# *TR 95/6 - Income tax: primary production and forestry*

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This document has changed over time. This is a consolidated version of the ruling which was published on *12 May 2010*

# Taxation Ruling
Income tax: primary production and forestry

**other Rulings on this topic**

**IT 235; IT 360; IT 362; IT 2129; IT 2296; IT 2394; IT 2561; TD 93/5; TD 93/79; TD 93/81; TR 92/3**


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*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

*[**Note:** This is a consolidated version of this document. Refer to the Tax Office Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]*

## What this Ruling is about

1. This Ruling deals with the extent to which receipts derived from the sale of timber constitute assessable income, whether or not the taxpayers are engaged in the forestry industry. It also considers the deductions allowable in respect of that income. This Ruling is mainly concerned with the tax consequences of transactions entered into by persons engaged in a business of forest operations. However, it also addresses the tax treatment of transactions related to timber which are not entered into in the course of carrying on a business of forest operations.

### Class of person/arrangement

2. This ruling applies to:

- persons engaged in forest operations; and
- persons not engaged in forest operations who dispose of timber.

3. It does not specifically deal with participants in afforestation schemes. Reference should be made to Taxation Ruling IT 360 in these cases.

## Ruling

### Forest operations as primary production

4. A taxpayer who is engaged in 'forest operations' is a primary producer for income tax purposes if those forestry activities constitute the carrying on of a business.

5. The definition of the term 'primary production' in subsection 6(1) of the *Income Tax Assessment Act 1936* (the Act) includes 'forest operations'. The term 'forest operations' is defined in subsection 6(1) as:

- the planting or tending in a plantation or forest of trees intended for felling; or
- the felling of trees in a plantation or forest;

and includes:

- the transport, by a person who has felled trees in a plantation or forest, of those trees or parts of those trees from the plantation or forest to a place where they are to be first subjected to milling or processing (including processing for the production of posts, poles or railway sleepers) or to a place from which they are to be transported to such a place;

where

- the operations are carried on in the course of, or for the purposes of, a business.

### *Planting or tending of trees*

6. The planting or tending of trees in a plantation or forest qualifies as forest operations if the trees planted or tended are intended for felling. The planting or tending of trees other than in a plantation or forest does not qualify as forest operations. The planting or tending of trees is also not forest operations if they are intended solely for decorative purposes or to provide shelter, irrespective of where they are grown.

7. The definition of 'tend' in the *Macquarie Dictionary* includes 'to look after; watch over and care for...'. Therefore, tending of trees in a plantation or forest includes the maintenance of the trees and activities to improve the growth of the trees.

8. A person who receives royalties under a right to fell or remove trees on land owned by that person is not regarded as conducting forest operations if the trees were not planted or tended for the purpose of felling.

### *Felling of trees*

9. Forest operations includes the felling of trees in a plantation or forest, even though the taxpayer concerned did not plant or tend the trees. The normal preparation for removal of felled trees (e.g., the lopping of branches and heads, the removal of bark or the sawing into manageable lengths) is to be regarded as part of the felling operations if it is carried out by the person who felled the trees (or that person's employees or contractors - see paragraphs 16 and 17).

### *Transportation of the trees*

10. Forest operations includes the transport of trees or parts of trees by the person who felled the trees (or that person's employees or contractors - see paragraphs 16 and 17) to the place where the first stages of milling or processing of the timber takes place. Forest operations also includes the transport by the person who felled the trees to a delivery point (e.g., a railway loading point) from which the trees are to be transported for milling or processing.

11. A person who contracts with a mill to supply timber, and who is required to cut, snig and haul the timber, in most cases will be engaged in forest operations. (Taxation Ruling IT 235).

12. A person engaged in transporting timber which has been felled by somebody else is not undertaking forest operations.

### *Milling or processing*

13. Milling or processing activities undertaken on-site using portable machinery will not constitute forest operations. The production of posts, poles and railway sleepers and in-field chipping is regarded as milling or processing. However, milling or processing does not include the normal preparation for the removal of felled trees (e.g., the lopping of branches and heads, removal of bark or the sawing into manageable lengths).

