



PR 2005/12 - Income tax: WA Blue Gum Project 2005

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 This document has changed over time. This is a consolidated version of the ruling which was published on *16 February 2005*



Product Ruling

Income tax: WA Blue Gum Project 2005

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Preamble

*The number, subject heading, **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 Tax Office **does not** sanction or guarantee this product. 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 participants 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 and how the product fits an existing portfolio. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out 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, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office 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 participants may wish to refer to the Tax Office website at www.ato.gov.au or contact the Tax Office directly to confirm the currency of this Product Ruling or any other Product Ruling that the Tax Office 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 'WA Blue Gum Project 2005 or simply as 'the Project'.

Tax law(s)

2. The tax laws dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 8-1 of the ITAA 1997;
- section 17-5 of the ITAA 1997;
- section 25-20 of the ITAA 1997;
- Division 27 of the ITAA 1997;
- Division 35 of the ITAA 1997;
- Division 328 of the ITAA 1997;
- section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 82KZL of the ITAA 1936;
- sections 82KZME to 82KZMG of the ITAA 1936; and
- Part IVA of the ITAA 1936.

Goods and Services Tax

3. All fees and expenditure referred to in this Ruling 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.

Changes in the Law

4. Although this Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering 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 participants in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

Class of persons

7. The class of persons to whom this Ruling applies is the persons more specifically identified in the Ruling part of this Product Ruling and who enter into the arrangement specified below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (that is, 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 intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it;
- persons who participate in the Project through offers made other than through the Product Disclosure Statement;
- persons who opt to 'Harvest' and 'Deliver' the 'Wood' grown on their 'Leased Area' and/or opt to sell their 'Wood' other than to the 'Purchaser' under the Wood Purchase Agreement; and
- persons who are accepted to participate in the Project after 30 June 2005.

Qualifications

9. The Commissioner rules on the precise arrangement identified in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner. The Ruling will be withdrawn or modified.

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Date of effect

11. This Ruling applies prospectively from 16 February 2005, 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).

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 commenced 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 2008. 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 arrangement specified below. 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 specified below. This arrangement incorporates the following documents:

- Application for a Product Ruling dated 26 November 2004 as constituted by documents provided on 5 October 2004 and 29 November 2004 and additional correspondence dated 30 November 2004, 3 December 2004, 10 December 2004, 27 January 2005 and 1 February 2005;
- Draft **Product Disclosure Statement** for the WA Blue Gum Project 2005 issued by WA Blue Gum Limited ('WABG' or the 'Responsible Entity') dated 26 November 2004;
- The **Constitution and the Deed of Variation of The Constitution** dated 25 May 2004 establishing the WA Blue Gum Project ('the Constitution') received 30 November 2004;
- Draft **Sub-Lease 2005**, to be entered into by each Grower and WABG ('the Landholder') received 30 November 2004;
- Draft **Agreement to Sub-lease 2005**, which may be entered into by each Grower and WABG received 30 November 2004;
- Draft **Project Management Contract (2005)**, to be entered into by each Grower, WABG (the 'Project Manager') and URS Australia Pty Ltd trading as URS Forestry ('URS Forestry') received 30 November 2004;
- Draft **Loan Agreement (2005)**, which may be entered into by each Grower and Albany Financial Pty Ltd ('the Financier'), an entity associated with WABG received 30 November 2004;
- Draft **Joint Venture Agreement**, which may be entered into by party A ('the First Joint Venture Grower') and party B ('the Second Joint Venture Grower') received 30 November 2004;
- Draft **Project Management Contract 2005 (Joint Venture)**, to be entered into by each Joint Venture Grower, WABG ('The Project Manager') and URS Australia Pty Ltd trading as URS Forestry ('URS Forestry') received 30 November 2004;
- Draft **Loan Agreement 2005 (Joint Venture)**, which may be entered into by the First Joint Venture Grower and the Financier received 30 November 2004;

- Draft **Sub-Lease 2005 (Joint Venture)**, to be entered into by the Second Joint Venture Grower and WABG received 30 November 2004;
- Draft **Agreement to Sub-lease 2005 (Joint Venture)**, which may be entered into by the Second Joint Venture Grower and WABG received 30 November 2004;
- The **Offer to Borrow and Master Tri-Partite Deed**, which may be entered into by each Grower, WABG and United Pacific Finance Pty Ltd ('the Introduced Lender') received 30 November 2004;
- Draft **Wood Purchase Agreement 2005**, to be entered into by each Grower, WABG ('the Authorised Vendor') and WA Chip & Pulp Co Pty Ltd ('the Purchaser') received 30 November 2004;
- Draft Plantation Services Agreement to be entered into between WABG and WACAP Treefarms Pty Ltd ('the Contractor') received 30 November 2004;
- The Scheme Property Custody Agreement between WABG and Sandhurst Trustees Ltd ('the Custodian') dated 12 April 2000; and
- The Compliance Plan for the WA Blue Gum Project dated 26 April 2004.

