



PR 2001/70 - Income Tax: Australian Growth Timber Project 3

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Product Ruling

Income tax: Australian Growth Timber Project 3

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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**, **Previous Rulings**, **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 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 and to ensure that the participants in the arrangement 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.

What this Product Ruling is about

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 Growth Timber Project 3, or just simply as 'the Project'.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- section 6-5 of the *Income Tax Assessment Act 1997* ('ITAA 1997');
 - section 8-1 (ITAA 1997);
 - section 17-5 (ITAA 1997);
 - Division 27 (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).

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 'Member') 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 who are considering investing 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 this. 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 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 'Members'.

8. 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

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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reproduction and rights should be addressed to the Manager,
Legislative Services, AusInfo, GPO Box 1920, Canberra ACT 2601.

Date of effect

11. This Ruling applies prospectively from 30 May 2001, 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).

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, the Product 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 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.

Previous Rulings

14. This Ruling replaces Product Ruling PR 2000/78, which is withdrawn on and from the date this Ruling is made (30 May 2001). Product Ruling PR 2000/78 will continue to apply to investors who entered into the Project on or before 30 May 2001.

Arrangement

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

- Application for Product Ruling dated 1 October 1999;
- The Australian Growth Timber Project 3 Prospectus, undated;
- Constitution for the Australian Growth Timber Project 3, undated;
- **Lease and Management Agreement for the Australian Growth Timber Project 3 between Australian Growth Managers Ltd (the ‘Project Manager’), Australian Growth Landholdings Ltd (the ‘Land Owner’) and the Member, undated;**
- Compliance Plan for the Australian Growth Timber Project 3, undated;
- Additional correspondence dated 23 May 2000, 29 May 2000, 2 June 2000, 12 April 2001 and 23 April 2001.

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

16. The documents highlighted are those the Members enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Member, or any associate of the Member, will be a party to, with the exception of finance agreements, to which paragraphs 34 to 38 apply. The effect of these agreements is summarised as follows.

Overview

17. This arrangement is known as the Australian Growth Timber Project 3.

Location	Kangaroo Island in South Australia, South West of Western Australia
Type of business each participant is carrying on	Commercial growing and cultivation of <i>Eucalyptus globulus</i> (Tasmanian Bluegum) trees for woodchipping.

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Number of hectares under cultivation	4,000
Name used to describe the product	Australian Growth Timber Project 3
Size of each Woodlot	1 hectare
Number of trees per hectare	1,000
Expected production	200-300 cubic metres / Woodlot
The term of the investment in years	12 years
Initial cost	\$6,050
Initial cost per hectare	\$6,050
Ongoing costs	Management Fees, Lease Fees, Harvest Fee.

18. Members applying under the Prospectus enter into a Lease and Management Agreement for the Australian Growth Timber Project 3. The arrangements are set out in the Constitution for the Project. The Lease agreement gives a Member a sub-lease over an identifiable area of land, called a 'Woodlot', until the Project is terminated on the earlier of 30 June 2012 or the date of distribution of the Gross Proceeds of Sale to Members. The term of the project is expected to be approximately 12 years. Each Woodlot is 1 hectare in size.

19. The Project Land is situated on Kangaroo Island in South Australia and the South West of Western Australia. Australian Growth Landholdings Ltd owns the Project Land.

20. Australian Growth Landholdings Ltd will sub-lease the Woodlot to the Member to enable the Member to carry on a business of long term silviculture for the purpose of producing timber for woodchipping or any other suitable purpose.

21. The Prospectus states there is no minimum subscription for this Project. Each investor may subscribe for a minimum of one Woodlot, at a cost of \$6,050 per Woodlot. A minimum of 1,000 trees per Woodlot (1,000 trees per hectare) will be planted during the period 1 July 2001 and 30 October 2001, and 1 May 2002 and 30 June 2002.

Constitution

22. The Constitution for the Project sets out the terms and conditions under which the Project Manager agrees to act for the Members and to manage the Project. The Project Manager will maintain a register of Members. The Lease and Management Agreement will be executed on behalf of a Member under a Power of

Attorney following them signing the Application. Members are bound by the Constitution by virtue of their participation in the Project.

Compliance Plan

23. The Project Manager has prepared a Compliance Plan in accordance with the Corporations Law. Its purpose is to establish a Compliance Committee to ensure the Project Manager meets its obligations as the Project Manager of the Project and that the rights of the Members are protected.