### *Carrying on a business*

14. The planting, tending or felling of trees will only be forest operations if those operations amount to the carrying on of a business. A person who plants, tends or fells trees but is not carrying on a business is not conducting forest operations. This is so even though the person may be conducting another form of primary production business. Similarly, a person who merely sells standing timber without tending or felling those trees is not conducting forest operations.

15. The question of whether a taxpayer's activities amount to the carrying on of a business depend on the facts of each particular case. Activities that have a commercial or profit making purpose and are organised in a business-like way will generally amount to carrying on a business. Guidelines for determining if a taxpayer is carrying on a business are set out in paragraphs 86 to 89.

***Contractors***

16. Where individual contractors operate in the forest industry and carry out forest operations on behalf of others under contracts that are wholly or principally for their labour, such persons will be treated as employees for income tax purposes (see the definition of 'employee' and paragraph (a) of the definition of 'salary or wage' in subsection 221A(1) of the Act). For a full discussion of contractors/employees refer to Taxation Rulings IT 235 and IT 2129.

17. The remuneration received as employees will be treated for tax purposes as salary or wage income. The averaging provisions in Division 16 of Part III (sections 149 to 158A) will not apply to that income. As salary or wage income, tax instalment deductions are required to be made from that income by the contractor's employer (section 221C).

**Assessable income from forest operations**

18. Income derived by a taxpayer in the ordinary course of carrying on a business of forest operations constitutes assessable income in the year of income in which it is derived (subsection 25(1) and section 48). Receipts which constitute assessable income may include:

- proceeds from the sale of felled timber;
- proceeds from the sale of standing timber;
- royalties received from granting rights to other persons to fell and remove timber;
- insurance recoveries;
- reafforestation incentive grants or payments.

19. The amount which is included in assessable income may be subject to the comments in paragraph 45 if a net profit amount is to be included.

20. The capital gains tax consequences of the disposal of trees are discussed in paragraphs 66 to 83. If the disposal of trees is covered both by ordinary income concepts and capital gains tax, subsection 160ZA(4) will apply.

### *Sale of felled timber*

21. Total receipts derived from the sale of felled timber by a taxpayer carrying on forest operations will generally constitute assessable income of the taxpayer in the year of income in which the timber is sold. The question of when felled timber is sold must be determined in accordance with general contract law. This is normally the date on which property in the timber passes and a debt becomes due and owing (see generally *Gasparin v. FC of T* 94 ATC 4280; (1994) 28 ATR 130, and the cases cited therein).

### *Standing timber*

*Disposal of standing timber not in the ordinary course of business*

22. A disposal of trees owned by a taxpayer and which have been planted (not necessarily by the taxpayer) and tended for the purpose of sale may result in the value of those trees being included in the taxpayer's assessable income under subsection 36(1), in the year the disposal takes place. This may be so whether or not the taxpayer is carrying on a business of forest operations, so long as the taxpayer is carrying on a business and the disposal is not in the ordinary course of carrying on that business. What is required is that the trees constitute the whole or part of the assets of that business.

23. Whether or not a particular contract results in a 'disposal' of trees, as distinct say, from a 'sale' of an interest in land, will depend on the interpretation of that contract. Subsection 36(1) will not apply if the trees are on leased land and the lessee does not have entirety of ownership of the trees on that leased land: *Rose v. FC of T* (1951) 84 CLR 118; 9 ATD 334.

24. The value of the trees is either:

- the market value on the day of disposal; or
- if in the Commissioner's opinion there is insufficient evidence of the market value - the value which the Commissioner considers reasonable (paragraph 36(8)(a)).

*Disposal of rights to standing timber*

25. A taxpayer carrying on forest operations may sell standing timber by granting a right to someone to cut and remove the timber, whether or not the right to remove the timber is exercised. The proceeds from sale are assessable under subsection 25(1).