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 that Growers may enter into or become a party to. A Loan Agreement will be executed where a Grower successfully applies for finance either from the Financier or the Introduced Lender. 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. In this Ruling the term 'associate' has the meaning given by section 318 of the ITAA 1936.

16. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

Overview

17. The salient features of the WA Blue Gum Project 2005 ('the Project') Project are as follows:

Location	South West region of Western Australia
Type of business to be carried on by each participant	Commercial growing and cultivation of <i>Eucalyptus globulus</i> (Tasmanian Blue Gum) trees for the purpose of harvesting and selling timber for wood chip
Number of hectares offered for cultivation	500 hectares however, oversubscriptions may be accepted
Size of each interest	One hectare
Minimum allocation	Six hectares
Number of trees per hectare	1,000 to 1,250 trees
Term of the Project	Approximately 10 years. The project will terminate when the plantation crop is harvested for the first time
Initial cost per hectare	\$4,950 for the Establishment Services
Ongoing costs	Growers will pay a management fee of \$99 per hectare per annum increased by the Consumer Price Index (CPI) and rent of \$412.50 per hectare per annum indexed by CPI
Other costs	<ul style="list-style-type: none"> • 'Harvest', 'Delivery' and processing fees; • Fire insurance; and • A fee of 15% when the 'Relevant Harvest Income' due to the Grower exceeds \$11,000 per hectare indexed annually in accordance with CPI

18. The Project is registered as a Managed Investment Scheme under the *Corporations Act 2001*. WA Blue Gum Limited ('WABG') has been issued with an Australian Financial Services Licence and will be the Responsible Entity for the Project.

19. An offer to participate the Project will be made through a Product Disclosure Statement ('PDS'). The offer under the PDS is for 500 hectares in the Project and will invite participants to subscribe for at least six hectares in the Project on or before 30 June 2005.

20. To participate in the Project participants must complete the Application and Power of Attorney Form in the PDS and pay \$4,950 per hectare with their 'Application' by 30 June 2005. The 'Application Money' will be banked into the relevant 'Application Fund' and released to WABG when the Grower's application to acquire an 'Interest' has been accepted by WABG.
21. Growers will establish, manage, harvest and sell a commercial plantation of *Eucalyptus globulus* trees and carry on a commercial business of afforestation during the 'Term' of the Project.
22. On or before 30 June 2005 Growers participating in the arrangement will execute a Sub-lease (and if relevant, an Agreement to Sub-Lease where there is no Project Land available for Growers on or before 30 June 2005), a Project Management Contract and a Wood Purchase Agreement.
23. The Sub-lease gives a Grower an interest in an identifiable area of land, called a 'Leased Area'. Each 'Leased Area' is made up of one hectare allotments. The minimum area of land that can be leased by a Grower in the Project is six hectares.
24. Where there is no Project land available for a Grower on or before 30 June 2005, the Project Manager may still accept the Grower's Application subject to a Sub-lease being entered into on behalf of the Grower and lodged for registration within nine months of the date of acceptance of the Grower's Application. Acceptance of the Grower's Application will also be subjected to the Project Manager's ability to complete all of the Establishment Services referred to in the Plantation Management Contract within the Establishment Period. In these circumstances, the Grower will be required to enter into an Agreement to Sub-lease with the Project Manager.
25. The Growers enter into a Project Management Contract with the Project Manager and URS Forestry. The Project Management Contract sets out the services to be provided by the Project Manager, in establishing and maintaining Tasmanian Blue Gum (*Eucalyptus globulus*) seedlings planted on the leased land for the purpose of felling and sale. Under the Project Management Contract, URS Forestry agrees to act as supervisor and advisor to the Project.
26. A custodian has been appointed under the Scheme Property Custody Agreement to protect the interests of the Grower in their dealings with WABG.

27. Two applicants may participate in the Project as 'Joint Venture Growers'. To participate in the Project as a 'Joint Venture Grower', participants must complete the Application and Power of Attorney Form (Joint Venture Growers) in the PDS and pay \$4,950 per hectare with their 'Application' by 30 June 2005. 'Joint Venture Growers' participating in the arrangement are also required to execute a Joint Venture Agreement, Sub-lease (and if relevant an Agreement to Sub-lease), Project Management Contract and Wood Purchase Agreement on or before 30 June 2005. The terms of the joint venture require that:

- (a) one 'Joint Venture Grower' is liable for the cost of Establishing the plantations ('first Joint Venture Grower'); and
- (b) the other 'Joint Venture Grower' is liable for the ongoing costs for the provision of land, management and insurance ('second Joint Venture Grower').

