


PR 2000/73 - Income tax: Great Southern Blue Gum Plantations 2000/2001 Projects

 This cover sheet is provided for information only. It does not form part of *PR 2000/73 - Income tax: Great Southern Blue Gum Plantations 2000/2001 Projects*

 This document has changed over time. This is a consolidated version of the ruling which was published on *14 June 2000*



Product Ruling

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

| | |
|-----------------------------------|------|
| Contents | Para |
| What this Product Ruling is about | 1 |
| Date of effect | 10 |
| Previous Ruling | 12 |
| Withdrawal | 13 |
| Arrangement | 14 |
| Ruling | 35 |
| Proposed new laws | 37 |
| Explanations | 41 |
| Detailed contents list | 67 |

Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

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 arrangements are not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangements will be carried out as described in this Product Ruling.

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

Terms of use of this Product Ruling

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

What this Product Ruling is about

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

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 27-5 (ITAA 1997);
- section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- section 82KZM (ITAA 1936);
- Part IVA (ITAA 1936).

3. On 21 September 1999, the Government announced a number of changes to the tax system as part of the New Business Tax System. A number of those changes could affect the tax laws dealt with in this Ruling. On 11 November 1999 the government announced further changes, some of which could also affect the tax laws dealt with in this ruling, especially those to do with 'tax shelters'. Some of those changes apply from the date of the announcement and others are proposed to apply from nominated dates in the future.

4. This Ruling does not deal with the Goods and Services Tax or any associated 'A New Tax System' legislative reforms, including the proposed changes announced as part of The New Business Tax System, except those legislative reforms which have now been enacted.

5. This Ruling does not deal with the announced changes which have not been enacted. We cannot rule on those changes until the relevant legislation is passed by Parliamentary process. However, if the changes become law the operation of that law will take precedence over the application of this Ruling, and to that extent, this Ruling will be superseded.

Class of persons

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

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

Qualifications

8. The Commissioner rules on the precise arrangement identified in this Ruling. 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.

9. 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 part 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

10. This Ruling applies prospectively from 14 June 2000, 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).

11. 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).

Previous Rulings

12. This Ruling replaces Product Ruling PR 2000/1, which is withdrawn on and from the date this Ruling is made. Product Ruling 2000/1 will continue to apply to investors who entered into the Project on or before 31 May 2000.

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 arrangements during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangements prior to withdrawal of the Ruling. This is subject to there being no material difference in the arrangements or in the persons' involvement in the arrangements.

Arrangement

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

- Great Southern Blue Gum Plantations 2001 Application for Product Ruling dated 15 October 1999;
- Amendment to Product Ruling Application for Great Southern Blue Gum Plantations 2000/2001 Projects dated 6 December 1999;
- Draft Prospectus prepared and issued by Great Southern Managers Australia Limited ('GSMAL' or 'the Responsible Entity') for the Great Southern Blue Gum Plantations 2000/2001 undated;
- Supplementary Prospectus issued by Great Southern Blue Gum Plantations 2000/2001 dated 31 May 2000;

- Great Southern Blue Gum Plantations 2000 Constitution made by GSMAL (as ‘the Responsible Entity’) dated 18 December 1998 and Great Southern Blue Gum Plantations 2001 Constitution made by GSMAL (as ‘the Responsible Entity’) dated 2 September 1999;
- **Draft Lease and Management Agreement** between GSMAL (as both the Lessor and the Responsible Entity) and the Grower, undated;
- Draft Plantation Management Agreement between GSMAL (as ‘the Responsible Entity’) and Great Southern Plantations Ltd (as the Manager) undated;
- Draft Management Service Agreement between GSMAL (as ‘the Responsible Entity’) and Great Southern Plantations Ltd (as ‘the Contractor’) undated;
- Compliance Plan for Great Southern Blue Gum Plantations 2001 adopted by GSMAL (as ‘the Responsible Entity’) on 7 October 1999;
- **Draft Applications for Finance for Principal and Interest Loans** – one for Individuals & Partnerships and one for Companies & Trusts, undated;
- **Draft Proforma Loan Deed** between Templegate Finance Pty Ltd (‘TFPL’) and the Borrower, undated;
- Mortgage Debenture between GSMAL (as ‘the Financier’) and TFPL (as ‘the Mortgagor’);
- Intercompany Loan Offer facility letter from GSMAL to TFPL dated 11 May 1999;
- Additional correspondence received from the applicant dated 31 May 2000 and 2 June 2000.

