

PR 2001/101 - Income tax: Australian Eucalypt Project 1993

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *27 June 2001*



Product Ruling

Income tax: Australian Eucalypt Project 1993

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Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons and Qualifications sections**), **Date of effect**, **Withdrawal**, **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 this product as an investment. 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 investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the ‘track record’ of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

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

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

Terms of Use of this Product Ruling

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

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.

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Australian Eucalypt Project 1993, or just simply as 'the Project', or the 'product'.

Tax laws

2. The tax laws dealt with in this Ruling are:
- Division 35 of the *Income Tax Assessment Act 1997* ('ITAA 1997').

Goods and Services Tax

3. In this Ruling, all fees and expenditure referred to include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as a Grower) to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

Business Tax Reform

4. The Government is currently evaluating further changes to the tax system in response to the *Ralph Review of Business Taxation* and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the laws enacted at the time it was issued, future tax changes may affect the operation of those laws and, in particular, the tax deductions that are allowable. Where tax laws change, those changes will take precedence over the application of this Ruling, and to that extent, this Ruling will be superseded.

5. Taxpayers who are considering investing in the Project are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

Note to promoters and advisers

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for investors in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that potential investors are fully informed of any

changes in tax laws that take place after the Ruling is issued. Such action should minimise suggestions that potential investors have been negligently or otherwise misled.

Class of persons

7. The class of persons to whom this Ruling applies is those who enter into the arrangement described below between 29 March 1993 and the date this Ruling is withdrawn. 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'.

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

Qualifications

9. The Commissioner rules on the precise arrangement identified in the 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.

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Date of effect

11. This Ruling applies prospectively from 27 June 2001 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

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agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement between 29 March 1993 and the date this Ruling is withdrawn. 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

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

- Prospectus issued by APT Projects Limited (then named Australian Eucalypts Limited) [Responsible Entity] dated 29 March 1993;
- **Lease and Management Agreement** between APT Projects Limited (then named Australian Eucalypts Limited), Australian Plantation Timber Limited (then named Australian Forest Holdings Limited), Trustees of Western Australia Limited (then named R & I Trustees Limited) and the Grower;
- Trust Deed between APT Projects Limited (then named Australian Eucalypts Limited) and Trustees of Western Australia Limited (then named R & I Australia Trustees Limited), dated 2 April 1992, Supplemental Deed dated 19 March 1993, and Supplemental Deed dated 13 April 1994; and

- Supplementary Deed to Consolidated Trust Deed dated 2 April 1992 (as amended by deeds dated 19 March 1993 and 13 April 1994) which established the 'Australian Eucalypt Projects' for the purpose of the registration of the 'Australian Eucalypt Project 1992' managed investment scheme, dated 26 May 2000.

Note: certain information received from APT Projects Limited 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 that Growers entered 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, which are a part of the arrangement. The effect of these agreements is summarised as follows.

Overview

16. This arrangement is called the Australian Eucalypt Project 1993.

Location	South West region of Western Australia.
Type of business each participant is carrying on	Commercial growing, and cultivation of <i>Eucalyptus globulus</i> (Tasmanian Blue Gums) trees for the purpose of producing timber for woodchipping.
Size of each leasehold area	1.33 hectare
Number of trees per hectare	1,000
Expected production	300 cubic metres per Lot
The term of the investment	11 years approximately.
Initial cost	\$7,500 plus \$2,700 to subscribe in shares in Australian Plantation Timber Limited (then named Australian Forest Holdings Limited)
Initial cost per hectare	\$7,669.17

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Ongoing costs	<p>Insurance to be provided by the Grower.</p> <p>5.5% of Net Proceeds of sales for Rent.</p> <p>5.5% of Net Proceeds of Sale for service fees for the period subsequent to the first 13 months.</p> <p>0.275% of Net Proceeds of Sale for Responsible Entity services.</p> <p>Felling costs</p>
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17. Growers participating in this arrangement entered into a Lease and Management Agreement for the Project. This Agreement is set out in the Schedule to the Constitution. The Agreement gives a Grower a lease from Australian Plantation Timber Limited (then named Australian Forest Holdings Limited) over an identifiable area of land called a 'Lot' until the Project is terminated pursuant to the provisions of the Constitution or, up until the trees are harvested and sold and net income distributed, whichever happens first. Each Lot is 1.33 hectares in size.

18. The Project Land is situated in the South West Region of Western Australia. Australian Plantation Timber Limited (then named Australian Forest Holdings Limited) leased the Lots to the Growers to enable the Growers to carry on a long term commercial afforestation business. Growers are specifically granted rights to harvest timber on their Lots for this purpose.