28. Each 'Joint Venture Grower' is liable for 50% of all harvesting, transportation and supervision costs and any incentive fees payable out of the proceeds of the sale of the 'Wood'. Each 'Joint Venture Grower' is entitled to a 50% share of the proceeds of sale of the 'Wood'.

29. There is no minimum amount that must be raised under the PDS. WABG has the right to accept oversubscriptions and additional land will be secured if necessary. The land for the Project will be leased by WABG from a third party land owner.

Constitution

30. The Constitution establishes the Project and operates as a deed binding all of the Growers and WABG. The Constitution sets out the terms and conditions under which WABG agrees to act as Responsible Entity and thereby manage the Project. Growers are bound by the Constitution by virtue of their participation in the Project.

31. Under clause 6 of the Constitution, all moneys received from Applicants will be paid to the Custodian. The Custodian shall open, or cause to be opened, an account designated 'Application Fund', into which all moneys received from 'Applicants' and accrued interest will be deposited. If the 'Application Money' is held in the 'Application Fund' for more than 12 months, the money shall be refunded, along with any interest earned on it, to the 'Applicant', unless the 'Applicant' directs WABG otherwise.

32. Among other things the Constitution sets out in detail the following:

- the Responsible Entity's entitlement to receive remuneration as set out in the Schedule from the 'Application Fund', including management fees and rents payable by Growers, and the proportion of the 'Relevant Harvest Income' specified in the Project Agreements, clause 8;

- a register of Growers is to be maintained, clause 9;
- the assignment of Grower's interest, clause 10;
- the Responsible Entity's powers to invest in and deal with any investments which are authorised by law, clause 11;
- the Responsible Entity's ability to borrow for the purpose of the Project and its protections and indemnities, clauses 12 and 13;
- additional powers, and other activities of the Responsible Entity, clauses 13 and 15;
- convening a meeting of Growers and voting requirements, clause 19; and
- complaints handling and dispute resolution, clauses 20 and 21.

Compliance Plan

33. As required by the *Corporations Act 2001*, WABG has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that WABG manages the Project in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected. Compliance is monitored by a Compliance Committee.

Scheme Property Custody Agreement

34. WABG, as Responsible Entity, has engaged Sandhurst Trustee Ltd to act as the Custodian of the Property, as defined at Item 1 of this Agreement. The 'Property' includes all 'Application Moneys' and 'Relevant Harvest Income' until disbursed or distributed in accordance with the Constitution, the Project Agreements and the 'Head Lease'.

Sub-lease Agreement 2005

35. Growers will enter into a sub-lease of land with the Landholder. The Grower is to establish, tend and harvest a 'Plantation' of eucalyptus trees for commercial wood production on the 'Leased Area'. The term of the Sub-lease is 12 years or, until the completion of the 'First Rotation', being the 'First Harvesting' of the 'Plantation'.

36. Under this Sub-lease the Grower grants the Landholder, its employees and contractors the right to enter the 'Leased Area' to carry out their duties under the Sub-lease in relation to the 'Leased Area', clause 4.3. The Landholder warrants that it is entitled to grant this Sub-lease to the Grower and the relevant consents required under clauses 3 and 4 have been obtained.

37. As consideration for the granting of this Sub-lease the Grower pays annual 'Rent' per hectare of the 'Leased Area', indexed after the 1st year by the Consumer Price Index (CPI). The 'Leased Area' is set out in Part 2 of the Schedule to the Sub-lease. The Grower may extend the 'Term' by giving written notice to the Landholder as required in clause 5.

38. Grower's covenants, Landholder's covenants and mutual covenants are outlined in clauses 7, 8 and 9. The 'Parties' acknowledge that the 'Plantation' is and shall remain the property of the Grower until the end of the 'Term' and the Grower shall be entitled to 'Harvest' the 'Plantation' and to retain all income from the sale of the 'Wood'.

39. Under Clause 10, if there is damage to or reduction in the viability of the 'Plantation', the Grower is required by the Landowner to reduce the 'Plantable Area' by the area which has been damaged or is no longer viable or, where the whole of the 'Plantation' is damaged or no longer commercially viable, to terminate the contract. The result of a reduction or termination under this clause is that the Grower is deemed to have surrendered the land back to the Landowner and all obligations in relation to that land under the Sub-lease end. The Grower's share of the 'Relevant Harvest Income' will be proportionally reduced.

40. The terms of the termination in the event of default and dispute resolution are outlined in clauses 13 and 14 respectively.

Agreement to Sub-lease (2005)

41. Where there is no Project Land available for a Grower on or before 30 June 2005, the Grower or, in the case of Joint Venture Growers, the Second Joint Venture Grower, will be required to enter into an Agreement to Sub-lease with WABG.

