



PR 2001/118 - Income tax: Kimseed Eucalypts Esperance 2000 Project

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Product Ruling

Income tax: Kimseed Eucalypts Esperance 2000 Project

Contents	Para
What this Product Ruling is about	1
Date of effect	11
Withdrawal	13
Arrangement	14
Ruling	42
Explanations	46
Detailed contents list	57

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**, **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.

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 'Kimseed Eucalypts Esperance 2000 Project', or just simply as 'the Project'.

Tax law(s)

2. The tax law dealt with in this Ruling is:
- 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 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 participating 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 entered into the arrangement described below between the date of issue of PR 2000/42 on 19 April 2000 and the date of withdrawal of PR 2000/83 on 26 April 2001. They 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 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

9. The Commissioner rules on the precise arrangements identified in this 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.

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Date of effect

11. This Ruling applies prospectively from 19 April 2000, the date PR 2000/42 was 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).

PR 2001/118

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, the Product 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 on or after 19 April 2000 and before 26 April 2001. 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:

- Application for Product Ruling dated 2nd March 2000;
- Kimseed Eucalypts Esperance 2000 Project Prospectus, dated 1 May 2000, issued by Kimseed Forestry Project Management Limited (KFPM). The Prospectus pertains to the Scheme listed below;
- Draft Supplementary Prospectus received from KFPM 15 June 2000;
- Constitution of KFPM dated 19th January 2000;
- Draft Constitution for the Scheme executed by KFPM, undated;
- Draft Compliance Plan for the Scheme executed by KFPM as the Responsible Entity (RE), undated;
- **Draft Lease and Management Agreement for the Scheme, between KFPM (the RE), Kimseed Forestry Pty Ltd (the Lessor) and the Grower;**
- Draft Services Agreement between KFPM and the Lessor, undated; and

- Correspondence received from KFPM dated 30 March 2000, 7 June 2000, 13 June 2000, 14 June 2000 and 28 November 2000.

Note: certain information received from KFPM 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 the Growers enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of the Grower, will be a party to. The effect of these agreements is summarised as follows.

Overview

16. This arrangement is called Kimseed Eucalypts Esperance 2000 Project.

Locations	Esperance and Neridup regions of Western Australia
Type of business each participant (Grower) is carrying on	Commercial growing and cultivation of Tasmanian blue gum (<i>E. globulus</i>) for the purpose of felling and sale of timber.
Unit of investment	Woodlot
Size of each Woodlot	1 Hectare
Number of hectares offered for cultivation	1,000 hectares
Number of trees per hectare	950
Expected production	25m ³ per hectare per year
Term of the investment	Approximately 10 years
Initial cost per Woodlot *	\$3,460 for Growers commencing participation by 30 June 2000 or \$3,696 from 1 July 2000
Initial Cost (for a minimum subscription of 3 Woodlots)	\$10,380 for Growers commencing participation by 30 June 2000 or \$11,088 from 1 July 2000
Ongoing costs per Woodlot	Annual lease and management fees plus Marketing fees payable at harvest

PR 2001/118

Note:

- * A discount off the Initial Services Fee Part 1 is available to Growers for a subscription of seven (7) or more Woodlots (reducing it to \$2,160 per Woodlot or \$2,376 from 1 July 2000).

17. Growers execute a Power of Attorney enabling KFPM as the Project Manager to act on their behalf and enter into the Lease and Management Agreement as required when they make an application for Woodlots.

18. Growers enter into a Lease and Management Agreement with KFPM (the Responsible Entity) and Kimseed Forestry Pty Ltd (the Lessor). The agreement gives a Grower a sublease from Kimseed Forestry Pty Ltd over an identifiable area of land called a 'Woodlot' for a period of 12 years or until the trees are harvested and sold and net income distributed. Under the agreement, Growers also contract KFPM to provide services including planting of Tasmanian Blue Gum (*Eucalyptus globulus*) trees for the purpose of eventual felling and sale approximately 8-12 years after establishment.

