


PR 2001/113 - Income tax: Great Southern Blue Gum Plantations 2000/2001 Projects

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 This document has changed over time. This is a consolidated version of the ruling which was published on *27 June 2001*



Product Ruling

Income tax: Great Southern Blue Gum Plantations 2000/2001 Projects

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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.*

No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee these products as investments. Further, we give no assurance that the products are 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 products. 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 arrangements are 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 arrangements will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities in future years to confirm the arrangements have been implemented as described below and to ensure that participants in the arrangements include in their income tax returns income derived in those future years.

Terms of use of this Product Ruling

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

Potential 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

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of persons who take part in the arrangements to which this Ruling relates. In this Ruling these arrangements are sometimes referred to as the Great Southern Blue Gum Plantations 2000 and/or 2001 Projects, or just simply as 'the Projects' or the 'products'.

Tax law(s)

2. The tax law dealt with in this Ruling is:
- Division 35 of the *Income Tax Assessment Act 1997* ('ITAA 1997').

Goods and Services Tax

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

Business Tax Reform

4. The Government is currently evaluating further changes to the tax system in response to the *Ralph Review of Business Taxation* and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the laws enacted at the time it was issued, future tax changes may affect the operation of those laws and, in particular, the tax deductions that are allowable. Where tax laws change, those changes will take precedence over the application of this Ruling, and to that extent, this Ruling will be superseded.

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

Note to Promoters and Advisers

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for investors in projects such as these. In keeping with that intention the Tax Office suggests that

promoters and advisers ensure that potential investors are fully informed of any changes in tax laws that take place after the Ruling is issued. Such action should minimise suggestions that potential investors have been negligently or otherwise misled.

Class of persons

7. The class of persons to whom this Ruling applies is those who entered into either of the arrangements described below between 2 February 2000 and 14 June 2000, the dates PR 2000/1 was issued and withdrawn respectively. They have a purpose of staying in the relevant 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'.

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

Qualifications

9. 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

11. This Ruling applies prospectively from 2 February 2000, the date PR 2000/1 was made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of

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a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on 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, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who entered into the specified arrangements between 2 February 2000 and 14 June 2000. This is subject to there being no material difference in the arrangements or in the persons' involvement in the arrangements.

Arrangement

14. The arrangements that are the subject of this Ruling are described below. The relevant documents or parts of documents incorporated into this description of the arrangements are:

- Great Southern Blue Gum Plantations 2001 Application for Product Ruling dated 15 October 1999;
- Amendment to Product Ruling Application for Great Southern Blue Gum Plantations 2000/2001 Projects dated 6 December 1999;
- Prospectus prepared and issued by Great Southern Managers Australia Limited ('GSMAL' or 'the Responsible Entity') for the Great Southern Blue Gum Plantations 2000/2001, dated 3 February 2000;
- Great Southern Blue Gum Plantations 2000 Constitution made by GSMAL (as 'the Responsible Entity') dated 18 December 1998 and Great Southern Blue Gum Plantations 2001 Constitution made by GSMAL (as 'the Responsible Entity') dated 2 September 1999;

- Draft **Lease and Management Agreement** between GSMAL (as both the Lessor and the Responsible Entity) and the Grower, undated;
- Draft Plantation Management Agreement between GSMAL (as ‘the Responsible Entity’) and Great Southern Plantations Ltd (as the Manager) undated;
- Draft Management Service Agreement between GSMAL (as ‘the Responsible Entity’) and Great Southern Plantations Ltd (as ‘the Contractor’) undated;
- Compliance Plan for Great Southern Blue Gum Plantations 2001 adopted by GSMAL (as ‘the Responsible Entity’) on 7 October 1999;
- Draft **Applications for Finance for Principal and Interest Loans** – one for Individuals & Partnerships and one for Companies & Trusts, undated;
- Draft **Proforma Loan Deed** between Templegate Finance Pty Ltd (‘TFPL’) and the Borrower, undated;
- Mortgage Debenture between GSMAL (as ‘the Financier’) and TFPL (as ‘the Mortgagor’);
- Intercompany Loan Offer facility letter from GSMAL to TFPL dated 11 May 1999; and
- Additional correspondence from the Applicant dated 13 December 2000.

