

PR 2006/159 - Income tax: W.A. Blue Gum Project 1998



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Product Ruling

Income tax: W.A. Blue Gum Project 1998

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! This publication provides you with the following level of protection:

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

No guarantee of commercial success

The Tax Office **does not** sanction or guarantee this product. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

Terms of use of this Product Ruling

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

What this Product Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who are taking part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. In this Product Ruling this scheme is referred to as the W.A. Blue Gum Project 1998 or simply as 'the Project'.

Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Growers.

3. The class of entities who can rely on those tax benefits consists of entities who were accepted into the project between 22 May 1998 and 21 May 1999 and who executed relevant Project Agreements mentioned in paragraphs 19 to 23 of this Ruling on or before 21 May 1999. They must have had a purpose of staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement.

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

- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- are accepted into this Project before 22 May 1998 or after 21 May 1999; or
- participate in the scheme through offers made other than through the prospectus.

Qualifications

5. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 19 to 26 of this Ruling.

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

- this Product Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Product Ruling may be withdrawn or modified.

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Date of effect

8. This Product Ruling applies from 1 July 2000, the date that Division 35 was enacted. It applies only to the specified class of entities that entered into the scheme from 22 May 1998 until 21 May 1999, being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities up to 30 June 2007. This Product Ruling will continue to apply to those entities even after its period of application for schemes entered into during the period of application.

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

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

10. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Changes in the Law

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

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

Note to promoters and advisers

15. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling is issued.

Ruling

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

Section 35-55 – exercise of Commissioner’s discretion

16. A Grower who is an individual and was accepted into the Project between 22 May 1998 and 21 May 1999 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10.

17. Subject to the Project being carried out in the manner described below, for these Growers the Commissioner will exercise his discretion in paragraph 35-55(1)(b) to include the following income years:

- from the income year ending 30 June 2001 to the income year ended 30 June 2010; or
- from the income year ending 30 June 2001 to the income year immediately prior to the clear fell harvest of the first plantation crop.

18. This conditional exercise of the discretion allows those losses to be offset against the Grower’s other assessable income in the income year in which the losses arise. The discretion exercised does not extend to any trees grown under the coppice option after the clear fell of the first plantation crop.

Scheme

Overview

19. This scheme is called the W.A. Blue Gum Project 1998. Offers to participate in the Project were made through a prospectus issued under the Corporations Law. Applicants accepted to participate in the Project appointed W.A. Blue Gum Limited to execute the Project Agreements on their behalf under a Power of Attorney.

Project Agreements

20. Under a Trust Deed binding the Manager and each Grower, a custodian agreed to act as the Growers' representative to protect their interests during the Term of the Project. Among other things it ensures that all establishment, maintenance and marketing activities carried out by the Manager are properly conducted.

21. Growers entered into a Project Management Contract with W.A. Blue Gum Limited and a forestry consultant for the establishment and maintenance of a plantation of Tasmanian Blue Gum (*Eucalyptus globulus*) trees for the purpose of clear fell at approximately 12 years. Under the Project Management Contract the forestry consultant agreed to act as supervisor and adviser to the Project during its Term. The forestry consultant engaged a forestry contractor to carry out the planting and maintenance programs.

22. Growers were granted a sub-lease over land in Western Australia by W.A. Blue Gum Land Pty Ltd. The sub-lease will terminate on the clear fell of the trees planted on the relevant land.

23. Growers also entered into a Wood Purchase Agreement with a wood purchaser to harvest and buy the wood produce unless W.A. Blue Gum Limited can negotiate better terms with a reputable third party buyer. The wood purchaser has the right under the Wood Purchase Agreement to match any such third party offers.

Fees and financing

24. Initial fees payable by Growers to participate in the Project were \$4,500 per hectare, with annual maintenance payments of \$65 (indexed for CPI increases) and annual rent of \$235 per hectare (indexed). GST was included in the maintenance fee and the rent following its introduction on 1 July 2000.

25. To fund their participation in the Project Growers had the option to enter into a Loan Agreement with Albany Financial Pty Ltd, a financier associated with the promoter. The Term of such loans was approximately 4 years with repayments of principal and interest required twice a year.

Coppice option

26. Following the harvest of the first plantation crop Growers will have an opportunity to participate in a second rotation plantation crop, by means of a coppice option. Growers who decide to exercise this option will be required to pay extra amounts at a future date and enter into arrangements to extend the effect of the Project Agreements.

The arrangement ruled on in this Ruling does not include trees grown under this coppice option.

Commissioner of Taxation

13 December 2006

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

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

27. Division 35 applies to losses from certain business activities from the income year ended 30 June 2001 and subsequent years. 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 taken into account in an income year unless:

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

28. In deciding to exercise the discretion in paragraph 35-55(1)(b) for the income years from **30 June 2001 to 30 June 2010 or the income year immediately prior to clear fell harvest**, the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years ended 30 June 2001 up to and including 30 June 2010 or the income year immediately prior to clear fell harvest:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35;
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, a Grower's business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit; and
- a Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

29. The exercise of the Commissioner's discretion under paragraph 35-55(1)(b) is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Appendix 2 – Detailed contents list

30. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2001/14

Subject references:

- afforestation
- non-commercial business losses

Legislative references:

- ITAA 1997 Div 35
- ITAA 1997 35-10

- ITAA 1997 35-10(2)
- 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)(b)
- TAA 1953
- TAA 1953 Sch 1 357-75(1)
- Copyright Act 1968

ATO references

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