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

15. The documents highlighted are those Growers enter into or become a party to. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate¹ of a Grower, will be a party to, which are part of the arrangements to which this Ruling applies. The effect of these agreements is summarised as follows.

¹ In this Ruling ‘associate’ has the meaning as defined in section 318 of the ITAA 1936.

PR 2000/73**Overview**

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

| | |
|--|--|
| location | The South West and Great Southern areas of Western Australia and the "Green Triangle" area of South West Victoria and the South East of South Australia |
| type of business each participant is carrying on | Commercial growing of <i>Eucalyptus globulus</i> (Tasmanian Blue Gums), the harvested timber producing short fibre hardwood woodchip for use in the paper industry |
| number of hectares under cultivation | This prospectus provides for 5000 hectares to be planted, however, oversubscriptions may be accepted |
| name used to describe the product | Great Southern Blue Gum Plantations 2000/2001 Projects |
| size of the leased area | 0.33 hectares |
| number of trees per hectare | Minimum average of 1000 |
| expected production | 250 cubic metres per hectare |
| the term of the investment | 11 years |
| initial cost | \$3,000 for applications lodged on or before 16 June 2000, and \$3,300 for applications lodged between 17 June 2000 and 31 January 2001 |
| initial cost on a per hectare basis | \$9,090 or \$10,000 |
| ongoing costs | GSMAL is to be paid 3.0% of net harvest proceeds as Management fees and 2.5% of net harvest proceeds as Lease fees |
| other costs | Growers will be charged for the cost of all insurance except Public Liability Insurance |

17. Growers applying under this prospectus join one of two projects, depending on their date of application. The date of application also determines the date of execution of the Lease and Management Agreement and the period of provision of establishment

services to which the initial fee relates. The two relevant projects are summarised as follows:

| Application lodged | Project | Date of Execution | Fee | Period of provision of establishment services |
|-------------------------|---------|--|---------|---|
| 1/2/2000 – 16/6/2000 | 2000 | on or before 16/6/2000 | \$3,000 | From date of execution of Lease and Management Agreement to 30/6/2000 |
| post 16/6/2000 | 2001 | at any time between 1/7/2000 and 31/1/2001 (inclusive) | \$3,300 | From date of execution of Lease and Management Agreement to 30/6/2001 |

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

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

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

21. Possible projected returns for the Projects depend on a range of assumptions and GSMAL does not give any assurance or guarantee whatsoever in respect of the future success of or financial returns associated with entering into the Lease and Management Agreements

in question. Based on the examples set out on pages 29 and 30 of the Prospectus, a Grower could expect to achieve compound pre-tax returns of between 7.4% and 11.0%.

Lease and Management Agreement

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

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

Establishment and Maintenance of the Plantation

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

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

26. GSMAL will ensure that the Gross Proceeds of Sale of each Project are paid into the relevant Proceeds Fund trust bank account. The Growers' proportional shares of the costs of felling and costs of sale, and, if applicable, the costs of chipping, will be paid from the Gross Proceeds of Sale to GSMAL, or the relevant contractor. GSMAL will receive from each of the Proceeds Funds an amount equal to 2.5% of the Net Proceeds of Sale, as rent, and another amount equal to 3.0%, as remuneration for the services provided following completion of the establishment services. These percentages have been calculated to ensure that GSMAL makes a profit in providing these services. The balance of the Net Proceeds of Sale for each Project will be held in the relevant Proceeds Fund on trust for the Growers (cl 21).

Fees

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

28. The Independent Forester states, at page 39 of the Prospectus, that 'The activities described in the Lease and Management Agreement are normal to plantation forestry operations. The price per Leased Area adequately covers costs associated with the satisfactory establishment of each Project'.