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

15. The documents highlighted are those Growers enter into or become a party to. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are part of the arrangements to which this Ruling applies. The effect of these agreements is summarised as follows.

Overview

16. The arrangements are called the Great Southern Blue Gum Plantations 2000 Project and the Great Southern Blue Gum Plantations 2001 Project.

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Location	The South West and Great Southern areas of Western Australia and the "Green Triangle" area of South West Victoria and the South East of South Australia
Type of business each participant is carrying on	Commercial growing of <i>Eucalyptus globulus</i> (Tasmanian Blue Gums), the harvested timber producing short fibre hardwood woodchip for use in the paper industry
Size of the leased area	0.33 hectares
Number of trees per hectare	Minimum average of 1000
Expected production	250 cubic metres per hectare
The term of the investment	Approximately 11 years
Initial cost	\$3,000 for applications lodged on or before 31 May 2000, and \$3,300 for applications lodged between 1 June 2000 and 31 January 2001
Initial cost on a per hectare basis	\$9,090 or \$10,000
Ongoing costs	Lease and management fees payable from net harvest proceeds.
Other costs	Growers will be charged for the cost of all insurance except Public Liability Insurance

17. Growers applying under this prospectus join one of two projects, depending on their date of application. The date of application also determines the date of execution of the Lease and Management Agreement and the period of provision of establishment services to which the initial fee relates. The two relevant projects are summarised as follows:

Application lodged	Project	Date of Execution	Fee	Period of provision of establishment services
on or before 31/5/2000	2000	on or before 31/5/2000	\$3,000	From date of execution of Lease and Management Agreement to 30/6/2000
post 31/5/2000	2001	at any time between 1/7/2000 and 31/1/2001 (inclusive)	\$3,300	From date of execution of Lease and Management Agreement to 30/6/2001

18. Growers participating in either Project will have entered into a Lease and Management Agreement with GSMAL (as both the Lessor and the Responsible Entity) which gives them a lease over an identifiable area of land called a Leased Area from GSMAL for approximately 11 years. The Agreement also provides for *eucalyptus globulus* (Tasmanian Blue Gum trees) to be planted on the Grower's leased land for the purpose of eventual felling and sale in approximately eleven years. Prior to harvest, Growers will have the right to apply to enter into a new Lease and Management agreement with GSMAL to manage the coppice to produce a second crop from the original planting. This will again be harvested when the volume of timber is appropriate.

19. A minimum of 1,000 trees per hectare will be planted following execution of the Lease and Management Agreement according to the table at paragraph 16.

20. Under the Prospectus, GSMAL offered 15,000 Leased Areas of 0.33 hectares at either \$3,000 or \$3,300 (the latter includes a GST component of \$300). There is no minimum amount that must be raised under the Prospectus for either Project but GSMAL has the right to accept oversubscriptions. Most of the land for the Projects has been leased by GSMAL from Great Southern Land Holdings Pty Ltd, a wholly owned subsidiary of GSMAL. The land has been secured primarily by purchase.

Lease and Management Agreement

21. Under the Lease and Management Agreement, Growers enter into an 11 year lease for one or more Leased Areas and contract with GSMAL to establish and maintain the plantation until maturity. Clause 2 of the Lease and Management Agreement grants an interest in the land to the Grower. Growers are not entitled to assign their rights under the Lease and Management Agreement, except in certain circumstances (cl 7). Certificates are issued to Growers. GSMAL keeps a register of Growers. Growers execute a Power of Attorney enabling GSMAL to act on their behalf as required (cl 29).

22. Growers may elect to collect their own timber produce (cl 18), or have GSMAL, acting as their agent, sell the timber produce, or process it into woodchips and then sell, on the Grower's behalf, for the best possible commercial price (cl 19). Non-Electing Growers are required to accept the 'Gross Proceeds of Sale' in full satisfaction and discharge of their rights in relation to the Forest Produce (cl 20).

