



# ***PR 1999/39 - Income tax: The Paulownia West Coast Project No 3***

 This cover sheet is provided for information only. It does not form part of *PR 1999/39 - Income tax: The Paulownia West Coast Project No 3*

 This document has changed over time. This is a consolidated version of the ruling which was published on *26 May 1999*



## Product Ruling

### Income tax: The Paulownia West Coast Project No 3

---

Contents	Para
What this Product Ruling is about	1
Date of effect	9
Withdrawal	11
Arrangement	12
Ruling	31
Explanations	37
Detailed contents list	52

#### ***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 98/1 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.*

## **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 Paulownia West Coast Project No 3, or just simply as 'the Project', or the 'product'.

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

2. The tax law(s) dealt with in this Ruling are section 8-1 of the *Income Tax Assessment Act 1997* ('ITAA 1997') and sections 82KL and 82KZM and Part IVA of the *Income Tax Assessment Act 1936* ('ITAA 1936').

#### **Class of persons**

3. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Growers'.

4. 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

5. The Ruling provides this specified class of persons with a binding ruling as to the tax consequences of this product. The Commissioner accepts no responsibility in relation to the commercial viability of this product, and gives no assurance the prices charged for the product are reasonable, appropriate, or represent industry norms. A financial (or other) adviser should be consulted for such information.

6. The Commissioner rules on the precise arrangement identified in the Ruling.

7. The class of persons defined in the Ruling may rely on its contents, provided the arrangement (described below at **paragraphs 12 to 30**) is carried out in accordance with details described in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out:

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

8. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no Product Ruling may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Manager, Legislative Services, AusInfo, GPO Box 1920, Canberra ACT 2601.

## Date of effect

---

9. This Ruling applies prospectively from 26 May 1999, the date this 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).

10. 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

---

11. This Product Ruling is withdrawn and ceases to have effect after 30 June 2001. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

## Arrangement

---

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

- Prospectus issued by Plantation Equity Services Limited ('PESL'), dated 6 May 1999;
- Constitution for The Paulownia West Coast Project executed by PESL, dated 20 April 1999;
- Compliance Plan for The Paulownia West Coast Project executed by the directors of PESL;
- Agency Agreement for the Paulownia West Coast Project between Gillard Turner & O'Brien Pty Ltd as Custodian and PESL, dated 16 April 1999;
- **Lease and Management Agreement** between PESL, Western Property Holdings Pty Ltd (the Lessor) and the Grower (this agreement forms the Schedule to the Constitution);
- **Offer to Borrow** between Paulownia WA Pty Ltd ('PWAPL') as lender and the Grower;
- letter from PESL dated 7 April 1999;
- letter from PESL dated 27 April 1999; and
- letter from PESL dated 10 May 1999.

**NOTE: certain information received from Plantation Equity Services Limited has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.**

13. The documents highlighted are those that Growers enter into. For the purposes of describing the arrangement to which this Ruling applies, 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. The effect of these agreements is summarised as follows.

14. This arrangement is called The Paulownia West Coast Project No 3. Growers participating in the Project enter into a Lease and Management Agreement ('LMA'). Under this agreement Growers sublease an area of land called a 'Timber Lot' from Western Property Holdings Pty Ltd in Western Australia. The property, known as 'Blue Lake', is leased by the landowner to Farmtech Management Pty Ltd who subleases the land to Western Property Holdings Pty Ltd who grants a lease to the Growers. Under the Lease and Management Agreement the Growers also contract with PESL to have certain paulownia trees (*paulownia fortunei*) planted on the Timber Lot for the purpose of eventual felling and sale, no later than 12 years from the date of execution of their respective agreements (cl 16 of the LMA).

15. There is no minimum amount that must be raised under the Prospectus and, thus, no minimum subscription level. The offer is stated to relate to 500 Timber Lots, each of an area of 0.4 hectares and at a total cost of \$9,000, payable in two instalments being an amount of \$7,000 on execution of the LMA and a subsequent payment of \$2,000 due and payable on or before 12 months after execution of the LMA. PESL has the right to accept over subscriptions. A minimum of 110 trees per Timber Lot (275 per hectare) will be planted in the first 12 months following execution of the Lease and Management Agreement. Possible projected returns for Growers are outlined on page 12 of the Prospectus. The projected returns depend on a range of assumptions and PESL does not give any assurance or guarantee whatsoever in respect of the future success of or financial returns associated with entering into Lease and Management Agreements being offered pursuant to the Prospectus. Based on the example set out on page 12 of the Prospectus, a Grower could expect to achieve an internal rate of return of 12.8% per Timber Lot. Growers execute a power of attorney enabling PESL to act on their behalf as required, when they make an application for a Timber Lot.