Interest in Land

24. A sub-lease is granted by Australian Growth Landholdings Ltd, the Land Owner, to the Members under the terms of the Lease and Management Agreement for the Project (cl. 3.1). Members are granted an interest in land in the form of a sub-lease to use their Woodlots for the purpose of conducting their afforestation business. Members must pay rent for each Woodlot annually to the Land Owner for the term of the Lease which is from the date of commencement until 30 June 2013.

Lease and Management Agreement

25. Each Member enters into a Lease and Management Agreement with the Project Manager for their Woodlots. Members contract with the Project Manager to carry out the services and duties in relation to the Woodlots, as set out in the Lease and Management Agreement, which are usual or necessary for carrying on the business of afforestation. The Project is terminated on the earlier of 30 June 2013 or the date upon which the trees upon the Woodlots have been harvested and sold and the Net Income distributed to the Members. A Member is entitled to assign their interest in certain circumstances (cl. 25.2).

26. Under the Lease and Management Agreement, the Project Manager agrees to perform the following services under the Agreement:

- purchase the *Eucalyptus globulus* trees and plant out the Leased Area at an average of 1,000 trees per Woodlot;
- cultivate, maintain, fertilise, water, spray, prune, thin out and do all other things necessary to the trees to produce mature trees suitable for woodchipping;

- keep down and exterminate upon the Leased Area all vermin and animal pests, insects and all noxious plants and weeds and comply with all laws and regulations with respect to the keeping down and exterminating on the same; and
- do all other things that are necessary or incidental to the carrying out of the Member's Business to produce a viable business of growing of *Eucalyptus globulus* trees for woodchipping or other suitable purposes.

Planting

27. During the period 1 July 2001 to 31 October 2001, and 1 May 2002 and 30 June 2002, the Project Manager will be responsible for planting *Eucalyptus globulus* trees on the leased area. The Project Manager will maintain the trees in a proper and skilful manner and according to generally accepted silvicultural methods. The services to be provided by the Project Manager over the term of the Project are outlined in the Lease and Management Agreement.

Harvesting

28. The Project Manager must harvest and process or procure a suitably qualified person to harvest and process the trees at market rates on a date not later than 12 years from the execution of the Lease and Management Agreement ('Settlement Date') (cl. 12.1, Lease and Management Agreement). The Manager will be responsible for paying for the cost of annual insurance on the Woodlot (cl. 27.1(a), Lease and Management Agreement).

29. The Proceeds of Sale of the Timber produce will be paid into the Scheme Bank Account. Proceeds received by the Project Manager are to be distributed in the following order of priority:

- to the Project Manager, the Member's Proportional Interest of the Operational Expenses;
- to the Project Manager, the Harvest Fee;
- any unpaid Lease Fees or Management Fees;
- any other amounts owed to the Manager or the Lessor pursuant to the terms of the Lease and Management Agreement or the Constitution; and
- distribute to the Member the remainder. (cl. 16.2 & 16.3, Lease and Management Agreement).

Fees

30. The initial amount payable under the Lease and Management Agreement is \$6,050 per Woodlot, payable on application. This amount includes the Management Fee of \$5,500 for the planting and land preparation costs and a Lease Fee of \$550. A Management Fee of \$132, indexed annually, is payable in advance on or before each anniversary of the Settlement Date.

31. A Lease Fee of \$88 indexed annually, is payable in advance on or before each anniversary of the Settlement Date.

32. The Member also agrees to pay the Project Manager a Harvest Fee equal to 3.3% of the Gross Proceeds of Sale. This amount will be withheld by the Project Manager from the proceeds of sale of the Member's timber before the Harvest proceeds are paid out to the Member.

33. The Application Monies will be banked in the Applications Bank Account by the Project Manager (cl. 15.2, Constitution).

Finance

34. Members can fund their investment in the Project themselves, borrow from Australian Growth Finance Limited (a lender associated with the Responsible Entity) or borrow from an independent lender.

35. This Ruling does not apply if a Member 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;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the 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;

- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Australian Growth Finance Limited, are involved, or become involved, in the provision of finance to Members for the Project.

36. Australian Growth Finance Ltd will offer Members a loan to finance the Lease Fees and the Management Fees. The finance will be provided at a fixed interest rate of 11.5%.

37. Repayments will be monthly and consist of Interest only for Year 1 and then 5 Years of Principal and Interest. All loans will be made on a full recourse basis and Australian Growth Finance Ltd will pursue legal recovery action against defaulting borrowers.

38. The Events of Default are specified in the Deed of Loan and include the borrowers failing to repay the moneys secured or any part thereof on or before the due time for payment under the Deed. In the event of a Default by the Borrower, the Lender has an unfettered discretion to give notice demanding the immediate payment of the moneys secured.