### *Royalties*

26. Royalties received by a taxpayer from the grant of a right to fell timber on land owned by the taxpayer are assessable income of the taxpayer (subsection 25(1)). The royalties are assessable income of the recipient even if the taxpayer granting the right is not carrying on a business of forest operations.

### *Insurance Recoveries*

27. If trees in a plantation or forest, planted or tended in the course of carrying on a business of forest operations, are destroyed, insurance monies received for the loss of the profits or income that would have been derived from the trees constitute assessable income in the year of income in which the amount is received (paragraph 26(j)).

28. If the trees are destroyed by fire, the taxpayer may elect to have the amount of the insurance recoveries spread over five years of income (section 26B). Only amounts received under a contract or policy of insurance, or like agreement, may be spread over five years of income. This concession does not extend to amounts received as compensation or damages received for the loss of trees.

### *Reafforestation incentive grants or payments.*

29. The receipt of a reafforestation grant or payment is assessable income of the recipient under subsection 25(1): *Ashgrove & Ors v. FC of T* (1994) 124 ALR 315 at 324; 94 ATC 4549 at 4554; (1994) 28 ATR 512 at 520 (*Ashgrove's* Case).

## Allowable deductions from forest operations

30. Allowable deductions from forest operations may include:

- purchase price paid to acquire a plantation or forest;
- amount paid for the right to fell standing timber;
- value of existing trees introduced into a new business;
- costs of establishing a plantation or forest;
- costs of tending a plantation or forest;
- costs of felling and transporting timber,
- costs of construction of an access road.

***Purchase of a plantation or forest***

*Purchase price of land and trees*

31. A deduction is not generally allowable for expenditure incurred on the acquisition of a plantation or forest in the year of income in which the expenditure is incurred. However, where part of the purchase price of land is attributable to timber standing on that land, section 124J of the Act may apply. If the taxpayer fells the trees for sale or use in manufacture for the purpose of producing assessable income or timber is felled pursuant to a right granted to another person for which amounts as or by way of royalty are payable, a deduction will be allowable to the taxpayer under section 124J in the year of income in which the timber is felled.

32. A deduction is allowable in each year of income in which trees are felled for the purpose of sale or use in manufacture. The amount of the deduction is the proportion of the price paid for the trees that is attributable to the timber felled during the particular year of income. This proportion may be based on either timber volume or tree numbers. If timber is felled over more than one year of income, the deduction allowable for each year is the amount of the cost of the timber that is attributable to the timber actually felled in that year.

33. An acceptable method of calculation is as follows:

$$\frac{A}{B} x\ C$$

where:

*A* is the number of trees felled or volume of timber felled;

*B* is the total number of trees available for felling or the total volume of timber available for felling; and

*C* is the total purchase price of the land or right attributable to standing timber at the time of purchase.

(**Note:** Trees felled either as thinnings to waste or where they are diseased and are not felled for sale or use in manufacture are excluded from both A and B - refer to paragraphs 37 and 38.)

34. The deduction is allowable to the taxpayer whether the taxpayer fells the trees or the taxpayer receives royalties under a right granted to another person to fell trees.

35. The year in which the final deduction is claimed under section 124J for the purchase price of the trees will depend on when the last of the trees to which the purchase price relates are felled. Factors listed in paragraph 11 of Taxation Ruling IT 362 will be relevant in deciding whether the full purchase price will be allowable to the taxpayer.

36. If none of the purchase price of the plantation or forest is attributable to the standing timber at the time of purchase, then no deduction will be allowable under section 124J on a subsequent felling of that timber. The part of the purchase price attributable to the trees must be identifiable at the time the plantation or forest is purchased. Although the amount relating to the trees does not need to be specifically stated in the contract, there should be documentary evidence that part of the purchase price is attributable to the trees. The onus will always remain with the purchaser to establish this amount.

*Thinning operations*

37. No deduction is allowable under section 124J for expenditure incurred by the taxpayer on thinning operations where the trees are not felled for sale or use in manufacture (e.g., thinning to waste). However, deductions may be allowable under subsection 51(1) for costs in respect of those operations in the year of income in which those costs are incurred (e.g., felling and transporting). Thinning operations carried out in relation to a right to fell timber granted by the taxpayer to another person may give rise to a deduction under section 124J where that right was granted 'in consideration of payments to be made to the taxpayer as or by way of royalty' (subparagraph 124J(b)(ii)).