42. Pursuant to the terms of the Agreement to Sub-lease the parties undertake to enter into a Sub-lease of the land on or before the 'Starting Date', being a date no later than will allow all the Establishment services referred to in the Plantation Management Contract to be completed within the Establishment Period. The parties are bound by, all the provisions of the Sub-lease from the 'Starting Date'.

Project Management Contract 2005

43. Under the Project Management Contract, Growers contract with the Project Manager to carry out such services as are required to establish, manage and maintain the 'Plantation' on the 'Land' until maturity in accordance with the 'Plantation Development and Management Plan' and sound silvicultural and environmental practices.

44. These services include the 'Establishment' of the 'Plantation' on the 'Land' during the 'Establishment Period' (clause 4).

45. In consideration for the performance by the Project Manager of its duties and obligations, the Grower agrees to pay the Project Manager the amounts specified in the Schedule.

46. The Grower pays 'Application Money' of \$4,950 per hectare for the 'Establishment' of the 'Plantation'. The Grower also pays an annual management fee per hectare of the 'Plantable Area' for ongoing management.

47. The Grower may express and give recommendations to the Project Manager relating to any matters which are subject to this agreement and object to and disallow any changes to the 'Plantation Development and Management Plan'. The Project Manager shall provide to the Grower a report not later than 20 November of each year. Among other things, the report will detail any changes to the 'Plantation Development and Management Plan', and set out the actual operations performed on the 'Land' (clauses 9 and 10).

48. Termination of the Project Management Contract in the event of default and procedures for dispute resolution are dealt with in clauses 15 and 17 respectively.

49. The Project Management Contract also provides for a second rotation plantation crop, through a coppice option. Growers who take up this option will be required to pay additional amounts at a future date and enter into arrangements to extend the effect of the Project agreements. This option may be taken up prior to the first 'Harvest' of the 'Plantation. **The coppice option is outside of the scope of this Product Ruling and the tax implications for Growers who participate in the coppice option do not form part of this Product Ruling.**

Plantation Services Agreement 2005

50. Under the Plantation Services Agreement the Contractor agrees to carry out the necessary 'Plantation Services' to establish, tend and maintain the 'Plantation' of eucalyptus trees on the 'Land' as set out in the 'Plantation Development and Management Plan'.

51. The services will be in accordance with sound silvicultural and environmental practices adopted within the forestry industry.

Wood Purchase Agreement 2005

52. Growers authorise the Authorised Vendor to enter into the Wood Purchase Agreement with the Purchaser on their behalf. Under the Agreement all of the Growers' 'Wood' is pooled together for sale to the Purchaser by the Authorised Vendor. Under the Agreement the Purchaser will 'Harvest', 'Deliver' and purchase the 'Wood', for a price offered as being fair and reasonable at the relevant time.

53. The Agreement provides for Growers and the Authorised Vendor to seek alternative prices for 'Harvest' and 'Delivery' and an alternative price for the 'Wood'. Where such alternatives are obtained the Purchaser retains the right to match the price offered by the other party.

54. The Agreement also provides for all or part of the 'Wood' to be sold for higher value use other than that of woodchips. This alternative will be considered at the time of 'Harvest' by the parties to the Wood Purchase Agreement.

Fees

55. Growers who are accepted to participate in the Project on or before 30 June 2005 and who have executed the Project Management Contract, the Sub-lease and the Wood Purchase Agreement will pay the following fees per hectare:

- the 'Application Money' payable under the Project Management Contract of \$4,950 per hectare;
- an annual management fee of \$99 per hectare indexed from 30 June 2005 is payable from the period beginning 1 July 2005 until the 'Plantation' has been 'Harvested'. The first annual management fee being payable on or before 28 February 2006, and thereafter on 28 February in each year;
- a fee of 15% when the 'Relevant Harvest Income' due to the Grower exceeds \$11,000 per hectare indexed annually from 30 June 2005;
- any unforeseen expenses in relation to fertiliser and/or insect issues, may be borne between the Growers in proportion to the number of hectares held by each Grower. The Growers may vote to meet such expenses at a meeting convened by WABG;
- rent of \$412.50 per hectare per annum indexed. The first rent is payable on 15 November 2005 in respect of the period from 1 July 2005 until 30 June 2006. Subsequently it is payable annually on 30 September; and
- the Grower's proportion of 'Harvest' and 'Delivery' fees, for services provided in accordance with the Harvest Plan.

Pooling of Growers timber and distribution of proceeds

56. Clause 7 of the Constitution sets out the circumstances relating to the pooling of Growers' timber and the distribution of proceeds from that sale. This Product Ruling only applies where the following principles apply to those pooling and distribution arrangements:

- only Growers who have contributed 'Wood' from their 'Plantation Allotment' to the pool making up the 'Relevant Harvest Income' are entitled to benefit from distributions from those proceeds; and
- 'Wood' is only pooled with the 'Wood' of Growers accepted to participate in the WA Blue Gum Project 2005.