16. It is indicated on page 11 of the Prospectus that only the first 300 Timber Lots sold to Growers will be located on the 'Blue Lake' property. Should subscriptions exceed this, further land will be

secured, subject to the satisfaction of the Manager. Such an event is not envisaged to affect the proceeds payable to a Grower due to the pooling of Forest Produce.

### **Lease and Management Agreement**

17. The Lease and Management Agreement is entered into between PESL, the Lessor and the Grower for each Timber Lot. Growers are granted an interest in land in the form of a lease to use their Timber Lot (identified in Schedule Items 1 to 3), for the purpose of conducting their afforestation business (cl 6.1). At all times the Grower has full right, title and interest in the Forest Produce and the right to have the Forest Produce sold for their benefit (cl 19.1). Each grower must pay to the Lessor rent in an amount equal to 2.5% of the Net Proceeds of sale (cl 4) within 5 days (cl 20.3). This agreement is subject to the terms of the Constitution.

18. Part III of the Lease and Management Agreement provides that each Grower contracts with PESL to establish and maintain the plantation until maturity for an annual fee. Growers may elect to collect their own Collectable Produce (cl 17) or PESL will sell the Forest Produce on the Grower's behalf, for the best possible commercial price (cl 18). Growers will share on a proportionate basis, the Proceeds of Sale of the Forest Produce following the payment of Harvest and Processing Costs, other Costs of Sale, rent to the Lessor and payment of amounts due to PESL (cl 20).

### **Constitution**

19. The Constitution establishes the Project and operates as a deed binding on all of the Growers and the PESL. The Constitution sets out the terms and conditions under which PESL agrees to act as Responsible Entity and thereby manage the Project. Growers are bound by the Constitution by virtue of their participation in the Project. Pursuant to clause 26 of the Constitution, PESL keeps a register of Growers. Growers are entitled to assign the Lease and Management Agreement in certain circumstances (cl 33 of the LMA). The Lease and Management Agreement must be entered contemporaneously by Applicants signing the Application and Limited Power of Attorney Form in the Prospectus.

### **Compliance Plan**

20. As required by the Corporations Law a Compliance Plan has been prepared by PESL. Broadly, the Plan encapsulates the Constitution; its purpose to ensure that PESL meets its obligations as 'Responsible Entity' for the Project and that the rights of Growers are

protected. The latter includes documentation of the details of Lease and Management Agreements in the Register, reporting to Growers and the handling of any proceeds from the sale of timber.

## Agency Agreement

21. The Agency Agreement is the means by which PESL appoints the Custodian, Gillard Turner & O'Brien Pty Ltd, to act as its agent to hold the Scheme Property as that term is defined in section 9 of the Corporations Law. It imposes certain standards and obligations on the Custodian and PESL, including maintaining proper records.

## Fees

22. The fees payable under the Lease and Management Agreement are:

- \$7,000 per Timber Lot for the plantation and maintenance services provided in the first 12 months (referred to as the Initial Period as set out in cl 21.1 and Item 9 of the Schedule);
- \$2,000 per Timber Lot for the plantation and maintenance services provided in the 12 months commencing on the expiration of the Initial Period, the due date for payment being on or before the expiration of the Initial Period (referred to as the Second Period as set out in cl 21.2 and Item 10 of the Schedule);
- \$500 per Timber Lot per annum (indexed) for the plantation and maintenance services provided for each 12 month period commencing on the expiration of the Initial Period (cl 22, cl 1: 'Annual Fee' is a defined term);
- the cost of annual insurance premiums for insurance effected by PESL on the Grower's behalf (cl 35);
- any Incentive Fee due to the Manager, calculated to be 25% of the Net Proceeds of Sale that exceed the Prospectus forecast of \$38,623 (cl 24, cl 1: 'Incentive Fee' is a defined term);
- a fee to the Manager of an amount equal to 2.5% of the Net Proceeds generated from the sale of the Grower's Forest Produce (cl 25); and
- rent to the Lessor of an amount equal to 2.5% of the Net Proceeds generated from the sale of the Grower's Forest Produce (cl 4).

23. The Independent Forester has stated, at page 21 of the Prospectus:

*'The Manager's estimates of the funds required to establish and manage the Project are reasonable and compare with the cost estimates for projects of a similar nature and should permit the project to proceed on a normal commercial basis'.*

24. Under the terms of the Constitution, PESL must deposit all monies it receives from applications into an Application Fund in the name of the Custodian. The application price will be released to PESL when the Custodian is reasonably satisfied that certain specified criteria in the Constitution have been met (cls 14 and 15.1 of the Constitution).

### **Planting**

25. During the first 12 month period PESL will be responsible for planting *paulownia fortunei* on the Timber Lot. From this period on, PESL will maintain the trees in accordance with good silvicultural practice. The services to be provided by PESL over the term of the Project are outlined in Item 8 of the Schedule to the Lease and Management Agreement. PESL will be responsible for arranging the marketing and sale of the Forest Produce. Harvesting and Processing of Trees will generally take place no later than 11 years from the Commencement Date, the maximum period of deferral is an additional 12 months (cl 16 of the LMA).