*Felling of diseased trees*

38. Diseased trees, if felled with other trees as part of felling operations for sale or use in manufacture, will not prejudice the deductions allowable under section 124J. If diseased trees are felled in separate felling operations then that part of the purchase price attributable to those trees will not be allowable under section 124J unless the diseased trees are felled for sale or use in manufacture, or pursuant to a right granted to another person for which amounts as or by way of royalty are payable. However, deductions may be allowable under subsection 51(1) for costs incurred in respect of those operations in the year of income in which the trees are felled (e.g., felling and transporting).

*Purchase price where vendor assessed under subsection 36(1)*

39. If a taxpayer purchases trees from a person who is assessable on the value of the trees under subsection 36(1) (refer paragraphs 22 and 23), the taxpayer is deemed under this provision to have purchased the trees at a price equal to their value on the day they were acquired from the previous owner. Expenditure on the deemed purchase price of the standing trees, i.e., their value on the day of acquisition, is generally expenditure of a capital nature and therefore not deductible under subsection 51(1).

40. Where the trees are acquired in circumstances covered by subsection 36(1) and the taxpayer fells the timber for sale or use in manufacture for the purposes of producing assessable income or timber is felled pursuant to a right granted by the taxpayer, a deduction for the deemed cost attributable to the trees felled in a particular year of income is allowable in the taxpayer's assessment for that year of income (section 124J).

41. However, if the trees are subsequently sold by the purchaser prior to felling or granting rights to another to fell, then the purchaser may not be entitled to a deduction for the cost attributable to the trees, even though the taxpayer may be assessable under subsection 36(1). The Government announced on 9 May 1995 that it proposes to amend the Act so that a deduction will be available in these circumstances.

***Amount paid to acquire a right to fell timber***

42. Expenditure incurred in acquiring a right to fell standing timber is generally of a capital nature: *Kauri Timber Company Ltd v. Commr of Taxes (NZ)* [1913] AC 771. However, a taxpayer who acquires a right to fell timber on someone else's land for sale or use in manufacture for the purpose of producing assessable income or timber is felled pursuant to a right granted by the taxpayer to another person for which amounts as or by way of royalty are payable, is entitled to a deduction in a year of income in which the trees are felled (section 124J). The amount of the deduction is the cost of so much of the right as is attributable to the timber felled during the particular year of income.

43. Section 124J will also apply where the taxpayer has acquired a right to fell standing timber even though the payment has not been made to the grantor of that right. The payment must be seen as resulting in the acquisition of the right by the taxpayer. Thus, deductions under section 124J are allowable to the purchaser of a right to fell standing timber where the timber is felled under a right initially granted by the owner of the standing timber to a person who then 'sold' that right to the purchaser: *Marbut Gunnersen Industries Pty Ltd v. FC of* T and *FC of T v. Monaro Sawmills Pty Ltd* (1982) 60 FLR 241; 82 ATC 4182; (1982) 12 ATR 926.

44. The comments in paragraphs 31 to 38 concerning the practical operation of section 124J also apply where a taxpayer acquires a right to fell standing timber. It is not necessary for the taxpayer's activities in the forestry industry to constitute the carrying on of a business.

### *Taxpayer appropriates land and trees to a new business*

45. If land and the trees thereon, originally acquired and used for purposes other than forest operations, are later ventured into a business of forest operations, the net profit from the sale of the timber when felled will be assessable income of the taxpayer under subsection 25(1). In calculating the net profit, the sale proceeds are reduced by an appropriate amount based on the market value of the timber at the time the trees were ventured into the business: *Gutwenger v. FC of T* 95 ATC 4008 at 4023; (1995) 30 ATR 82 at 98.

### *Costs of establishing a plantation or forest*

46. Expenditure incurred in the course of establishing a plantation or forest, provided the expenditure is not of a capital nature, is an allowable deduction under subsection 51(1).

