


# ***PR 2007/86 - Income tax: APT Eucalypt Project 2001***

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## Product Ruling

### Income tax: APT Eucalypt Project 2001

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**ⓘ This publication provides you with the following level of protection:**

This publication (excluding appendices) 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**

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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**

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

## What this Ruling is about

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1. This 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 take 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 APT Eucalypt Project 2001 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.

3. The class of entities who can rely on this Ruling consists of the entities who are described in Product Ruling PR 2000/95 and who, between 30 August 2000 and 30 June 2001, entered into the scheme that is set out in paragraphs 15 to 40 of that Ruling. They will have 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. In this Ruling these entities are referred to as 'Growers'.

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

### Qualifications

5. The class of entities defined in this Product Ruling may rely on it provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 15 to 40 of PR 2000/95.

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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### **Superannuation Industry (Supervision) Act 1993**

8. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this product may contravene the provisions of SISA 1993.

## **Date of effect**

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9. This Ruling applies for the income years ending 30 June 2004 to 30 June 2012 for Growers who, between 30 August 2000 and 30 June 2001, entered into the scheme that is set out in paragraphs 15 to 40 of PR 2000/95. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities up to 30 June 2012. 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.

10. However, the Product Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

11. 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 (subsection 357-75(1) Item 1 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953)).

12. 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.

13. 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**

14. 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 the Ruling and, to that extent; this Product Ruling will have no effect.

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

## **Note to promoters and advisers**

16. 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**

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### **Continuing application of Product Ruling 2000/95**

17. Although now withdrawn, the tax benefits set out in Product Ruling PR 2000/95 continue to apply to participants who are within the specified class of persons to which the Ruling applied and who entered into the specified arrangement between 30 August 2000 and 30 June 2001. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement (other than the changes described in paragraphs 22, 23 and 24 of this Ruling). A copy of PR 2000/95 can be obtained on the Tax Office's Internet site at <http://www.ato.gov.au>

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

18. 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.

**Section 35-55 – exercise of Commissioner's discretion**

19. A Grower who is an individual and was accepted into the Project between 30 August 2000 to 30 June 2001, may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55 (1) (b) for these Growers for the income years ending 30 June 2004 to 30 June 2012. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

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## **Scheme**

**Overview**

20. The scheme that is the subject of this Ruling is called APT Eucalypt Project 2001 and is described in paragraphs 15 to 40 of PR 2000/95 (now withdrawn). It also incorporates the following additional documents:

- correspondence dated 8 June 2007;
- updated Grower cash flow summary dated 23 May 2007;
- correspondence dated 4 September 2007;
- copies of June 2002, January 2005, December 2005 and December 2006 Report to Growers; and
- copies of Independent Forester's Report dated 23 January 2004, 20 December 2004, 31 March 2006 and 6 May 2007.

21. Each Grower entered into a Management Agreement with the Responsible Entity for the APT Eucalypt Project 2001 for their Timberlots. The termination of the Project is the date the trees on the Timberlots have been harvested.

22. In July 2005, Integrated Tree Cropping Ltd (ITC) completed a takeover of Australian Plantation Timber Ltd (APT). Since then, ITC Project Management Pty Ltd (ITCPM) has undertaken the day-to-day management of the projects as the Responsible Entity.

## **Harvest**

23. Paragraph 36 of PR 2000/95 stated that the Responsible Entity expected the harvest to take place not later than 11 years after the commencement date unless the Responsible Entity believed that it would be in the best interests of all Growers for the harvesting to be deferred to a later date.

24. ITC now believes it would be in the best interests of Growers to defer the harvest by one year to 2013.

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**Commissioner of Taxation**

17 October 2007

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## **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**

25. 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.

### **Section 35-55 – exercise of Commissioner's discretion**

26. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ended 30 June 2004 to 30 June 2012, the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 Income tax: non-commercial business losses: Commissioner's discretion. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division; and
- there is an objective expectation that within a period that is commercially viable for the almond growing industry, a Grower's business activity will satisfy one of the four tests or produce a taxation profit.

27. 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 in the year it is incurred.

28. 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 on in a materially different way from 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**

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

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## References

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- Previous draft:*
- Not previously issued as a draft
- Related Rulings/Determinations:*
- PR 2000/95; TR 2007/6
- Subject references:*
- [required]
- 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)
  - SISA 1993
  - TAA 1953
  - TAA 1953 Sch 1 357-75(1)
  - Copyright Act 1968

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### ATO references

NO: 2007/1098  
ISSN: 1441-1172  
ATOlaw topic: Income Tax ~~ Product ~~ timber