Ruling

Goods and Services Tax

39. A Member's share of the gross sales proceeds from the Project, less any GST payable on these proceeds, will be assessable income under section 6-5. Section 17-5 excludes from assessable income an amount relating to GST payable on a taxable supply.

Section 8-1

40. Expenditure incurred by a Member who participates in this Project that is otherwise deductible under section 8-1 falls within subsections 82KZME(9), (10) and (11). Such expenditure is an exception ('Exception 5') to the prepayment rules contained in sections 82KZME and 82KZMF. Therefore, the amount and timing of tax deductions for such expenditure is determined under section 82KZM where the Member is a 'small business taxpayer' (see paragraphs 68 to 70), or under sections 82KZMA-82KZMD where the Member is NOT a 'small business taxpayer'.

Tax deductions for a Member who is a ‘small business taxpayer’**(i) Deductions where a Member is not registered nor required to be registered for GST**

41. A Member may claim the tax deductions referred to in the Table below where the Member:

- is a ‘small business taxpayer’;
- participates in the Project by 30 June 2001 to carry on the business of growing trees;
- incurs the fees shown in paragraph 30 to 32; and
- is not registered nor required to be registered for GST.

Fee Type	ITAA 1997 Section	Year ended 30/6/2001	Year ended 30/6/2002
Management Fee	8-1	\$5,500 – see note (i) below	\$132 (indexed) – see note (i) below
Lease Fee	8-1	\$550 – see note (i) below	\$88 (indexed) – see note (i) below
Interest	8-1	As incurred – see note (ii) below	As incurred – see note (ii) below

Notes:

- (i) Where a Member who is a ‘small business taxpayer’ incurs the Management and Lease Fee as required respectively by the Lease and Management Agreement those fees are deductible in full in the year incurred. However, if a Member **chooses** to prepay fees for the doing of things (e.g., the provision of management services or the leasing of land) that will not be wholly done within 13 months of the fees being incurred, then the prepayments rules in section 82KZM of the ITAA may apply to apportion those fees. In such cases, the tax deduction for the prepaid fee **MUST** be determined using the formula shown in paragraph 67 unless the expenditure is ‘excluded expenditure’. ‘Excluded expenditure’, being expenditure of less than \$1,000, is an ‘exception’ to the prepayment rules and is deductible in full in the year in which it is incurred.
- (ii) For a Member who is a ‘small business taxpayer’ interest incurred using the finance option offered by Australian Growth Finance Limited (described in

paragraphs 36-38) is deductible in full in the year in which it is incurred.

The deductibility or otherwise of interest arising from agreements that Members enter into with financiers other than Australian Growth Finance Pty Ltd is outside the scope of this Ruling. However, Members who are 'small business taxpayers' and who finance their participation in the Project other than with Australian Growth Finance Pty Ltd should read carefully the discussion of the prepayment rules in paragraph 66 to 67 below as those rules may be applicable if interest is prepaid for a period exceeding 13 months.

(ii) Deductions where a Member is registered or is required to be registered for GST

42. Where a Member who is registered or is required to be registered for GST:

- is a 'small business taxpayer';
- participates in the Project by 30 June 2001 to carry on the business of growing trees;
- incurs the fees shown in paragraph 30 to 32; and
- is entitled to an input tax credit for the fees,

then the tax deductions shown in the Table above at paragraph 41 will exclude any amounts of input tax credit (Division 27 of the ITAA). See Example 1 at paragraph 99.

Tax deductions for a Member who is NOT a 'small business taxpayer'

(i) Deductions where a Member is not registered nor required to be registered for GST

43. A Member may claim the tax deductions referred to in the Table below where the Member:

- is NOT a 'small business taxpayer';
- participates in the Project by 30 June 2001 to carry on the business of growing trees;
- incurs the fees shown in paragraphs 30 to 32; and
- is not registered nor required to be registered for GST.