47. If a taxpayer acquires land and then plants or establishes trees, no part of the cost of the land is attributable to the trees. Accordingly, no deduction is allowable under section 124J in any year of income in which trees are felled.

### *Costs of tending a plantation or forest*

48. Expenditure necessarily incurred in tending a plantation or forest in the course of carrying on a business of forest operations is an allowable deduction in the year of income in which it is incurred.

### *Costs of felling and transporting timber*

49. Expenditure incurred in felling and transporting the timber is allowable in the year of income in which the expenditure is incurred.

50. [Withdrawn.]

51. [Withdrawn.]

## Trading stock

### *Trees as trading stock*

52. Trees form part of the land on which they grow and while standing do not constitute trading stock. Trees on hand at the end of a year of income that have been felled for the purpose of manufacture or sale in the course of carrying on a business of forest operations constitute trading stock and must be taken into account in calculating the taxpayer's taxable income (subsection 28(1)).

### *Valuation of trading stock*

53. The taxpayer has the option of valuing felled timber that is trading stock on hand at the end of a year of income at its cost price, market value or replacement price (subsection 31(1)).

## Assessable income from trees not in a forest operation

54. A taxpayer may dispose of trees but not be carrying out forest operations (refer to paragraph 14). Disposal of the trees may give rise to assessable income. Assessable income may include:

- proceeds from the sale of standing timber;
- royalties received from granting rights to other persons to fell and remove timber;
- profits from isolated transactions.

55. The capital gains tax consequences of the disposal of trees are discussed in paragraphs 66 to 83. If the disposal of trees is covered both by ordinary income concepts and capital gains tax, subsection 160ZA(4) will apply.

### *Standing timber*

*Disposal of standing timber not in the ordinary course of business*

56. The comments in paragraphs 22 and 23 apply equally to a person not conducting forest operations so long as the trees disposed of constituted assets of the business carried on by the taxpayer.

*Disposal of rights to standing timber*

57. In *Stanton v. FC of T* (1955) 92 CLR 630; 11 ATD 1, a taxpayer received a lump sum, payable in instalments, for agreeing to sell standing timber. The agreement provided for a limitation on the quantity of timber sold, with a reduction in the price if the amount of timber found to be standing on the land was less than that contracted for, whether the timber was cut and removed or not. The quarterly instalments of the purchase price were due independently of the amount of timber removed. The amount in question was held not be a 'royalty' for the purposes of paragraph 26(f). The case should be contrasted with the decision in *E K White v. FC of T* (1968) 120 CLR 191; 15 ATR 173, where the taxpayer's land became devoted exclusively to the sale of standing timber and the sale proceeds were held to be assessable income. Subsection 36(1) would generally not apply to these situations unless the preconditions described in paragraph 22 were met.

58. Where payments received in these circumstances exceed the contract price, whether or not the contracted tonnage has been exceeded, the excess payments constitute royalties and assessable income under subsection 25(1): *Ashgrove & Ors v. FC of T* (1994) 124 ALR 315 at 338; 94 ATC 4549 at 4564; (1994) 28 ATR 512 at 533.

59. In certain cases, the parties to the contract for the standing timber may never intend to meet the terms of the contract. Instead, the true intention of the contract is to pay for the amount of timber taken at a price based on the market price at the time the timber is taken. In these cases, the payments for the timber are royalties under paragraph 26(f).

60. There may also be capital gains tax consequences on the disposal of rights to standing timber. These are discussed in paragraphs 66 to 83.

### *Royalties*

61. The comments in paragraph 26 apply equally to a taxpayer not conducting forest operations. Also refer to the comments in paragraph 58 above.

### *Profits from isolated transactions*

62. An isolated transaction involving forest operations may give rise to assessable income. This may occur when the taxpayer has a profit making intention or purpose and the transaction was entered into in the course of carrying on a business, or in carrying out a business operation or commercial transaction. The factors which are considered relevant in determining whether an isolated transaction amounts to a business or commercial transaction are set out in Taxation Ruling TR 92/3.