19. The Project Land is situated in two locations:

- Esperance region of Western Australia, and
- Neridup region of Western Australia

20. There is no minimum subscription for this Project. The Prospectus states that 1,000 hectares of land have been selected and further land may be acquired for planting if needed. The initial cost is divided into Initial Services Fee Part 1 and Part 2. Each investor is required to subscribe for a minimum of three (3) Woodlots. The Initial Services Fee Part 1 is \$2,360 payable upon application (or \$2,596 if application is on or after 1 July 2000). A further \$1,100 is then payable in the 2000/2001 financial year (this is the Initial Services Fee Part 2). If a Grower subscribes for seven (7) or more Woodlots, the Initial Services Fee Part 1 is \$2,160 payable upon application, (or \$2,376 on or after 1 July 2000), and a further \$1,100 is payable in the 2000/2001 financial year. The expected yield from each Plantation Unit is 25 cubic metres of timber per hectare per year (approx 250 cubic metres at maturation).

21. Possible projected returns for Growers are outlined in the Prospectus. The projected returns depend on a range of assumptions and the Project Manager does not give any assurance or guarantee whatsoever in respect of the future success of, or financial returns associated with, entering into the Project.

Constitution

22. The Constitution establishes the project and details the responsibilities of KFPM as the Responsible Entity. It sets out the terms and conditions under which the Responsible Entity agrees to act for the Growers and to manage the Project. The Responsible Entity:

- ensures that Application Funds are not released until appropriate agreements etc are in place;
- prepares the Management Agreement and Lease documents;
- distributes the profits; and
- keeps a register of Growers.

Compliance Plan

23. The Project Manager has prepared a Compliance Plan in accordance with the Corporations Law. It establishes a compliance committee whose purpose is to ensure that the Project Manager meets its obligations as the Responsible Entity of the Project and that the rights of the Growers are protected.

Interest in Land

24. The Lessor (Kimseed Forestry Pty Ltd) grants a Lease to the Growers under the terms of the Lease and Management Agreement. Growers are granted an interest in land in the form of a Lease to use the said land for the purpose of conducting their afforestation business. Growers must pay Rent to the Lessor by 30 September of each year of the project. The first payment due on 30 September 2000 will be \$165 per Woodlot. In each subsequent year the amount will be set at the amount for Rent in the preceding year or indexed at the annual rate of inflation, whichever is greater.

25. The term of a Grower's Lease is until the date the trees on the Woodlots have been harvested and sold and the Responsible Entity pays the proceeds into the Proceeds Fund.

Planting

26. *Eucalyptus globulus* trees will be planted in September 2000 or before 30 June 2001 in accordance with good silvicultural practice. After planting, the Responsible Entity will maintain the trees and provide ongoing reports as required by the Lease and Management Agreement.

Lease and Management Agreement

27. A Lease and Management Agreement is entered into between the Responsible Entity (KFPM), the Lessor (Kimseed Forestry Pty Ltd) and the Grower for each Woodlot.

28. Growers contract with the Responsible Entity (KFPM) to establish and maintain the plantation until maturity. Growers pay the Management Fees for the term of the Project. The Initial Services Fee Part 1 is \$2,360 per Woodlot (minimum of 3 Woodlots) or \$2,596 per Woodlot where the Grower commences participation on or after 1 July 2000. These amounts are discounted where a Grower subscribes for 7 Woodlots or more to \$2,160 or \$2,376 respectively. The Initial Services Fee Part 1 is for preparing a management plan and obtaining necessary approvals as outlined in the Lease and Management Agreement. In addition, a fixed fee of \$1,100 per Woodlot is payable in return for plantation preparation and establishment costs including the provision of seedlings. This represents the Initial Services Fee Part 2 outlined in the Lease and Management Agreement.