Finance

57. Growers have the option to fund their involvement in the Project between two finance packages offered on commercial terms. Growers may borrow from the Financier (a lender associated with WABG), or the Introduced Lender. Alternatively, Growers may borrow from an independent lender.

58. Growers cannot rely on this Product Ruling if they enter into a finance package with the Financier or the Introduced Lender that materially differs from those provided to the Tax Office by WABG with the application for this Product Ruling. These financial packages are summarised below.

59. Growers are able to borrow from the Financier an amount of up to 80% of the 'Application Money'. The terms of the finance are, as follows:

- a term ending on 30 September 2009, with repayments of principal and interest twice each year; and
- a fixed interest rate of 10.2% per annum.

60. The security for the loan is provided by the assignment to the Financier of the Grower's rights and interest in the Project Management Contract, the Sub-lease, the Wood Purchase Agreement and all monies payable to the Grower under those Agreements, and the insurances. The assignment occurs upon default by the Grower or other events set out in clause 8 of the Loan Agreement.

61. The loan is provided by the Financier on a full recourse basis and recovery action will be taken in respect of any default by the borrower. Overdue repayments will incur interest at the default rate of 14% per annum.

62. As an alternative, Growers are able to borrow from the Introduced Lender an amount up to 100% of the application amount. The terms of the finance are a ten (10) year term with interest only payable for the first three (3) years and then principal and interest over the following seven (7) years with a fixed interest rate of 10.95% per annum. Security is provided by a charge over the whole right, title and interest of the benefits arising out of each of the project documents and all monies payable to the Grower in these agreements. The loan is on a full recourse basis and recovery action will be taken in respect of any default. Overdue repayments incur interest at a default rate of approximately 14.95% per annum.

63. Growers cannot rely on this Product Ruling if the 'Application Money' other than the 'Application Money' payable subject to a finance arrangement, is not paid in full by 30 June 2005. Where an application is accepted by WABG subject to finance approval by any lending institution, Growers cannot rely on this Ruling if written evidence of that approval has not been given to WABG by 30 June 2005.

64. This Ruling does not apply if the finance arrangement entered into by the Grower 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, other than the Financier and the Introduced Lender, are involved or become involved in the provision of finance to Growers for the Project.

Ruling

Application of this Ruling

65. This Ruling applies only to Growers who are accepted to participate in the Project and who have executed a Project Management Contract, Sub-lease and Wood Purchase Agreement on or before 30 June 2005. The Grower's participation in the Project must constitute the carrying on of a business of primary production. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced.

66. This Ruling does not apply:

- to Growers who are excluded from the Ruling as described in the Class of Persons or the Arrangement section of this Product Ruling;
- to Growers who opt to 'Harvest' and 'Deliver' the 'Wood' grown on their 'Leased Area' and/or opt to sell their 'Wood' other than to the 'Purchaser' under the Wood Purchase Agreement; or
- where the 'Wood' grown on the Growers' woodlots is pooled other than under the principles set out in paragraph 56.

The Simplified Tax System (STS)

Division 328

67. For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower is an 'STS taxpayer'. To be an 'STS taxpayer' a Grower:

- must be eligible to be an 'STS taxpayer'; and
- must have elected to be an 'STS taxpayer'.

Qualification

68. This Product Ruling assumes that a Grower who is an 'STS taxpayer' is so for the income year in which their participation in the Project commences. A Grower may become an 'STS taxpayer' at a later point in time. Also, a Grower who is an 'STS taxpayer' may choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer', during the term of the Project. These are contingencies relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

Assessable income***Section 6-5 and section 328-105***

69. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

70. The Grower who is not an 'STS taxpayer' recognises ordinary income from carrying on the business of afforestation at the time that income is derived.

71. The Grower who is an 'STS taxpayer' recognises ordinary income from carrying on the business of afforestation at the time that income is received (paragraph 328-105(1)(a)).

Stamp duty***Section 25-20***

72. A Grower may claim a tax deduction under 25-20 of the ITAA 1997, for the expense incurred in relation to registering or stamping the Sub-lease over property used solely for the purposes of producing assessable income.

Deductions for the Application Money, Management Fees, Rent and Interest***Section 8-1 and section 328-105***

73. A Grower who enters into the Project on or before 30 June 2005 may claim tax deductions, on a per hectare basis, for the following expenditure.

74. However, if for any reason, an amount shown or referred to in the Table below is not fully paid in the year in which it is incurred by a Grower who is an 'STS taxpayer' then the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower. For an 'STS taxpayer' any amount or part of an amount shown in the Table below which is not paid in the year in which it is incurred will be deductible in the year in which it is actually paid.