26. The gross proceeds of sale of the Forest Produce of Non-Electing Growers will be paid direct to PESL who must within 2 business days either forward such amounts to the Custodian for depositing into a Proceeds Fund or make a direct deposit into the Proceeds Fund (cl 20.1 of LMA and cl 6.2(a) of the Compliance Plan). Within 10 business days of receiving the gross proceeds of sale the Custodian must pay to PESL the relevant Grower's proportional share of the costs of harvest, processing and costs of sale (cl 20.2 of LMA and cl 6.2(b) of the Compliance Plan). This is to be supported by an auditor's certificate obtainable within 5 business days, which verifies gross proceeds of sale, volume of Forest Produce included in the sale and harvest, processing and sale costs (cl 20.4 of the LMA). Within a further 5 business days, the Custodian will pay, on behalf of the Growers, rent owed to the Lessor, PESL's remuneration and other amounts owing to PESL. The balance of the Net Proceeds of Sale will be distributed to the Non-Electing Growers. The terms 'Proceeds Fund' and 'proportional share' are defined in clause 1 of the LMA.

27. If a Grower is an 'Electing Grower' (cls 1 and 17 of the LMA), the Grower's proportional share of the costs of harvesting and processing, rent owed to the Lessor, PESL's remuneration and other

amounts owing to PESL, are due for payment on the day specified by PESL for collection of the Grower's collectable produce (cls 17.2 and 17.3 of the LMA).

## Finance

28. As indicated at page 11 of the Prospectus, a time payment option is available to approved applicants at the time the application is made. An 'Offer to Borrow' may be obtained from the Dealer and duly completed by the applicant, the lender involved being Paulownia WA Pty Ltd ('PWAPL'). The loan is interest-free and is fully repayable within an 8 month period. It is envisaged on page 11 of the Prospectus that such a financial arrangement would involve an initial payment of \$1,000 per Timber Lot followed by 8 equal monthly payments of \$750 per Timber Lot. Payments received from Growers by PWAPL are regularly transferred to the Application Fund in the name of the Custodian, who will then pay such amounts to PESL on a regular basis in the manner set out in paragraph 24 above.

29. Clause 11.9 of the Constitution sets out PESL's rights on default in payment of an application price.

30. PWAPL will have full recourse to the Borrower's assets should the Borrower (Grower) default, and it will pursue appropriate legal action against defaulting Growers. Finance arrangements organised directly by a Grower with a Lender other than PWAPL are outside the arrangement to which this Ruling applies.

## Ruling

### Section 8-1

31. For the year ended 30 June 1999 section 8-1 will apply to Growers entering into this Project as follows:

- the plantation and maintenance fee of \$7,000 per Timber Lot incurred by a Grower on execution of the Lease and Management Agreement on or before 30 June 1999 will be an allowable deduction.

32. For the year ended 30 June 2000 section 8-1 will apply to Growers entering into this Project as follows:

- the second instalment of the plantation and maintenance fee of \$2,000 per Timber Lot paid by a Grower on or before 30 June 2000 will be an allowable deduction; and

- annual maintenance of \$500 per Timber Lot, indexed, incurred by a Grower on or before 30 June 2000 will be an allowable deduction.

33. For the year ended 30 June 2001 section 8-1 will apply to Growers entering into this Project as follows:

- annual maintenance of \$500 per Timber Lot, indexed, incurred by a Grower on or before 30 June 2001 will be an allowable deduction.

### **Section 82KZM**

34. The expenditure incurred by Growers, as described in paragraphs 31 to 33 above, does not fall within the scope of section 82KZM.

### **Section 82KL**

35. Section 82KL does not apply to deny the deductions otherwise allowable under section 8-1.

### **Part IVA**

36. 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**

37. Consideration of whether fees payable under the Lease and Management Agreement are deductible under section 8-1 begins with the first limb of the section. This view proceeds 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 the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced and,

hence, whether the second limb applies. However, that does not preclude the application of the first limb and determining whether the outgoings in question have a sufficient connection with activities to produce assessable income.

38. An afforestation scheme can constitute the carrying on of a business. Where there is a business, or a future business, the gross sale proceeds from the timber's sale from the scheme will constitute gross assessable income 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.

39. 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.

40. For this Project Growers have, under the Lease and Management Agreement, rights in the form of a lease over an identifiable area of land consistent with the intention to carry on a business of growing trees. Under the same agreement Growers appoint PESL, as Manager, to provide services such as planting, cultivating, tending, culling, pruning, fertilising, replanting, spraying, maintaining and otherwise caring for the trees. Growers control their investment. The specific cost of these services provided in the first twelve months will total \$7,000. Growers may either collect their own Forest Produce and arrange for its sale or they have the option of PESL arranging marketing and sale for a fee from the gross sale proceeds.