29. An Annual fee of \$154 for each Woodlot for other maintenance services is payable on 30 September 2000 and will be indexed in each year thereafter services are rendered on 30 June. The amount will be set at the amount of the fee in the preceding year or indexed at the annual rate of inflation, whichever is greater. A Marketing fee of 3.3% of Harvest Proceeds is also payable upon maturity of the project.

30. A hardship provision exists in the Lease and Management Agreement which allows the Project Manager to elect to waive a Grower's obligation to pay fees for no more than 2 years. The Project Manager will be reimbursed pursuant to the terms of the Constitution.

31. The Responsible Entity (KFPM) will purchase and plant *Eucalyptus globulus* trees on the plantation. It will also cultivate, maintain, replant where necessary, fertilise, water, prune, tend, maintain and otherwise care for the Woodlots as and when required according to good silvicultural and forestry practices to produce mature trees suitable for timber sale.

32. The Responsible Entity (KFPM) guarantees that if a Grower invests in the Project, the Initial Services Part 1, consisting of the preparation of a Management Plan and obtaining all necessary approvals, will be provided by 30 June 2000 if the Commencement Date is on or before 30 June 2000, or by 30 June 2001 if the Commencement Date is after 30 June 2000.

33. A Grower may elect, within 12 months of application, to market and arrange for the sale of the Tree Crop. Where a Grower does not take up this option, the Responsible Entity will harvest and

sell the timber produce on the Grower's behalf. The Responsible Entity will arrange insurance at the Growers' cost.

34. The Responsible Entity may be removed from its appointment by an ordinary resolution of Growers if the Growers take action under Division 1 of Part 2G.4 of the Corporations Law if the Responsible Entity:

- is involved in any breaches of its obligations;
- goes into liquidation;
- has retired or is removed as the Responsible Entity.

Fees

35. The following is a summary of the fees payable.

		Year 1	Year 2	Year 3
		Payable on application	Payable on later of application date or 30 September 2000	Payable on 30 September in subsequent years
Initial Services Part 1 (per Woodlot) Applications prior to 1 July 2000	(for a minimum subscription of 3 Woodlots)	\$2,360	-	-
	(for subscription of 7 Woodlots or more)	\$2,160		
Initial Services Part 1 (per Woodlot) Applications on or after 1 July 2000	(for a minimum subscription of 3 Woodlots)	\$2,596	-	-
	(for subscription of 7 Woodlots or more)	\$2,376		
Initial Services Part 2 (per Woodlot)		-	\$1,100	-
Annual Services (per Woodlot)		-	\$154	\$154 (indexed)

PR 2001/118

Annual Rent (per Woodlot)		-	\$165	\$165 (indexed)
Total Fees Payable Applications prior to 1 July 2000	(for a minimum subscription of 3 Woodlots)	\$7,080	\$4,257	\$957 (indexed)
	(for a subscription of 7 Woodlots) or more	\$15,120	\$9,933	\$2,233 (indexed)
Total Fees Payable Applications on or after 1 July 2000	(for a minimum subscription of 3 Woodlots)	\$7,788	\$4,257	\$957 (indexed)
	(for a subscription of 7 Woodlots)	\$16,632	\$9,933	\$2,233 (indexed)
Marketing Fee (applicable only at maturity)	3.3% of Harvest Proceeds	-	-	-

The Initial Services Fee Part 1 is for the preparation of a Management Plan for the Woodlots and the obtaining of all necessary approvals and is payable upon application. The Initial Services Fee Part 2 is for purchase of seedlings, supervision & management of work and administration, and is payable on the later of 30 September 2000 and the date of application.

36. The Annual Services fee of \$154 per Plantation Unit is for supervision, maintenance and management of the crop. This amount is payable on the later of 30 September 2000 and the date of application and on 30 September annually thereafter.

37. The Application Monies will be banked in a Special Trust Account formed under the Project's Constitution (cl. 4 of the Constitution). Upon acceptance of an Application, the Responsible Entity shall release the relevant application monies from the Application Fund trust account and apply them in payment of the fees under the Lease and Management Agreement in respect of the Initial Services (cl. 8 of the Constitution).