19. The Prospectus states that there was no minimum subscription for this Project, however applications made under the Prospectus were not accepted after 29 September 1993. Each investor subscribed for a minimum of one Lot, at a cost of \$10,200 per Lot, being \$7,500 payable under the Lease and Management Agreement and \$2,700 to subscribe for shares in Australian Plantation Timber Limited (then named Australian Forest Holdings Limited).

20. The Growers entered into a Lease and Management Agreement with APT Project Limited (then named Australian Eucalypts Limited) to have Tasmanian Blue Gum (*Eucalyptus globulus*) seedlings planted on their leased land for the purpose of eventual felling and sale. Growers had the option of electing to collect their own felled forest produce upon Application instead of having the Manager sell it on their behalf (cl. 18 of the Lease and Management Agreement).

21. Growers contributed \$7,500 for each Lot under the Lease and Management Agreement. Within the first 13 months of the date of

execution of the Lease and Management Agreement, the Manager arranged for each Grower's Lot to be planted with sufficient Tasmanian Blue Gum seedlings as would reasonably be expected to produce 300 cubic metres of harvestable timber per hectare 11 years after planting.

Constitution

22. The Constitution for the Project sets out the terms and conditions under which the Responsible Entity agrees to act for the Grower and to manage the Project. The Responsible Entity will keep a register of Growers (cl. 40.1). Growers are entitled to assign their Grower's interest in certain circumstances (cl. 27.1). The Lease and Management Agreement is annexed to the Constitution and was executed on behalf of a Grower following them signing the Application and a Power of Attorney Form in the Prospectus. Growers are bound by the Constitution by virtue of their participation in the Project.

Compliance Plan

23. The Responsible Entity has prepared a Compliance Plan in accordance with the Corporations Law. Under the Compliance Plan, a Compliance Committee will monitor to what extent the Responsible Entity meets its obligations as the Responsible Entity of the Project and the rights of the Growers are protected.

Lease and Management Agreement

24. Under the Lease and Management Agreement, Growers entered into a lease for one or more Lots and contracted with APT Projects Limited (then named Australian Eucalypt Limited) to establish and maintain the Grower's lot until the Forest produce equals or exceeds 300m³/ha and, in any event, not later than 11 years from the Commencement Date.

25. Growers may have elected to collect their own forest produce (cl. 18) or APT Projects Limited (then named Australian Eucalypt Limited), acting as agent, will process and sell the forest produce as the Grower's agent for the maximum practicable price (cl. 19). Non-Electing Growers will accept the Gross Proceeds of Sale in full satisfaction and discharge of Growers' rights in relation to the forest produce (cl. 20).

26. The Manager will carry out the following services under the agreement:

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- plant *Eucalypt globulus* seedlings or trees of an appropriate size as would reasonable be expected to produce 300 cubic metres per hectare of harvestable timber within eleven years;
- tend to the trees and maintain the Lot according to good silvicultural and forestry practices; and
- keep access roads in good repair and each Lot free from rabbits and other vermin.

Planting

27. During the first 13 month period of the Project APT Projects Limited (then named Australian Eucalypt Limited) planted *Eucalyptus globulus* seedlings on each Lot. From this period on APT Projects Limited has and will continue to maintain the trees in accordance with good silvicultural practice. The services to be performed by APT Projects Limited are outlined in Item 10 of the Schedule to the Agreement.

28. When the yield in the Forest equals or exceeds 300 cubic metres per hectare, or no later than 11 years from the Commencement Date, APT Projects Limited will arrange for harvest and notify Electing Growers where and when to collect the produce and the proportionate share of felling costs they must pay. APT Projects Limited will be responsible for arranging the processing and sale of the produce of the Non-Electing Growers. APT Projects Ltd will provide ongoing reports to the Growers on the progress of the Plantations.

Fees

29. The total fees payable in respect of services to be performed over the first 13 months of the Term under the Lease and Management Agreement are \$7,500 (cl. 22).

30. Non-Electing Growers are required to pay the Manager a further 5.5% of the Net Proceeds of Sale (gross proceeds less felling costs and costs of sales) as a services fee for the period subsequent to the first 13 months of the Term of the Project (cl. 23). Non-Electing Growers also are required to pay the Lessor an amount equal to 5.5% of the Net Proceeds of Sale as rent (cl 3 of the Lease and Management Agreement). Electing Growers are required to pay an amount equal to that payable by the Non-Electing Growers in respect of rent and services, after harvest (cl. 3.3, cl. 23.1(b)). Electing Growers must also pay the Manager his/her proportionate share of felling costs at the time of collection of the timber produce. These payments will provide both the Lessor and the Manager with commercial compensation for

the provision of the leased land and the services over the respective periods of time.