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

30. Following provision of the establishment services GSMAL will meet the Projects' ongoing costs, other than insurance premiums payable by Growers (cl 5.4 of the Lease and Management Agreement), out of its own funds. In return Growers are charged 3.0% and 2.5% of the Net Harvest Proceeds, respectively, for the services provided and rental of the Leased Area. GSMAL is required to lodge funds in an account known as the Maintenance Reserve Fund or hold bank backed securities for an amount of the future maintenance costs to be determined by the Independent Forester (cl 11 of the Constitutions). This will ensure that sufficient reserve funds will be available, if needed, to meet ongoing maintenance costs of the Projects.

Finance

31. Growers can choose to fund their investment themselves, borrow from an unassociated lending body or borrow through special

finance arrangements offered by TFPL. Two finance options are offered in this last respect:

- Option A interest free
- deposit of \$300 per Leased Area plus all relevant GST associated with the initial fee
 - 12 equal monthly instalments by periodical debit; or
- Option B principal and interest
- deposit of \$300 per Leased Area plus all relevant GST associated with the initial fee
 - 48 equal monthly repayments
 - interest rate currently 9.5% fixed
 - security by Loan Deed over the Lease and Management Agreement.

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

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

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- entities associated with the Projects, other than Templegate Finance Pty Ltd, are involved in the provision of finance for the Projects;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrowers risk;
- additional benefits will be granted to the borrowers for the purpose of section 82KL or the funding arrangements transform the project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arms length;
- repayments of the principal and interest are linked to the derivation of income from the Projects;
- the funds borrowed, or any part of them, will not be available for the conduct of the Projects but will be

transferred (by any mechanism) back to the lender or any associate; or

- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

34. Other than the arrangement referred to in paragraph 31 there is no agreement, arrangement or understanding between any entity or party associated with the Projects and any financial or other institution for the provision of any finance to the Growers for any purpose associated with the Projects.

Ruling

Section 8-1

35. Section 8-1 of the ITAA 1997 will apply to Growers entering either Project 2000 or Project 2001 as follows:

- (i) to allow a deduction of \$3,000 per Leased Area, incurred on execution of the Lease and Management Agreement on or before 16 June 2000 in respect of participants in Project 2000, for the year of income ending 30 June 2000;
- (ii) to allow a deduction of \$3,300 per Leased Area incurred on execution of the Lease and Management Agreement between 1 July 2000 and 31 January 2001 (inclusive) in respect of participants in Project 2001, for the year of income ending 30 June 2001. New section 27-5 of the ITAA 1997 will apply to these Growers however, to reduce the amount of the deduction allowable by any input tax credit to which the Grower is entitled;
- (iii) to allow a deduction for interest incurred in respect of Option B, during the years ending 30 June 2000 and/or 30 June 2001, for those years.

Sections 82KZM and 82KL; Part IVA

36. For a Grower who invests in the Projects the following provisions of the ITAA 1936 have application as indicated:

- (i) the expenditure by Growers does not fall within the scope of section 82KZM;
- (ii) section 82KL does not apply to deny the deductions otherwise allowable; and

- (iii) 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.

Proposed new laws

Losses from non-commercial business activities

37. Provisions introduced into Parliament, but not yet enacted, will mean that in some circumstances, losses arising from a business activity will not be allowed as deductions in the year that they arise. These provisions will only apply from 1 July 2000 to individual taxpayers (including individual taxpayers in general law partnerships) carrying on a business activity. They will not apply however, to an individual with a loss from a primary production business activity where their non primary production assessable income for the income year (excluding any net capital gain) is less than \$40,000 (proposed subsection 35-10(4)).

38. Under proposed subsection 35-10(2), where an individual taxpayer's business activity does not meet one of the objective tests set out in proposed sections 35-30, 35-35, 35-40 and 35-45 then, unless the Commissioner exercises the discretion in proposed section 35-55, a loss arising in an income year from the taxpayer's business activity cannot be claimed as a deduction in that year. A loss, in this context, refers generally to the excess of a taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

39. The Project's agreements, its Prospectus, and its cash flow projections, show that Growers are expected to incur losses relating to interests in the Project during the Project's early years and, that none of the objective tests are expected to be met in those years. However, provided that a Grower's business activity under the Project is carried on during the income years specified below in the manner described in the Arrangement, the Commissioner will exercise his discretion under proposed paragraph 35-55(1)(b).