PR 2005/12

Fee Type	Year ended 30 June 2005	Year ended 30 June 2006	Year ended 30 June 2007	Year ended 30 June 2008
Application Money	\$4,950 See Notes (i) & (ii)	Nil	Nil	Nil
Management fees	Nil	\$99 (indexed) See Notes (i) & (iii)	\$99 (indexed) See Notes (i) & (iii)	\$99 (indexed) See Notes (i) & (iii)
Rent	Nil	\$412.50 (indexed) See Notes (i), (iii) & (v)	\$412.50 (indexed) See Notes (i), (iii) & (v)	\$412.50 (indexed) See Notes (i), (iii) & (v)
Interest payable to the Financier and/or the Introduced Lender	As incurred (Non-STS taxpayers) Or as paid (STS taxpayers) See Notes (iv) & (v)	As incurred (Non-STS taxpayers) Or as paid (STS taxpayers) See Notes (iv) & (v)	As incurred (Non-STS taxpayers) Or as paid (STS taxpayers) See Notes (iv) & (v)	As incurred (Non-STS taxpayers) Or as paid (STS taxpayers) See Notes (iv) & (v)

Notes:

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27. See Example 1 at paragraph 115.
- (ii) Under section 82KZMG the 'Application Money' is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 99 to 102) and is deductible in the income year in which it is incurred (where the Grower is **not an 'STS taxpayer'**) or the year in which it is paid (where the Grower is an **'STS taxpayer'**).
- (iii) The management fees and 'Rent' set out in the Project Management Contract and the Sub-lease Agreement are deductible in full in the year that they are incurred (where the Grower is **not an 'STS taxpayer'**) or the year in which they are paid (where the Grower is an **'STS taxpayer'**).
- (iv) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than the Financier or the Introduced Lender, is outside the scope of this Ruling. Growers who borrow from lenders other than the Financier or the Introduced Lender may request a private ruling on the deductibility of the interest incurred.

- (v) This Ruling will not apply to any Grower who prepays fees or interest. A prepayment of fees or interest will occur where an amount is paid by a Grower for fees or interest for a period that extends beyond the income year in which the fees or interest are incurred. Such Growers may seek a private ruling on the tax implications of their participation in the Project.

Joint Venture Growers

75. A Grower who is a 'Joint Venture Grower' (as explained in paragraphs 27 to 28) and is **not** an 'STS taxpayer' may claim deductions for the following amounts set out in the relevant Tables and Notes:

- the '**Joint Venture Grower**' referred to in paragraph 27(a) may claim deductions under section 8-1 for amounts incurred for the 'Application Money' and any interest on funds borrowed from the Financier or the Introduced Lender; and
- the '**Joint Venture Grower**' referred to in paragraph 27(b) may claim deductions under section 8-1 for amounts incurred for ongoing management fees, and 'Rent', and under section 25-20, for costs in relation to registering or stamping the Sub-lease.

76. Where either or both of the 'Joint Venture Growers' **is** an 'STS taxpayer' the deductions referred to in paragraph 74 are deductible in the income year in which they are paid by, or paid on behalf of the 'Joint Venture Grower' (paragraph 328-105(1)(b)).

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

Section 35-55 – exercise of Commissioner's discretion

77. A Grower who is an individual accepted into the Project by 30 June 2005 may have losses arising from their participation in the Project that would be deferred to a later income year under section 35-10. Subject to the Project being carried out in the manner described above, the Commissioner will exercise the discretion in paragraph 35-55(1)(b) for the income years ending **30 June 2005 to 30 June 2016 or to the income year preceding the first 'Harvest' of the 'Wood' grown on the Grower's 'Plantation' (whichever occurs sooner)**. This conditional exercise of the discretion will allow those losses to be offset against the Grower's other assessable income in the income year in which the losses arise.

Sections 82KZME, 82KZMF and 82KL and Part IVA

78. For a Grower who participates in the Project and incurs expenditure as required by the Project Management Contract and the Sub-lease Agreement the following provisions of the ITAA 1936 have application as indicated:

- expenditure by a Grower who participates in the Project does not fall within the scope of sections 82KZME and 82KZMF;
- section 82KL does not apply to deny the deductions otherwise allowable; and
- 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.

Explanation

Is the Grower carrying on a business?

79. For the amounts set out in the Table above to constitute allowable deductions the Grower's afforestation activities as a participant in the WA Blue Gum Project 2005 must amount to the carrying on of a business of primary production.

80. Where there is a business, or a future business, the gross proceeds from the sale of the 'Wood' grown on the Grower's 'Plantation' 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.