Fee Type	ITAA 1997 Section	Year ended 30/6/2001	Year ended 30/06/2002
Management Fee	8-1	Amount must be calculated – see notes (i) & (iv) below	\$132 (indexed) plus balance of Year 1 management fees – see notes (ii) & (iv) below
Lease Fee	8-1	\$550 – see notes (ii) & (iv) below	\$88 (indexed) – see notes (ii) & (iv) below
Interest	8-1	As incurred – see notes (iii) & (iv) below	As incurred – see notes (iii) & (iv) below

Notes:

- (i) A Member who is NOT a ‘small business taxpayer’ **cannot** claim the prepaid Management Fees in full in the years in which the fees are incurred. The tax deduction in each year must be calculated using the formula in subsection 82KZMB(3) (shown below). This formula apportions the tax deduction in each ‘expenditure year’ (i.e., the year that the fees are incurred) using the number of days in the ‘eligible service period’. The ‘eligible service period’ means, generally, the period over which the management services are to be provided.

$$\text{Management Fee} \times \frac{\text{Number of days of eligible service period in the expenditure year}}{\text{Total number of days of eligible service period}}$$

Because of the operation of the capping provisions in section 82KZMC, there is no additional deductible amount available in the ‘expenditure year’ from the Table in subsection 82KZMB(5). Instead, the balance of the Management Fee incurred each year is determined under subsection 82KZMC(4) and the formula in subsection 82KZMC(5). These provisions apportion the balance of the prepaid Management Fee incurred each year over the years in which the management services are to be provided (See Example 2 at paragraph 100).

Australian Growth Managers Limited must provide the Member with the number of days of ‘eligible service

period' for the income year ended 30 June 2001 (i.e., the first 'expenditure year'). This figure is necessary to calculate the Member's tax deduction for both the income year ended 30 June 2001 and the other income years over which the management services will be provided.

- (ii) The Management Fee for the year ended 30 June 2002 and each year thereafter, and the Lease Fee, being amounts of less than \$1,000 each year, constitutes 'excluded expenditure' and are deductible in full in the year in which they are incurred. However, if a Member who is NOT a 'small business taxpayer' acquires more than one Woodlot, the quantum of the Lease Fee and the annual Management Fee may be \$1,000 or more. Where this occurs, the Member must determine the tax deduction that is allowable by using the method shown above for the Management Fee (see Note (i)).
- (iii) A Member who is NOT a 'small business taxpayer' and who finances participation in the Project using the finance option offered by Australian Growth Finance Limited (described in paragraphs 36 to 38) is not required to prepay interest. The interest incurred is, therefore, deductible in full in the year in which it is incurred.

The deductibility or otherwise of interest arising from agreements entered into with financiers other than Australian Growth Finance Limited is outside the scope of this Ruling. However, all Members who finance their participation in the Project other than with Australian Growth Finance Limited should read carefully the discussion of the prepayment rules in paragraph 71 to 77 below as those rules may be applicable if interest is prepaid.

- (iv) A Member, who **chooses** to prepay the Management Fee and/or the Lease Fee for a period exceeding 13 months, should read carefully the information in paragraph 77 below. The tax deductions for prepaid fees with an 'eligible service period' exceeding 13 months must be determined using the formula shown in paragraph 77 unless the expenditure is 'excluded expenditure'.

(ii) Deductions where a Member is registered or required to be registered for GST

44. Where a Member who is registered or required to be registered for GST:

- is NOT a ‘small business taxpayer’;
- participates in the Project by 30 June 2001 to carry on the business of growing trees;
- incurs the fees shown in paragraphs 30 to 32; and
- is entitled to an input tax credit for the fees,

then the tax deductions calculated using the methods described and the amounts shown in the Table above at paragraph 43 will exclude any amounts of input tax credit (Division 27 of the ITAA). See Example 1 at paragraph 99.

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

Section 35-55 – Commissioner’s discretion

45. For a Member who is an individual and who enters the Project during the year ended 30 June 2001 or 30 June 2002 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 will decide for the income years ending 30 June 2001 to 30 June 2010 that the rule in section 35-10 does not apply to this activity provided that the Project is carried out in the manner described in this Ruling.

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

- a Member’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 87 in the Explanations part of this ruling, below).

47. Where, either the Member’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 Member 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. Members are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Members 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.

Sections 82KZM, 82KZMB – 82KZMD, 82KL and Part IVA

49. For a Member who participates in the Project and incurs expenditure as required by the Management Agreement and the Lease Agreement the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Member who is a 'small business taxpayer' does not fall within the scope of section 82KZM (but see paragraphs 66 to 67);
- section 82KZMB applies to expenditure by a Member who is not a 'small business taxpayer' (but see paragraph 77;
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Explanations

Section 8-1

50. Consideration of whether the Lease Fees 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 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.

Is the Member carrying on a business?

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 assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income. 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 Members 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, Members appoint Australian Growth Managers Ltd, as Project Manager, to provide services such as purchasing and planting the trees, cultivating, maintaining, fertilising, watering, spraying, pruning, thinning out and doing all other things necessary to the trees to produce mature trees suitable for woodchipping such as keep down and exterminate all vermin and animal pests, insects and all noxious weeds. Members are considered to control their investment.