Establishment and Maintenance of the Plantation

23. During the period commencing upon execution of the Lease and Management Agreement GSMAL will be responsible for planting *eucalyptus globulus* on the Leased Areas. GSMAL has the capacity and resources to carry out the establishment and planting program in respect of both Project 2000 and Project 2001. From this period on, GSMAL will maintain the trees in accordance with good silvicultural practice. The services to be provided by GSMAL over the term of the Projects are defined in clause 1 of the Agreement. GSMAL will also be responsible for the establishment and maintenance of access roads and fire breaks, and is required to keep the Leased Areas free from vermin. Clause 11.3 of the Agreement provides that the Grower shall have at all times the full right, title and interest in the Forest Produce, and the right to have that produce sold for their benefit.

24. GSMAL will also be responsible for arranging the marketing and sale of either the timber produce or woodchips. When the cubic metre per hectare yield for the Forest equals or exceeds 250 cubic metres per hectare, or no later than 11 years from the Commencement Date, GSMAL will arrange for the harvesting and will notify Electing Growers when and where to collect their produce, and what their proportional shares of the costs of felling are (cl 17.2). GSMAL will provide ongoing reports to the Growers on the progress of the plantation.

25. GSMAL will ensure that the Gross Proceeds of Sale of each Project are paid into the relevant Proceeds Fund trust bank account. The Growers' proportional shares of the costs of felling and costs of sale, and, if applicable, the costs of chipping, will be paid from the Gross Proceeds of Sale to GSMAL, or the relevant contractor. Growers are also required to pay GSMAL an amount equal to 2.75% of the Net Proceeds of Sale, as rent, and another amount equal to 3.3%, as remuneration for the services provided following completion of the establishment services. These percentages have been calculated to ensure that GSMAL makes a profit in providing these services. The balance of the Net Proceeds of Sale for each Project will be held in the relevant Proceeds Fund on trust for the Growers (cl 21).

Fees

26. The total establishment fees payable under the Lease and Management Agreement in respect of the two projects are as set out in the table at paragraph 16.

27. The Application Monies will be banked into the appropriate Applications Fund, depending on the date of application. These monies will be released to GSMAL when certain specified criteria have been met (cls 8 and 9 of the Constitutions and cl 22 of the Lease and Management Agreement).

28. Following provision of the establishment services GSMAL will meet the Projects' ongoing costs, other than insurance premiums payable by Growers (cl 5.4 of the Lease and Management Agreement), out of its own funds. In return Growers are charged 3.3% and 2.75% of the Net Harvest Proceeds, respectively, for the services provided and rental of the Leased Area. GSMAL is required to lodge funds in an account known as the Maintenance Reserve Fund or hold bank backed securities for an amount of the future maintenance costs to be determined by the Independent Forester (cl 11 of the Constitutions). This will ensure that sufficient reserve funds will be available, if needed, to meet ongoing maintenance costs of the Projects.

Finance

29. Growers can choose to fund their investment themselves, borrow from an unassociated lending body or borrow through special finance arrangements offered by TFPL. Two finance options are offered in this last respect:

- | | |
|----------|---|
| Option A | interest free |
| | <ul style="list-style-type: none"> • deposit of \$300 per Leased Area plus all relevant GST associated with the initial fee • 12 equal monthly instalments by periodical debit; or |
| Option B | principal and interest |
| | <ul style="list-style-type: none"> • deposit of \$300 per Leased Area plus all relevant GST associated with the initial fee • 48 equal monthly repayments • interest rate currently 9.5% fixed • security by Loan Deed over the Lease and Management Agreement. |

30. Under both options GSMAL is to be put in funds by the financier as and when the monthly repayments are due by the Grower. Both options involve full recourse loans and TFPL will pursue legal action against defaulting borrowers.

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

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;

- entities associated with the Projects, other than Templegate Finance Pty Ltd, are involved in the provision of finance for the Projects;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrowers risk;
- additional benefits will be granted to the borrowers for the purpose of section 82KL or the funding arrangements transform the project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arms length;
- repayments of the principal and 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 Projects but will be transferred (by any mechanism) back to the lender or any associate; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

32. There is no agreement, arrangement or understanding between any entity or party associated with the Projects and any financial or other institution for the provision of any finance to the Growers for any purpose associated with the Projects.