## Allowable deductions for trees not in a forest operation

63. Allowable deductions may include:

- purchase price paid to acquire a plantation or forest;
- amount paid for the right to fell standing timber.

### *Purchase of a plantation or forest*

64. The comments in paragraphs 31 to 36 on the purchase price of land and trees, and the comments in paragraphs 39 to 41 on the purchase price where the vendor is assessed under subsection 36(1), apply equally to a taxpayer who is not conducting forest operations.

### *Amount paid to acquire a right to fell timber*

65. The comments in paragraphs 42 to 44 apply equally to a taxpayer who is not conducting forest operations.

## Capital gains tax

### *Land and trees owned before 20 September 1985*

66. There are no capital gains tax (CGT) consequences for a taxpayer on the disposal of timber felled by the taxpayer after 19 September 1985 where the taxpayer owned the land and trees before 20 September 1985 (Taxation Determination TD 93/79).

67. While the trees are attached to the land, the land and trees are considered to be a single pre-CGT asset owned by the taxpayer. After the trees are cut, the taxpayer still retains ownership of the timber (now a chattel). In effect, the original asset has been split into two pre-CGT assets. However, there has been no change in the ownership of any asset as a result of the cutting of the trees. Accordingly, there is no disposal for capital gains tax purposes (section 160M).

68. If the taxpayer later sells the timber, the sale of this asset will not be subject to capital gains tax as the taxpayer will be disposing of a pre-CGT asset.

69. Where the owner of pre-CGT land and trees sells timber according to one or more post-CGT contracts providing:

- a contract for the sale of the uncut timber; and

- a contract for granting the purchaser of the timber the right to enter the taxpayer's property over a period of time and remove timber as and when required;

the transactions taken together **may** constitute the grant of a *profit à prendre* (Taxation Determination TD 93/81). A *profit à prendre* is an interest in land and is an asset separate from the land. It is created at the time of its grant.

70. To determine if a *profit à prendre* arises, the test in *Marshall v. Green* [1875] 1 CPD 35 should be applied - that is, where at the time of the contract it is contemplated that the purchaser will derive a benefit from the further growth of the thing sold, then the purchaser acquires an interest in the land, i.e., a *profit à prendre*: *Ashgrove's* case.

71. The terms of each individual agreement must be examined to determine the intent of the parties regarding the benefit of any future growth, i.e., whether it is an agreement for the sale of goods to which the right to enter and sever the timber is ancillary, or whether it is an agreement for the sale or creation of an interest in the land (a *profit à prendre*).

72. The grant of a *profit à prendre* may give rise to the disposal of a post-CGT asset created by the grantor (see below **Capital Gains Tax and *Profits à Prendre*** at paragraph 76). The proceeds from the 'sale' of the timber are treated as part of the consideration received from the granting of the *profit à prendre*.

### *Land and trees acquired after 19 September 1985*

73. For capital gains tax purposes the felling of timber or the sale of standing timber on land acquired on or after 20 September 1985 results in the original asset (the land with the trees) being split into two post-CGT assets (the land and the timber).

74. The cost base, indexed cost base or reduced cost base of the timber sold will be the amount of the relevant cost base of the combined asset that is attributable to the timber (subsection 160ZH(13)). If the taxpayer disposes of the land, the original cost base, indexed cost base or reduced cost base of the land will be reduced by the amount that was attributed to the timber (subsection 160ZH(14)).

75. Any net capital gain arising on the disposal of the timber (or land) is assessable income of the year of income in which the disposal occurs or is deemed to have occurred (refer to subsections 160U(3) and (4)). This need not necessarily be the year in which the timber is felled.

## Capital Gains Tax and *Profits à Prendre*

76. As outlined above (paragraph 70) a right to remove standing timber may constitute a *profit à prendre*. The effect of the capital gains tax provisions on a taxpayer who grants a *profit à prendre* after 19 September 1985 depends on when it was granted.