Marketing Fee

38. Harvesting is expected to take place during the eleventh year of the Project. For Growers who do not elect to market the timber, the Responsible Entity (KFPM) will be responsible for arranging the marketing and sale of the timber produce. Those Growers are required to pay a Marketing Fee to the Responsible Entity equal to 3.3% of the Harvest Proceeds.

39. The proceeds of sale of the timber produce will be banked in the Agency Account formed under the Project's Constitution. Proceeds received by the Responsible Entity are to be distributed to the Grower after deductions of:

- amounts for any outstanding Annual Fees; and
- amounts outstanding for operational expenses and harvest fee.

Finance

40. Growers can fund their investment in the Project themselves or borrow from an independent lender. All funding will be on a full recourse basis.

41. This Ruling does not apply if a Grower enters 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;
- entities associated with the Project provide finance for the Project;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's 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 terms are of a non-arm's length nature;
- repayments of the principal and 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) 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.

Ruling

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

Section 35-55 - Commissioner's discretion

42. For a Grower who is an individual and who entered the Project between 19 April 2000 and 26 April 2001, 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 2010 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.

43. 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 49 in the Explanations part of this ruling, below).

44. 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.

45. 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

46. 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.

47. 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.

48. 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.

49. 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.

50. 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

PR 2001/118

- (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).

51. A Grower who was accepted into, and commenced participation in, the Project between 19 April 2000 and 26 April 2001 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 three interests in the Project is unlikely to pass one of the objective tests, or produce a taxation profit, until the income year ended 30 June 2011.

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

53. 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 19 April 2000 and prior to 26 April 2001, 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 2010.

54. 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.

55. 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.

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

- the report of the Independent Forester and additional evidence provided by the Responsible Entity with the application and, subsequently, in further information requested by the Commissioner;

- the financial projections and information contained in the Prospectus; and
- independent, objective, and generally available information relating to the afforestation industry.

Detailed contents list

57. Below is a detailed contents list for this Product Ruling:

	Paragraph
What this Product Ruling is about	1
Tax law(s)	2
Goods and Services Tax	3
Business Tax Reform	4
Note to promoters and advisers	6
Class of persons	7
Qualifications	9
Date of effect	11
Withdrawal	13
Arrangement	14
Overview	16
Constitution	22
Compliance Plan	23
Interest in Land	24
Planting	26
Lease and Management Agreement	27
Fees	35
Marketing Fee	38
Finance	40
Ruling	42
Division 35 - deferral of losses from non-commercial business activities	42
Section 35-55 - Commissioner's discretion	42
Explanations	46

PR 2001/118

Division 35 – deferral of losses from non-commercial business activities	46
Detailed contents list	57

Commissioner of Taxation

29 June 2001

<i>Previous draft:</i>	- tax shelters
Not previously issued in draft form	- tax shelters project
<i>Related Rulings/Determinations:</i>	<i>Legislative references:</i>
PR 1999/95; PR 2000/42;	- ITAA 1997 Div 35
PR 2000/83; TR 92/1; TR 92/20;	- ITAA 1997 35-10
TR 97/16; TD 93/34; TR 98/22;	- ITAA 1997 35-10(2)
	- ITAA 1997 35-10(3)
<i>Subject references:</i>	- ITAA 1997 35-10(4)
- carrying on a business	- ITAA 1997 35-30
- commencement of business	- ITAA 1997 35-35
- afforestation	- ITAA 1997 35-40
- management fee expense	- ITAA 1997 35-45
- producing assessable income	- ITAA 1997 35-55
- product rulings	- ITAA 1997 35-55(1)
- public rulings	- ITAA 1997 35-55(1)(a)
- schemes and shams	- ITAA 1997 35-55(1)(b)
- taxation administration	- ITAA 1936 82KL
- tax avoidance	- ITAA 1936 Part IVA
- tax benefits under tax avoidance schemes	

ATO references:

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