Ruling

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

Section 35-55 - Commissioner's discretion

33. For a Grower who is an individual and who entered the 2000 Project on or after 2 February 2000, 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. Similarly, for the 2001 Project, the Commissioner has decided for the income years ended 30 June 2001 to 30 June 2011 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.

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

- a Grower's business activity satisfies one of the objective tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the 'Exception' in subsection 35-10(4) applies (see paragraph 40 in the Explanations part of this ruling, below).

35. Where, either the Grower's business activity satisfies one of the objective tests, the discretion in subsection 35-55(1) is exercised, or the Exception in subsection 35-10(4) applies, 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.

36. 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 this perspective has not been made.

Explanations

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

37. Under the rule in subsection 35-10(2) a deduction for a loss incurred by an individual (including an individual in a general law partnership) from certain business activities will not be allowable in an income year unless:

- the 'Exception' in subsection 35-10(4) applies;
- one of four objective tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or
- if one of the objective tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

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38. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

39. Under the loss deferral rule in subsection 35-10(2) the relevant loss is not able to be taken into account in the calculation of taxable income in the year that loss arose. Instead, in a later year it may be offset against any income from the same or similar business activity, or, if one of the objective tests is passed, or the Commissioner's discretion exercised, against other income.'

40. For the purposes of applying the objective tests, subsection 35-10(3) allows taxpayers to group business activities 'of a similar kind'. Under subsection 35-10(4), there is an 'Exception' to the general rule in subsection 35-10(2) where the loss is from a primary production business and the individual taxpayer has other assessable income for the income year from sources not related to that activity, of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

41. In broad terms, the objective tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);
- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year) (section 35-35);
- (c) at least \$500,000 of real property is used on a continuing basis in carrying on the business activity in that year (section 35-40); or
- (d) at least \$100,000 of certain other assets is used on a continuing basis in carrying on the business activity in that year (section 35-45).

42. A Grower who was accepted into, and commenced participation in the 2000 Project between 2 February 2000 and 31 May 2000 is carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling and additional information provided since, indicates that a Grower who acquires the minimum investment of one interest in the Project is unlikely to pass one of the objective tests, or produce a taxation profit, until the income year ended 30 June 2011.

43. Therefore, prior to this time, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b),

the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

44. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, for an individual Grower who acquired an interest(s) in the 2000 Project between 2 February 2000 and 14 June 2000, the Commissioner has decided that it would be unreasonable not to exercise the second arm of the discretion in paragraph 35-55(1)(b) for the years ending 30 June 2001 to 30 June 2010, or for the years ending 30 June 2001 to 30 June 2011 for the 2001 Project.

45. The discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where:

- (i) the business activity has started to be carried on; and
- (ii) there is an objective expectation that the business activity of an individual taxpayer will either pass one of the objective tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

46. Information provided by the applicant states that the business activity comprised by a Grower's involvement in this Project has started to be carried on, and will continue to be carried on in a manner that is not materially different to that described in the Arrangement in this Product Ruling.

47. In deciding to exercise the discretion in paragraph 35-55(1)(b) the Commissioner has relied upon:

- the report of the Independent Forester and additional evidence provided by the Responsible Entity with the application and subsequently, in further information requested by the Commissioner;
- independent, objective, and generally available information relating to the plantation timber industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity.

Detailed contents list

48. Below is a detailed table of contents list for this Ruling:

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Commissioner of Taxation

27 June 2001

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Not previously issued in draft form	- management fees expenses
	- producing assessable income
	- product rulings
	- public rulings
	- schemes and shams
	- taxation administration
	- tax avoidance
<i>Related Rulings/Determinations:</i>	
TR 92/1; TR 92/20; TD 93/34;	
TR 97/11; TR 97/16; TR 98/22;	
PR 1999/95	
<i>Subject references:</i>	<i>Legislative references:</i>
- carrying on a business	- ITAA 1997 Div 35
- commencement of business	- ITAA 1997 35-10(2)
- fee expenses	- ITAA 1997 35-10(3)

- 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)(a)
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 - ITAA 1997 35-55(2)
-

ATO references:

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