40. In accordance with the decision to exercise the discretion during this period, and subject only to the above condition relating to the Arrangement (discussed below at paragraphs 64 and 65), Growers can deduct losses arising from interests they hold in the Project in the years that such losses arise.

Explanations

Section 8-1

41. Consideration of whether lease and management fees 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.

42. 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.

43. 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.

44. For these Projects Growers have, under the Lease and Management Agreement, rights in the form of a lease over an

PR 2000/73

identifiable area of land consistent with the intention to carry on a business of growing trees. Under the Lease and Management Agreement Growers appoint GSMAL, as Responsible Entity, to provide services such as planting, cultivating, tending, culling, pruning, fertilising, replanting, spraying, maintaining and otherwise caring for the trees. Growers are considered to have control of their investment. The specific cost to the Grower of these services provided during the period of provision of establishment services is either \$3,000 or \$3,300. Growers may either collect the Forest Produce and arrange for its sale themselves or they have the option of GSMAL arranging marketing and sale in return for a proportion of the sale proceeds.

45. The Lease and Management Agreement gives Growers full right, title and interest in the Forest Produce and the right to have the Forest Produce sold for their benefit (cl 11.3). The relevant documentation contemplates that Growers will have an ongoing interest in the growing trees. The trees belong to the Growers in the sense that they have an interest in the land on which they are growing and a profit à prendre in respect of the timber produce, which confers an equitable interest in the trees upon the Grower.

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

47. 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 discussed in that Ruling. The Independent Forester's report is that the Projects are realistic and commercially viable. Growers to whom this Ruling applies intend to derive assessable income from the Projects. This intention is related to projections contained in the Prospectus that suggest the Projects 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.

48. Growers will engage the professional services of a Responsible Entity 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.

49. 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.

50. 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. No capital component is identifiable. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

51. Section 27-30 operates to deny a deduction that would otherwise be available under section 8-1 for the year ended 30 June 2000 to the extent that the loss or outgoing (incurred after 30 November 1999 and before 1 July 2000) includes an amount relating to an input tax credit to which a Grower will be entitled after 1 July 2000. This is as a consequence of the application of section 10 of the *A New Tax System (Goods and Services Tax) Transition Act 1999*. Section 27-5 operates to deny a deduction that would otherwise be available under section 8-1, to the extent that the loss or outgoing incurred (after 1 July 2000) includes an amount relating to an GST input tax credit to which a Grower is entitled.

Section 82KZM

52. 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 to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement that is not wholly done within the same year of income as the execution of the relevant agreement.

53. Under the Lease and Management Agreement the fee of either \$3,000 or \$3,300 per Leased Area will be incurred on execution of that Agreement. This fee is charged for providing services to a Grower by 30 June of the year of execution of the Agreement. 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.

54. There is also no evidence that might suggest the services covered by the fee could not be provided within the same year of

income as the expenditure in question is incurred. Thus, for the purposes of this Ruling, it can be accepted that no part of the initial fee is for GSMAL doing 'things' that are not to be wholly done within the year of income of the fee being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditure by Grower. New sections 82KZMC and 82KZMD also have no application to these Projects since the services to be provided in respect of the initial fee are completed in the same year of income as the expenditure is incurred.

Section 82KL

55. The operation of section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. Here, there may be a loan provided by TFPL to the Grower. The loan is provided on a full recourse basis, and on commercial terms. 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

56. 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 Project will be a 'scheme' commencing generally on the date 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 initial fee, 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.

57. 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 Projects, for example, such as the Lease and Management fee being 'excessive', and uncommercial, predominantly financed by a non-recourse loan, and resulting in insufficient 'real money' coming into the Responsible Entity's hands, that might suggest the Projects were so 'tax driven', and so designed to produce a tax deduction of a certain magnitude that would attract the operation of Part IVA.