81. For schemes such as that of the WA Blue Gum Project 2005, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As Taxation Ruling TR 2000/8 sets out, these circumstances have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

82. Generally, a Grower will be carrying on a business of afforestation, and hence primary production, if:

- the Grower has an identifiable interest (by lease) or rights over the land (by licence) on which the Grower's Trees are established;
- the Grower has a right to harvest and sell the wood produce from those trees;
- the afforestation activities are carried out on the Grower's behalf;

- the afforestation activities of the Grower are typical of those associated with a afforestation business; and
- the weight and influence of general indicators point to the carrying on of a business.

83. In this Project, each Grower enters into a Project Management Contract and a Sub-lease Agreement.

84. Under the Sub-lease Agreement each individual Grower will have rights over a specific and identifiable area of at least six hectares of land, called the 'Leased Area'. The Sub-lease Agreement provides the Grower with an ongoing interest in the specific trees on the 'Leased Area' for the term of the Project. Under the Sub-lease the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose. The Sub-lease allows the Project Manager to come onto to the land to carry out its obligations under the Project Management Contract.

85. Under the Project Management Contract the Project Manager is engaged by the Grower to establish and maintain a 'Plantation' on the Grower's identifiable 'Land' during the term of the Project. The Project Manager has provided evidence that it holds the appropriate professional skills and credentials to provide the management services to establish and maintain the 'Plantation' on the Grower's behalf.

86. The Project Manager is also engaged to arrange harvest and sell, on the Grower's behalf, the 'Wood' grown on the 'Plantation' on the Grower's 'Land'.

87. 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 Project's description for all the indicators.

88. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of the 'Wood' that will return a before-tax profit, that is a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

89. The pooling of 'Wood' from the 'Plantation' on the Grower's 'Land' with the 'Wood' of other Growers is consistent with general afforestation practices. Each Grower's proportionate share of the sale proceeds of the pooled 'Wood' will reflect the proportion of the trees contributed from their 'Plantation'.

90. The Project Manager's services are also consistent with general silvicultural practices. They are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses. While the size of a 'Land' is relatively small, it is of a size and scale to allow it to be commercially viable.

91. The Grower's degree of control over the Project Manager as evidenced by the Project Management Contract, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, the Project Manager will provide the Grower with regular progress reports on the Grower's 'Land' and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the Project Manager in certain instances, such as cases of default or neglect.

92. 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. For the purposes of this Ruling, the Growers' afforestation activities in the WA Blue Gum Project 2005 will constitute the carrying on of a business.

The Simplified Tax System

Division 328

93. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

94. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling (but refer to Taxation Ruling TR 2002/6 and Taxation Ruling TR 2002/11). Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

Deductibility of the Application Money, Management Fees and Rent

Section 8-1

95. Consideration of whether the Application Money, management fees and the 'Rent' are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing 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 that a taxpayer is contractually committed 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 in determining whether the outgoing in question has a

sufficient connection with activities to produce assessable income.

96. The Application Money, management fees and 'Rent' associated with the afforestation activities will relate to the gaining of income from the Grower's business of afforestation (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of 'Wood') is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. There is no capital component of the management fee. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

Prepayment provisions

Sections 82KZL to 82KZMG

97. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (for example, the performance of management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

98. For this Project, only section 82KZL (an interpretive provision) and section 82KZMG are relevant, (but see paragraphs 103 to 107 for comments on the possible application of sections 82KZME and 82KZMF).

Section 82KZMG

99. Expenditure that meets the requirements of section 82KZMG is excluded from the application of the prepayment rules that would otherwise apply. Section 82KZMG provides a '12 month rule' that, in effect, facilitates a deduction for certain prepaid expenditure incurred under a plantation forestry managed agreement. The 12 month rule applies to expenditure for 'seasonally dependent agronomic activities' that will be carried out during the establishment period of a particular planting of trees. Seasonally dependent agronomic activities are explained in Taxation Determination TD 2003/12. Whilst the establishment period itself may exceed 12 months, each seasonally dependent agronomic activity must be completed within 12 months of its eligible service period (as defined in subsection 82KZL(1)), and by the end of the following income year.

Application of the prepayment provisions to this Project

Section 82KZMG

100. Under the Project Management Contract, a Grower incurs the 'Application Money' consisting of expenditure of \$4,950 per hectare that:

- is for 'seasonally dependent agronomic activities'; and
- meets the other requirements of section 82KZMG.

101. A Grower who is not an 'STS taxpayer' can claim an immediate deduction for the 'Application Money' in the income year in which the amount is incurred.

102. A Grower who is an 'STS taxpayer' can claim an immediate deduction for the 'Application Money' in the income year in which the fee is paid. Where the fee is not wholly paid in the year in which it is incurred it is only deductible in that year to the extent it is paid by, or paid for the Grower.