41. The Lease and Management Agreement gives Growers more than a chattel interest in the timber on harvest. The Project documentation contemplates Growers will have an ongoing interest in the growing trees; though there may not arise any legal interest in the land there is an interest in the nature of a *profit à prendre* which, coupled with the licence, confers an equitable interest in the trees in question upon the Grower.

42. Growers have the right to use the land in question for afforestation purposes and to have PESL come onto the land to carry out its obligations under the Constitution and the Lease and Management Agreement. The Growers' degree of control over PESL, as evidenced by the Agreements and supplemented by the Corporations Law, is sufficient. Under the Project, Growers are entitled to receive regular progress reports on PESL's activities. Growers are able to terminate arrangements with PESL in certain instances, such as cases of default or neglect. The afforestation activities described in the Lease and Management Agreement are carried out on the Growers' behalf.

43. 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. The Independent Forester's report is that the Project's success is expected. Growers 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 Growers, i.e., a 'profit' in cash terms that does not depend in its calculation, on the fees in question being allowed as a deduction.

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

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

46. 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 this business. They will, thus, be deductible under the first limb of section 8-1. 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 the first limb of section 8-1 are met. The exclusions do not apply.

**Section 82KZM**

47. Under the Lease and Management Agreement the fee of \$7,000 per Timber Lot will be incurred on execution of that Agreement. This fee is charged for providing services to a Grower only for the period of 12 months from the execution of the Agreement. For the purpose of this Ruling, 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. The fee is expressly stated to be for a number of specified services. There is no evidence that might suggest the services covered by the fee could not be provided within 12 months of incurring the expenditure in question. Thus, for the purposes of this Ruling, it can be accepted that no part of the fee of \$7,000 is for PESL doing 'things' that are not to be wholly done within 12 months of the fee of \$7,000 being incurred. On this basis, the basic precondition for section 82KZM's operation is not satisfied and it will not apply to the expenditure by Growers of \$7,000 per Timber Lot.

48. The same conclusion can be drawn regarding the second plantation and maintenance fee of \$2,000, applying to such services provided in the 12 months commencing upon the expiration of the Initial Period.

**Section 82KL**

49. Section 82KL's operation depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. Here, there may be a loan provided by PWAPL to the Grower. However the loan is provided on a full recourse basis and is discharged within a twelve month period. 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**

50. 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). The Paulownia West Coast Project No 3 will be a 'scheme'. It commenced generally on 6 May 1999 when the Prospectus was issued. The Growers will obtain a 'tax benefit' from entering into the scheme, in the form of the deduction for the amount of \$7,000 per Timber Lot, allowable under section 8-1, that would not have been obtained but for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

51. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the eventual harvesting of the trees. Further, there are no features of the Project, for example, such as the initial period fee of \$7,000 and second period fee of \$2,000 or the annual fee of \$500 being 'excessive', and uncommercial, and predominantly financed by a non-recourse loan, that might suggest the Project was so 'tax driven', and so designed to produce a tax deduction of a certain magnitude that would attract the operation of Part IVA.

## **Detailed contents list**

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

	<b>Paragraph</b>
<b>What this Product Ruling is about</b>	<b>1</b>
Tax law(s)	2
Class of persons	3
Qualifications	5
<b>Date of effect</b>	<b>9</b>
<b>Withdrawal</b>	<b>11</b>
<b>Arrangement</b>	<b>12</b>
Lease and Management Agreement	17
Constitution	19
Compliance Plan	20
Agency Agreement	21
Fees	22
Planting	25
Finance	28
<b>Ruling</b>	<b>31</b>
Section 8-1	31
Section 82KZM	34
Section 82KL	35
Part IVA	36
<b>Explanations</b>	<b>37</b>
Section 8-1	37
Section 82KZM	47

# PR 1999/39

Section 82KL	49
Part IVA	50

---

## Commissioner of Taxation

26 May 1999

---

*Previous draft:*

No draft issued

*Related Rulings/Determinations:*

PR 98/1; TR 92/1; TR 92/20;  
TR 97/11; TR 97/16; TD 93/34

*Subject references:*

- carrying on a business
- commencement of business
- fee expenses
- interest expenses
- management fees
- producing assessable income
- product rulings
- public rulings

- taxation administration

- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

*Legislative references:*

- ITAA1936 82KZM
- ITAA1936 Pt IVA
- ITAA1936 177A
- ITAA1936 177C
- ITAA1936 177D
- ITAA1997 8-1

*Case references:*

---

ATO references:

NO 98/8892-6

BO

FOI number: I 1019645

ISSN: 1039-0731

Price: \$1.40