Interest deductibility

58. This Ruling deals only with the deductibility of interest by Growers who intend to finance the investment through the Option B

loan facility offered by Templegate Finance Pty Ltd. Whether the resulting interest fees are deductible under section 8-1 depends on the same reasoning as that applied to whether the Lease and Management fees are deductible. The interest fees will be in respect of a loan to finance the operations - the planting, tending, maintenance and harvesting of the trees - that will continue to be directly connected with the gaining of 'business income' from the Projects. These fees will thus also have a sufficient connection with the gaining of assessable income. No capital, private or domestic component is identifiable in respect of them.

Proposed changes to losses from non-commercial business activities

59. Under the rule in proposed subsection 35-10(2), a deduction for losses incurred by individuals (including individuals in general law partnerships) from certain business activities will not be allowable in an income year unless:

- one of four statutory objective tests is met; or
- the Commissioner exercises a discretion to allow the losses.

60. In broad terms, the statutory 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).

61. For the purposes of applying the tests, subsection 35-10(3) allows taxpayers to group business activities of a similar kind. And, under subsection 35-10(4), there is an 'Exception' to the general rule in section 35-55(2) where the losses are from primary production business activities and the individual taxpayer has other assessable income for the income year of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of taxpayers they are beyond the scope of this Product Ruling and are not considered further.

62. Information provided with the application for this Product Ruling indicates that investors in the Project are unlikely to pass one

of the statutory tests and therefore, unless the Commissioner exercises a discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer the loss from the business activity to a future year.

63. 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 individual investors who acquire interests in the Project, the Commissioner has determined that it would be unreasonable not to exercise the discretion in paragraph 35-55(1)(b).

64. The discretion in paragraph 35-55(1)(b) may be exercised 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 with an interest in the Project will either pass one of the statutory tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

65. This Product Ruling is issued on a prospective basis (i.e., before an individual Grower’s business activity starts to be carried on). Therefore, if the Project fails to be carried on during the income years specified above in the manner described in the Arrangement, the Commissioner’s discretion will not have been exercised as one of the key conditions in paragraph 35-55(1)(b) will not have been met.

66. In deciding to exercise his discretion the Commissioner has relied upon

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

Detailed contents list

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

| | Paragraph |
|--|------------------|
| What this Product Ruling is about | 1 |
| Tax law(s) | 2 |

| | |
|--|-----------|
| Class of persons | 6 |
| Qualifications | 8 |
| Date of effect | 10 |
| Previous Rulings | 12 |
| Withdrawal | 13 |
| Arrangement | 14 |
| Overview | 16 |
| Lease and Management Agreement | 22 |
| Establishment and Maintenance of the Plantation | 24 |
| Fees | 27 |
| Finance | 31 |
| Ruling | 35 |
| Section 8-1 | 35 |
| Sections 82KZM and 82KL; Part IVA | 36 |
| Proposed New Laws | 37 |
| Losses from non-commercial business activities | 37 |
| Explanations | 41 |
| Section 8-1 | 41 |
| Section 82KZM | 52 |
| Sections 82KL | 55 |
| Part IVA | 56 |
| Interest deductibility | 58 |
| Proposed changes to losses from non-commercial business activities | 59 |
| Detailed contents list | 67 |

Commissioner of Taxation

14 June 2000

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

TR 92/1; TR 92/20; TD 93/34;
 TR 97/11; TR 97/16; TR 98/22;
 PR 1999/95; PR 2000/1

Subject references:

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

PR 2000/73

- product rulings
 - public rulings
 - schemes and shams
 - taxation administration
 - tax avoidance
- Legislative references:*
- ITAA 1936 82KL
 - ITAA 1936 82KZM
 - ITAA 1936 82KZMC
 - ITAA 1936 82KZMD
 - ITAA 1936 Pt IVA
 - ITAA 1936 177A
 - ITAA 1936 177C
 - ITAA 1936 177D
 - ITAA 1997 6-5
 - ITAA 1997 8-1
 - ITAA 1997 27-5
 - ITAA 1997 27-30
 - ITAA 1997 35-10(2)
 - ITAA 1997 35-10(4)
 - ITAA 1997 35-30
 - ITAA 1997 35-35
 - ITAA 1997 35-40
 - ITAA 1997 35-55
 - ITAA 1997 35-55(1)(b)
-

ATO references:

NO 99/1954-6; 99/5304-3

BO

FOI number: I 1020774

ISSN: 1441-1172