54. The Lease and Management Agreement gives Members full right, title and interest in the timber produce and the right to have the timber produce sold for the benefit of the Member (cl. 15.1).

55. Members have the right to use the land in question for afforestation purposes and to have the Project Manager come onto the land to carry out its obligation under the Lease and Management

Agreement. The Members' degree of control over the Project Manager, as evidenced by the Agreements and supplemented by the Corporations Law, is sufficient. Under the Project, Members are entitled to receive regular progress reports on the activities of Australian Growth Managers Ltd. Members are able to terminate arrangements with the Project Manager in certain instances, such as where there has been a breach (of a substantial nature) by the Project Manager or Land Owner of their respective obligations or covenants under the Lease and Management Agreement or they have committed an act of bankruptcy or gone into liquidation. The afforestation activities described in the Lease and Management Agreements are carried out on the Members' 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. Members to whom this Ruling applies intend to derive assessable income from the Project. This intention is related to projections contained in the Prospectus that suggest the Project should return a 'before-tax' profit to the Members, 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 the proposals contained in the Prospectus are realistic.

57. Members will engage the professional services of a Manager with appropriate credentials. There is a means to identify which trees Members 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. Members 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 Members' 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.

Sections 82KZME, 82KZMF and Exception 5

60. Unless one of the statutory exceptions applies, where the requirements of section 82KZME are met, section 82KZMF operates to set the amount and timing of deductions for expenditure that a taxpayer incurs in a year of income. Effectively, these provisions apportion the allowable tax deductions over the period during which the prepaid benefits will be provided.

61. This Product Ruling is issued in response to an application received by the Commissioner on or before 1pm (by legal time in the Australian Capital Territory) on 11 November 1999. Therefore, the Project is an arrangement to which Exception 5 (subsections 82KZME(9), (10) and (11)) applies. Because Exception 5 applies, sections 82KZME and 82KZMF do not apply to set the amount and timing of expenditure incurred by Members who participate in the Project. Expenditure incurred by a Member for the doing of a thing not to be wholly done within the expenditure year will, therefore, be determined under section 82KZM (for a 'small business taxpayer') or sections 82KZMA – 82KZMD (for a taxpayer who is NOT a 'small business taxpayer').

Section 82KZM - Members who are 'small business taxpayers'

62. 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 if certain expenditure incurred under an agreement is in return for the doing of a thing under the agreement that is not wholly done within 13 months after the day on which the expenditure is incurred. The term 'small business taxpayer' is explained below in paragraphs 68 to 70.

63. The Management Fee of \$5,500 per Woodlot will be incurred on execution of the Lease and Management Agreement. This fee is charged for providing services to a Member in the first 13 months of the Project. 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.

64. There is also no evidence that might suggest the services covered by the fee could not be provided within 13 months of the expenditure in question being incurred. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial fee is for the Manager doing 'things' that are not to be wholly done within 13 months of the day on which the fee is incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditure. The Management Fee is

therefore deductible in full in the year it is incurred by a Member who is a 'small business taxpayer'.

65. A Member who is a 'small business taxpayer' also incurs expenditure on annual Management Fees for the year ended 30 June 2002 and each year thereafter and Lease Fees. The Management Fees of \$132 (indexed) per Woodlot, are incurred on or before the 30 June each year for management services to be provided wholly within 13 months. The Lease Fees of \$550 for the year ended 30 June 2001 and \$88 (indexed) for each year thereafter, per Woodlot, are incurred on or before the 30 June each year for a lease over the land for the following 12 months. Therefore, the basic precondition for section 82KZM is also not satisfied for expenditure for these fees where they are paid annually as required by the relevant agreements. Therefore, the Lease Fees and annual Management Fees are deductible in full in the year in which a Member who is a 'small business taxpayer' incurs them.

66. Although not required by the Lease and Management Agreement, some Members who are 'small business taxpayers' may choose to prepay fees for periods longer than that required by the Agreements. Where a prepayment is incurred and the 'eligible service period' is greater than 13 months then, contrary to the conclusion reached above, unless the expenditure is 'excluded expenditure' section 82KZM will apply. 'Excluded expenditure', being expenditure of less than \$1,000, is an exception to section 82KZM.

67. Where the 'eligible service period' exceeds 13 months the formula in paragraph 82KZM(1)(c) (shown below) is used to apportion the tax deduction over the period that the benefits relating to the prepaid fees are provided.

Period in year

Eligible service period

In this formula:

Period in year is the number of days in the whole or the part of the eligible service period in the year of income;

Eligible service period is the number of days in the eligible service period.

