PR 2001/70W - Income Tax: Australian Growth Timber Project 3

Notice of Withdrawal

Product Ruling

Income tax: Australian Growth Timber Project 3

1. Product Ruling PR 2001/70 sets out the Commissioner's opinion on the tax consequences for a defined class of entities (Members) participating in an arrangement known as 'Australian Growth Timber Project 3' (the Project), a forestry managed investment scheme with the purpose of establishing and tending to Tasmanian Blue Gum trees for sale in Australia.

2. This Product Ruling has been withdrawn in accordance with subsection 358-20(1) of Schedule 1 to the *Taxation Administration Act 1953*, which states the Commissioner may withdraw a public ruling either wholly or to an extent. Where the scheme described in the ruling is materially different from the scheme actually carried out, the ruling does not have any binding effect on the Commissioner.

All legislative references in this Notice of Withdrawal notice are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.

Overview

3. The Commissioner issued PR 2001/70 for Australian Growth Timber Project 3 on 30 May 2001. Each Member participating in the arrangement was required to enter into a Lease and Management Agreement for the Project.

4. On 14 October 2005, each individual Lease and Management Agreement was replaced with a single Consolidated Lease and Management Agreement (CLMA) between Australian Growth Managers Limited (the Responsible Entity at the time) and each several Member (referred to as 'Growers' in the CLMA).

5. On 22 December 2011, Primary Securities Ltd replaced Australian Growth Managers Limited as the Responsible Entity for the Project, pursuant to section 601FL of the *Corporations Act 2001* (Corporations Act).

6. On 29 November 2012, a meeting of Members was held to discuss the viability and possible early termination of the Project. In this meeting, the Members present voted in favour of terminating the Project.

7. On 7 January 2013, Primary Securities Ltd notified the Australian Securities and Investments Commission (ASIC) of the impending commencement of the winding up of the Project in accordance with subsection 601NC(2) of the Corporations Act. Primary Securities Ltd has advised the Australian Taxation Office (ATO) that the Project commenced winding up on 9 January 2013 and is expected to be deregistered in or around May 2013.

8. Primary Securities Ltd has advised the ATO that the CLMA was terminated on 9 January 2013. The termination of the CLMA has resulted in the Project being carried on in a materially different way to how it was described in PR 2001/70. The ruling is no longer binding on the Commissioner from 9 January 2013.

9. Provided that up to the date of termination of the CLMA, the Project was carried out as described in PR 2001/70, the termination does not disturb the tax treatment of previous Members' outgoings as set out in PR 2001/70.

10. This Notice of Withdrawal sets out the tax outcomes for Members arising as a consequence of the termination of the CLMA.

Carrying on a business

11. Paragraphs 17, 20 and 24 PR 2001/70 set out how Members have an interest in the Project. Paragraphs 51 to 59 explain how the Members' participation in the Project constitutes the carrying on of a business of afforestation by the Members. Upon termination of the CLMA, on 9 January 2013, all Members ceased to have an interest in each of their Woodlots and therefore ceased to carry on the business of afforestation.

Deferral of losses from non-commercial business activities

12. Division 35 only applies to individuals, alone or in partnership, in income years in which they are carrying on a business activity. Under paragraph 45 of PR 2001/70, the Commissioner conditionally undertook to exercise his discretion under paragraph 35-55(1)(b), to allow losses incurred by Members who are individuals to be offset against other assessable income in the income year in which the losses arise, for the income years ended 30 June 2001 to 30 June 2010.

13. As the Commissioner has not exercised his discretion for the income year ended 30 June 2011 and subsequent income years, any losses from the individual's business activity for the period 1 July 2010 to 9 January 2013 (the date the business activity ceased) will be deferred under subsection 35-10(2) unless, for each income year within that period (or part thereof), the individual:

- meets the income requirement test in subsection 35-10(2E), and the business activity meets at least one of the four business activity tests in Division 35; or
- comes within the exception in subsection 35-10(4).