Sections 82KZME and 82KZMF

103. Under the Arrangement to which this Product Ruling applies the ongoing management fee and the 'Rent' are incurred annually and relate to the income year in which they are incurred. Interest payable to the Financier and the Introduced Lender is incurred monthly in arrears or twice yearly in arrears. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF have no application to this Arrangement.

104. A Grower who is not an 'STS taxpayer' can, therefore, claim a deduction for each of the relevant amounts in the income year in which the amount is incurred.

105. A Grower who is an 'STS taxpayer' can claim a deduction for each of the relevant amounts in the income year in which the amount is paid.

106. However, sections 82KZME and 82KZMF may have relevance if a Grower in this Project chooses to prepay all or some of the expenditure payable under the Project Management Contract, Sub-lease Agreement or prepays interest under a finance agreement with the Financier or the Introduced Lender or chooses or is required to prepay interest under a loan agreement with a lender other than the Financier or the Introduced Lender. Where such a prepayment is made these prepayment provisions will also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

107. Growers who choose to prepay fees or interest are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

Division 35 – deferral of losses from non-commercial business activities***Section 35-55 – exercise of Commissioner’s discretion***

108. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years discussed in paragraph 77 the Commissioner has applied the principles set out in Taxation Ruling TR 2001/14 Income tax: Division 35 – non-commercial business losses. Accordingly, based on the evidence supplied, the Commissioner has determined that for those income years:

- it is because of its nature the business activity of a Grower will not satisfy one of the four tests in Division 35; and
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, a Grower’s business activity will satisfy one of the four tests set out in Division 35 or produce a taxation profit.

109. A Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income in the income years discussed in paragraph 77.

110. The exercise of the Commissioner’s discretion under paragraph 35-55(1)(b) is conditional on the Project being carried on in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

Section 82KL – recouped expenditure

111. The operation of section 82KL depends, among other things, on the identification of a certain quantum of ‘additional benefits(s)’. 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 – general tax avoidance provisions

112. 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).

113. The WA Blue Gum Project 2005 will be a ‘scheme’. A Grower will obtain a ‘tax benefit’ from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 72 to 76 that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

114. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the 'Wood'. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Example

Entitlement to GST input tax credits

115. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her viticulture business. Her manager is registered for GST and charges her a management fee payable every six months in advance. On 1 December 2003, Susan receives a valid tax invoice from her manager requesting payment of a management fee in advance, and also requesting payment for an improvement in the connection of electricity for her vineyard that she contracted him to carry out. The tax invoice includes the following details:

Management fee for period 1/1/2004 to 30/6/2004	\$4,400*
Carrying out of upgrade of power for your vineyard as quoted	<u>\$2,200*</u>
Total due and payable by 1 January 2004 (includes GST of \$600)	<u>\$6,600</u>

*Taxable supply

Susan pays the invoice by the due date and calculates her input tax credit on the management fee (to be claimed through her Business Activity Statement) as:

$$\frac{1}{11} \times \$4,400 = \$400.$$

Hence her outgoing for the management fee is effectively \$4,400 less \$400, or \$4,000.

Similarly, Susan calculates her input tax credit on the connection of electricity as:

$$\frac{1}{11} \times \$2,200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2,200 less \$200, or \$2,000.

In preparing her income tax return for the year ended 30 June 2004, Susan is aware that the management fee is deductible in the year incurred. She calculates her management fee deduction as \$4,000 (not \$4,400).

Susan is aware that the electricity upgrade is deductible 10% per year over a 10 year period. She calculates her deduction for the power upgrade as \$200 (one tenth of \$2,000 only, not one tenth of \$2,200).

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Commissioner of Taxation

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Related Rulings/Determinations:

PR 1999/95; TR 92/1; TR 92/20;
 TR 97/11; TR 97/16; TR 98/22;
 TR 2000/8; TR 2001/14;
 TR 2002/6; TR 2002/11;
 TD 93/34; TD 2003/12

Subject references:

- advance deductions and expenses for certain forestry expenditure
- carrying on a business
- commencement of business
- fee expenses
- forestry agreement
- interest expenses
- management fees
- non-commercial losses
- producing assessable income
- product rulings
- public rulings
- seasonally dependent agronomic activity
- stamp duty
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project
- taxation administration

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 Pt III Div 3 Subdiv H
- ITAA 1936 82KZL(1)

- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME
- ITAA 1936 82KZMF
- ITAA 1936 82KZMG
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 25-20
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 328
- ITAA 1997 328-105
- ITAA 1997 328-105(1)(a)
- ITAA 1997 328-105(1)(b)
- ITAA 1997 Subdiv 328-F
- ITAA 1997 Subdiv 328-G
- TAA 1953 Pt IVAAA
- Copyright Act 1968
- Corporations Act 2001

Case references:

- Commissioner of Taxation v. Lau (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55

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