Subdivision 960-Q - Small business taxpayers

68. A 'small business taxpayer' is defined in section 960-335 of the ITAA 1997 as a taxpayer who is carrying on a business and either their 'average turnover' for the year is less than \$1,000,000 or their turnover recalculated under section 960-350 is less than \$1,000,000.

69. 'Average turnover' is determined under section 960-340 by reference to the average of the taxpayer's 'group turnover'. The group turnover is the sum of the 'value of business supplies' made by the taxpayer and entities connected with the taxpayer during the year (section 960-345).

70. Whether a Member is a 'small business taxpayer' depends upon the circumstances of each Member and is beyond the scope of this Product Ruling. It is the responsibility of each Member to determine whether or not they are within the definition of a 'small business taxpayer'.

Sections 82KZMA – 82KZMD - Members who are NOT 'small business taxpayers'

71. For a Member who is NOT a 'small business taxpayer', sections 82KZMA to 82KZMD determine the amount of a deduction otherwise allowable under section 8-1 where expenditure is incurred under an agreement for the doing of a thing that is not to be wholly done within the income year in which the expenditure is incurred (the 'expenditure year'). Generally, these provisions operate to limit the amount of deduction available in the expenditure year to the amount that relates to that income year.

72. Section 82KZMA is a gateway provision that sets out when the new treatment will apply. Sections 82KZMB and 82KZMC set out the rules for prepayments incurred in the transitional period, for things to be done wholly within 13 months. For Members investing in the Project transitional treatment applies to prepayments initially incurred in the year ended 30 June 2001. Section 82KZMD governs the deductibility of prepayment expenditure where the eligible service period ends more than 13 months after the date the expenditure was occurred.

73. Under the Lease and Management Agreement, the Management Fee is for services to be wholly done within 13 months of the fee being incurred. Therefore, the tax deduction available to a Member for the Management Fee of \$5,500 will be determined in accordance with the rules contained in section 82KZMB and 82KZMC. The amount of the deduction available to Members in the 'expenditure year' (that is, the year ended 30 June 2001) is determined using the formula in subsection 82KZMB(3) and the table in subsection 82KZMB(5).

74. However, section 82KZMB is subject to the capping provisions in section 82KZMC. For Members who participate in the Project and incur the Management Fee in the year ended 30 June 2001, the 'later year amount' for the purposes of the table in subsection 82KZMB(5) is nil. Therefore, for the year ended

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30 June 2001, the tax deduction for a Member who is NOT a 'small business taxpayer' will be the amount determined using the formula in section 82KZMB(3) only. The balance of the tax deduction is then determined under subsection 82KZMC(4) using the formula in subsection 82KZMC(5). For Members in this Project, the balance of the 13 month 'eligible service period' is in the year ended 30 June 2002, therefore the balance of the Management Fee is deductible in that year. Example 2 at paragraph 100 demonstrates the application of these provisions.

75. A Member who is NOT a 'small business taxpayer' also incurs expenditure on annual Management Fees from the year ended 30 June 2002 and each year thereafter and Lease Fees. The Lease Fees of \$550 for the year ended 30 June 2001 and \$88 (indexed) for each year thereafter, per Woodlot, are incurred on or before the 30 June each year for a lease over the land for the following 12 months. The Management Fees of \$132 (indexed) per Woodlot, are incurred on or before the 30 June each year for management services to be provided wholly within 13 months. The Lease Fees and the annual Management Fees constitute 'excluded expenditure' for a Member who is allocated one Woodlot in the Project. 'Excluded expenditure', being expenditure of less than \$1,000, is an exception to sections 82KZMB and 82KZMC. The annual Management Fees for the year ended 30 June 2002 and each year thereafter and the Lease Fees are therefore deductible in full in the year in which a Grower who is NOT a 'small business taxpayer' incurs them.

76. However, if a Member who is NOT a 'small business taxpayer' acquires more than one Woodlot in the Project, the quantum of a the Lease Fees or annual management Fees may be \$1,000 or more. Where this occurs, like the Management Fee discussed above, the amount and timing of the deduction allowable for the Lease Fees and annual Management Fees must be determined under sections 82KZMB and 82KZMC.