Finance

31. Growers funded their investment in the Project themselves, or borrowed from an independent lender.

32. This Ruling does not apply if a Grower has entered into a finance agreement that includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the 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-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender, or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, are involved or become involved, in the provision of finance to Growers for the Project.

Ruling

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

Section 35-55 - Commissioner's discretion

33. For a Grower who is an individual and who entered the Project on or after 29 March 1993 the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project.

Under paragraph 35-55(1)(b) the Commissioner has decided for the income years ended 30 June 2001 to 30 June 2003 that the rule in section 35-10 does not apply to this business activity provided that the Project has been, and continues to be carried on in a manner that is not materially different to the arrangement described in this Ruling.

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

- a Grower's business activity satisfies one of the objective tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the 'Exception' in subsection 35-10(4) applies (see paragraph 40 in the Explanations part of this Ruling, below).

35. Where, either the Grower's business activity satisfies one of the objective tests, the discretion in subsection 35-55(1) is exercised, or the Exception in subsection 35-10(4) applies, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of deductions attributable to their business activity in excess of any assessable income from that activity, i.e., any 'loss' from that activity, to a later year. Instead, this 'loss' can be offset against other assessable income for the year in which it arises.

36. Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner's decision to exercise the discretion in paragraph 35-55(1)(b) as an indication that the Tax Office sanctions or guarantees the Project or the product to be a commercially viable investment. An assessment of the Project or the product from this perspective has not been made.

Explanations

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

37. Under the rule in subsection 35-10(2) a deduction for a loss incurred by an individual (including an individual in a general law partnership) from certain business activities will not be allowable in an income year unless:

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

38. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

39. Under the loss deferral rule in subsection 35-10(2) the relevant loss is not able to be taken into account in the calculation of taxable income in the year that loss arose. Instead, in a later year it may be offset against any income from the same or similar business activity, or, if one of the objective tests is passed, or the Commissioner's discretion exercised, against other income.'

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

41. In broad terms, the objective tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);
- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year) (section 35-35);
- (c) at least \$500,000 of real property is used on a continuing basis in carrying on the business activity in that year (section 35-40); or
- (d) at least \$100,000 of certain other assets is used on a continuing basis in carrying on the business activity in that year (section 35-45).

42. A Grower who was accepted into, and who has participated in the Project since 29 March 1993 is carrying on a business activity that is subject to these provisions. Information provided with the application for this Product Ruling and additional information provided since, indicates that a Grower who acquires the minimum investment of one interest in the Project is unlikely to pass one of the objective tests or produce a taxation profit until the income year ended 30 June 2004. Growers who acquired more than one interest in the Project may however, pass one of the tests in an earlier income year.

43. Therefore, prior to this time, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b),

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the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

44. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, for an individual Grower who acquired an interest(s) in the Project on or after 29 March 1993 and prior to any withdrawal of this Product Ruling, the Commissioner has decided that it would be unreasonable not to exercise the second arm of the discretion in paragraph 35-55(1)(b) for the years ended 30 June 2001 to 30 June 2003.

45. The discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where:

- (i) the business activity has started to be carried on; and
- (ii) there is an objective expectation that the business activity of an individual taxpayer will either pass one of the objective tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

46. Information provided by the applicant states that the business activity comprised by a Grower's involvement in this Project has started to be carried on, and will continue to be carried on in a manner that is not materially different to that described in the Arrangement in this Product Ruling.

47. In deciding to exercise the discretion in paragraph 35-55(1)(b) the Commissioner has relied upon:

- the report of the independent forester; and
- independent, objective, and generally available information relating to the afforestation 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

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Commissioner of Taxation

 27 June 2001

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:
 TR 92/1; TR 92/20; TR 97/11;
 TR 97/16; TR 98/22; TD 93/34;
 PR 1999/95
Subject references:

- carrying on a business
- commencement of business
- afforestation
- management fee expenses

- producing assessable income
- product rulings
- public rulings
- schemes and shams
- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

Legislative references:

- ITAA 1997 Div 35

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- ITAA 1997 35-10
 - ITAA 1997 35-10(2)
 - ITAA 1997 35-10(3)
 - 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)
 - ITAA 1997 35-55(1)(a)
 - ITAA 1997 35-55(1)(b)
-

ATO references:

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