14. Amounts deferred under subsection 35-10(2) as outlined in paragraph 14 will only be deductible in a subsequent year if the business activity that gave rise to this amount or a business activity 'of a similar kind' is carried on in that subsequent year. If the business activity, or a business activity that is 'of a similar kind', is never carried on again, the entitlement to deduct the amount will be lost. For more information regarding 'business activity of a similar kind' see paragraphs 49 to 54 of Taxation Ruling TR 2001/14 *Income tax: Division 35 – non-commercial business losses.*

Amounts incurred after business activities cease

15. Division 35 does not apply to amounts incurred from the Member's business activity following the cessation of the business activity on 9 January 2013. Therefore, amounts incurred after the business activity ceases, for example interest (refer to paragraph 26 below), may be deductible.

16. A Member who incurs capital expenditure after the business ceases will be entitled to claim a deduction under section 40-880 so long as the expenditure related to the business activity, as the Commissioner has exercised the discretion in section 35-55 in relation to one or more income years prior to the cessation of the business activity (subsection 35-10(2A)).

Disposal of trading stock

17. On the termination of the CLMA, the Members' standing timber became the property of RuralAus Plantation Management Pty Ltd (RuralAus) (the head lessee of the land on which the trees stood as at the time of termination).

18. As the Members were carrying on a business, the standing timber is considered to be their trading stock (section 70-85). The loss of the standing timber is considered a disposal of trading stock outside of the ordinary course of business under subsection 70-90(1).

19. Where this occurs each Member is required to include in their assessable income, the market value of the trading stock on the day of disposal. Primary Securities Ltd has advised that the market value of the Members' trees was nil on the day of disposal.

Part refund of fees

20. Credit notes have been issued to Members in respect of lease and management fees invoiced to Members in respect of the income year ending 30 June 2013.

21. Where Members have *not* paid the invoiced amount of lease and management fees prior to the issue of credit notes, the credit notes will halve the fees invoiced to Members in that year. For these Members, the receipt of credit note results in a reduction in the amount incurred for lease and management fees that they can deduct (subject to the application of Division 35 as set out at paragraphs 13 to 15) in relation to the income year ending 30 June 2013.

22. Where Members have paid the lease and management fees prior to the issue of credit notes, they will receive a cash refund of half of those fees. RuralAus Investment Ltd will pay the refunds to Members. For these Members, the refund will be received as assessable income from the Member's business of afforestation and will be included in the Member's assessable income in the income year of receipt. Further, lease and management fees paid in the income year ending 30 June 2013 (and prior income years in which the discretion under paragraph 35-55(1)(b) is not exercised) may have formed part of amounts deferred under subsection 35-10(2), as outlined in paragraph 14. Amounts deferred under subsection 35-10 (2) can be offset against any refunds received after the income year ending 30 June 2013.

Deregistration of Project

23. As a result of the Project's deregistration, each Member's interest in the Project will end. As a result, CGT event C2 will happen to the Member under section 104-25. The termination will need to be in accordance with the Project's Constitution and requirements under the Corporations Act.

24. Under section 104-25, a capital loss may arise for the Member if the Member previously incurred capital expenditure which forms part of the cost base of their interest in the Project. However, expenditure which the Member has previously deducted, or can deduct, including any deductible expenditure that is deferred under subsection 35-10(2), is excluded from the cost base and is not taken into account in calculating the outcome under section 104-25. Overall, this should result in a nil cost base for all Members.

Interest on loans after cessation of business

25. If Members have funded their participation in the Project through a loan, interest incurred on the loan after the cessation of their business of afforestation will continue to be deductible under section 8-1 provided each Member meets certain requirements outlined in Taxation Ruling TR 2004/4 *Income tax: deductions for interest incurred prior to the commencement of or following the cessation of, relevant income earning activities.*

26. As noted, Division 35 will not apply to interest expenditure incurred in relation to the Project after the business activity ceased on 9 January 2013.

Commissioner of Taxation
20 May 2001

ATO references

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