77. Although not required by either the Lease and Management, some Members who are NOT 'small business taxpayers' may choose to prepay fees for periods longer than that required by the Agreements. Where a prepayment is made and the 'eligible service period' is greater than 13 months then section 82KZMB and 82KZMC do not apply. Instead, unless the expenditure is 'excluded expenditure', section 82KZMD will apply to apportion the tax deduction over the period that the benefits relating to the prepaid fees are provided. The relevant formula contained in subsection 82KZMD(2) is:

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

Interest deductibility***(i) Members who use Australian Growth Finance Pty Ltd as the finance provider***

78. Members may finance their participation in the Project through a finance option offered by Australian Growth Finance Limited (see paragraphs 36 to 38 above). Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of lease and management fees.

79. The interest incurred for the year ended 30 June 2001 and in subsequent years of income will be in respect of a loan to finance the Project business operations of afforestation and is, therefore, directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

80. As the finance option offered by Australian Growth Finance Pty Ltd does not require a Member to prepay interest, section 82KZM or sections 82KZMA-82KZMD will not apply. The interest will be deductible in full in the year in which it is incurred.

81. However, a Member who, contrary to the requirements of the finance option offered by Australian Growth Finance Pty Ltd, **chooses** to prepay interest will be required to determine any tax deduction under section 82KZM (for a Member who is 'small business taxpayer') or sections 82KZMA-82KZMD (for a Member who is not a 'small business taxpayer') – see discussion above of these provisions.

(ii) Members who DO NOT use Australian Growth Finance Pty Ltd as the finance provider

82. The deductibility of interest incurred by Members who finance their participation in the Project through a loan facility with a bank or financier other than Australian Growth Finance Pty Ltd is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by, the Tax Office.

83. While the terms of any finance agreement entered into between relevant Members and such financiers are subject to commercial negotiation, those agreements may require interest to be prepaid. Unless the prepaid interest is 'excluded expenditure', where such a loan facility requires interest to be prepaid, relevant Members will be required to determine any tax deduction under section 82KZM (for a Member who is 'small business taxpayer'), or sections 82KZMA-82KZMD (for a Member who is not a 'small business taxpayer') – see discussion above of these provisions.

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

84. 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.

85. 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.

86. 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.

87. 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 activity 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 Members who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

88. 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 are used on a continuing basis in carrying on the business activity in that year (section 35-45).

89. A Member who participates in the Project will be carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling indicates that a Member 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. Members who acquire more than one interest in the Project may, however, pass one of the tests in an earlier income year.

90. 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 Member's participation in the Project.

91. 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 Member who acquires an interest(s) in the Project, the Commissioner will decide that it would be unreasonable not to exercise the second arm of the discretion in paragraph 35-55(1)(b) for the income years ending 30 June 2001 to 30 June 2010.

92. The second arm of 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.

93. This Product Ruling is issued on a prospective basis (i.e., before an individual Member's business activity starts to be carried on). Therefore, if the Project fails to be carried on during the income years specified above (see paragraph 45), in the manner described in the Arrangement (see paragraphs 15 to 38), the Commissioner's discretion will not have been exercised, because one of the key conditions in paragraph 35-55(1)(b) will not have been satisfied.

94. In deciding that the second arm of the discretion in paragraph 35-55(1)(b) will be exercised on this conditional basis, the Commissioner has relied upon:

- the report of the independent forester provided with the application by the Responsible Entity; and

- independent, objective, and generally available information relating to the afforestation industry.

Section 82KL - recouped expenditure

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

Part IVA - general tax avoidance provisions

96. 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 a tax benefit (section 177D).

97. The Australian Growth Timber Project 3 will be a ‘scheme’. A Member will obtain a ‘tax benefit’ from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 41 to 44 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.

98. Members to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the timber produce. There are no facts that would suggest that Members have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing with each other at arm’s length or, if any parties are not at arm’s length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Examples

Example 1 – Entitlement to ‘input tax credit’

99. Margaret, who is registered for GST, invests in the Green Circle Bluegums Project. The management fees are payable on 1 July each year for management services to be provided over the following 12 months. On 1 July 2000 Margaret pays her first year’s management fees of \$5,500 and is eligible to claim a tax deduction for the fees in the income year ended 30 June 2001. The extent of her

deduction for the management fees, however, is reduced by the amount of any 'input tax credit' to which she is entitled. The Project Manager provides Margaret with a 'tax invoice' showing its ABN and the price of the taxable supply for management services as \$5,500. Using the details shown on the valid tax invoice, Margaret calculates her input tax credit as:

$$1/11 \times \$5,500 = \$500$$

Therefore, the tax deduction for management fees that she can claim in her income tax return for the year ended 30 June 2001 is \$5,000 (\$5,500 less \$500).

