents list**

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67. Below is a detailed contents list for this Ruling:

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*Related Rulings/Determinations:*

TR 92/1; TR 97/11; TR 97/16;

TD 93/34; IT 175; IT 2001;

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*Subject references:*

- carrying on a business
- commencement of business
- afforestation
- management fee expenses
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

*Legislative references:*

- ITAA 1997 8-1
- ITAA 1997 27-5
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(b)
- ITAA 1936 82KL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 Pt IVA
- TAA 1953 Pt IVAAA
- Copyright Act 1968

## ATO references:

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