Example 2 - Tax deductions for prepaid expenditure where Exception 5 applies and the Grower is NOT a 'small business taxpayer'

100. Joseph decides to invest in the ABC Pineforest Prospectus which is offering 500 interests of 0.5ha in an afforestation project of 25 years. The ABC Pineforest Project lodged an application for a Product Ruling on 20 October 1999 and the Ruling was issued by the Tax Office on 8 January 2000. Accordingly, Exception 5 applies to taxpayers who are accepted into the Project and incur prepaid expenditure under the arrangement.

The management fees are \$5,000 in the first year and \$1,200 for years 2 and 3. From year 4 onwards the management fee will be the previous year's fee increased by the CPI. The first year's fees are payable on execution of the agreements for services to be provided in the following 12 months. Thereafter, the fees are payable in advance each year on the anniversary of that date. The project is subject to a minimum subscription of 300 interests. Joseph provides the Project Manager with a 'Power of Attorney' allowing the Manager to execute his Management Agreement and the other relevant agreements on his behalf. On 5 June 2001 the Project Manager informs Joseph that the minimum subscription has been reached and the Project will go ahead. Joseph's agreements are duly executed and management services start to be provided on that date.

Joseph has extensive business interests and his average turnover for the 2000/2001 income year exceeds \$1 million. Therefore, he is not a 'small business taxpayer' and must calculate his tax deductions under the prepayment rules in sections 82KZMA-82KZMD.

Joseph, who is not registered nor required to be registered for GST calculates his tax deduction for management fees for the **2001 income year** as follows:

$$\text{Management fee} \times \frac{\text{Number of days of eligible service period in the expenditure year}}{\text{Total number of days of eligible service period}}$$

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$$\$5,000 \times \frac{26}{365}$$

= **\$356** (this is Joseph's total tax deduction in 2001 for the Year 1 prepaid management fees of \$5,000. It represents the 26 days for which management services were provided in the 2001 income year).

In the **2002 income year** Joseph will be able to claim a tax deduction for management fees calculated as the sum of two separate amounts:

$$\$5,000 \times \frac{339}{365}$$

= **\$4,643** (this represents the balance of the Year 1 prepaid fees for services provided to Joseph in the 2002 income year).

$$\$1,200 \times \frac{26}{365}$$

= **\$85** (this represents the portion of the Year 2 prepaid management fees for the 26 days during which services were provided to Joseph in the 2002 income year).

\$4,643 + \$85 = \$4,728 (The sum of these two amounts is Joseph's total tax deduction for management fees in 2002).

Joseph continues to calculate his tax deduction for prepaid management fees using this method for the term of the Project.

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Commissioner of Taxation

30 May 2001

<i>Related Rulings/Determinations:</i>	- ITAA 1997 Div 27
PR 1999/95; TR 92/1; TR 94/25;	- ITAA 1997 27-5
TR 97/11; TR 97/16; TR 98/22;	- ITAA 1997 27-30
TD 93/34; IT 175	- ITAA 1997 Div 35
	- ITAA 1997 35-10
	- ITAA 1997 35-10(2)
<i>Subject references:</i>	- ITAA 1997 35-10(3)
- carrying on a business	- ITAA 1997 35-10(4)
- commencement of business	- ITAA 1997 35-30
- afforestation	- ITAA 1997 35-35
- management fee expenses	- ITAA 1997 35-40
- producing assessable income	- ITAA 1997 35-45
- product rulings	- ITAA 1997 35-55
- public rulings	- ITAA 1997 35-55(1)
- schemes and shams	- ITAA 1997 35-55(1)(a)
- taxation administration	- ITAA 1997 35-55(1)(b)
- tax avoidance	- ITAA 1997 Subdiv 960-Q
- tax benefits under tax avoidance schemes	- ITAA 1997 960-335
- tax shelters	- ITAA 1997 960-340
	- ITAA 1997 960-345
	- ITAA 1997 960-350
<i>Legislative references:</i>	- ITAA 1936 82KL
- ITAA 1997 6-5	- ITAA 1936 82KZM
- ITAA 1997 8-1	- ITAA 1936 82KZM(1)(c)
- ITAA 1997 8-1(1)(a)	- ITAA 1936 82KZMA
- ITAA 1997 8-1(1)(b)	- ITAA 1936 82KZMB
- ITAA 1997 17-5	- ITAA 1936 82KZMB(2)

- ITAA 1936 82KZMB(3)
 - ITAA 1936 82KZMB(5)
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 - ITAA 1936 82KZMF
 - ITAA 1936 Pt IVA
 - ITAA 1936 177A
 - ITAA 1936 177C
 - ITAA 1936 177D
 - ITAA 1936 177D(b)
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