### *Profits à prendre granted after 19 September 1985 and before 21 September 1989*

77. The granting of a *profit à prendre* during this period is treated as a part disposal of the land in terms of section 160R. The capital gains provisions do not apply if the land had been acquired before 20 September 1985 (Taxation Ruling IT 2561).

### *Profits à prendre granted after 20 September 1989 and before 26 June 1992*

78. A *profit à prendre* is an asset created at the time it was granted. The asset is taken (by former paragraph 160M(5)(c)) to have been acquired by the grantor. Subsection 160C(2) then treats the grantor as owning the asset. The time of acquisition is determined by section 160U.

79. Where ownership of the asset changes, i.e., where the grantee becomes the owner of the *profit à prendre*, there is a disposal of the asset by the grantor (and an acquisition of the asset by the grantee) in terms of subsection 160M(6): refer to obiter comments of Hill J in *Ashgrove & Ors v. FC of T* (1994) 124 ALR 315 at 335-336; 94 ATC 4549 at 4562; (1994) 28 ATR 512 at 531.

80. It follows that, if the grant of the *profit à prendre* occurs on or after 21 September 1989, there is an acquisition by the grantor of a new asset created after that date. The capital gains provisions apply on the disposal of the new asset notwithstanding that the underlying asset, for example the land, may have been acquired before 20 September 1985. (Taxation Ruling IT 2561)

### *Profits à prendre granted after 25 June 1992*

81. Amendments to the capital gains tax provisions effective from 26 June 1992 apply to *profits à prendre* granted after 25 June 1992.

82. The effect of these amendments is that when a *profit à prendre* is granted, the asset is taken by paragraph 160M(6A)(a) to have been acquired by and commenced to be owned by the grantor. The time of acquisition is determined by subparagraphs 160U(6)(a)(ii) or (b)(ii). Further, the grantor is taken by paragraph 160M(6A)(b) to have subsequently disposed of the asset to the grantee in whom it is vested on its creation. The time of disposal is determined by subparagraphs 160U(6)(a)(iii) or (b)(iii).

### *Capital Gains and non-capital costs*

83. The cost base of a plantation or forest may include non-capital costs incurred by the owner of a plantation or forest that was acquired after 20 August 1991 (paragraph 160ZH(1)(ba) and subsection 160ZH(6A)). These costs may only be included in the cost base if they are not otherwise deductible (subsection 160ZH(6B)). However, non-capital costs cannot be taken into account in working out a capital loss and will not be eligible for indexation.

## Date of effect

84. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a 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).

## Explanations

### Forest operations as primary production

85. The term 'forest operations' is defined in subsection 6(1) of the Act. The implications of being in forest operations are:

- income derived by a taxpayer in the course of carrying on a business of forest operations constitutes assessable income (subsection 25(1));
- the averaging provisions apply to this income;
- the taxpayer may be eligible for other tax concessions which apply to primary producers.

***Carrying on a business***

86. One of the tests which must be satisfied for forest activities to be forest operations is that the operations carried on by the taxpayer are carried on in the course of, or for the purpose of, a business. The term 'business' is defined broadly in subsection 6(1) to include any profession, trade, employment or vocation. However, whether or not the activities of a taxpayer amount to the carrying on of a business is a question of fact and degree to be decided on the facts of each case.

87. In determining whether particular activities constitute the carrying on of a business, courts and tribunals have considered the following elements to be relevant:

(i) whether the activities have a significant commercial purpose (*Thomas v. FC of* T 72 ATC 4094; (1972) 3 ATR 165);

(ii) the scale of the activities (a person may carry on a business even though they do so in a small way) (*Thomas* (supra));

(iii) the nature of the activities, particularly whether they have the purpose of profit making (however, profit making in a particular year is not essential) (*Ferguson v. FC of T* (1979) 37 FLR 310; 79 ATC 4261; (1979) 9 ATR 873);

(iv) repetition and regularity of the activities (*Ferguson* (supra));

(v) whether the activities are organised in a business-like manner (*Ferguson* (supra));

(vi) volume of the operations and the amount of the capital employed (*Ferguson* (supra));

(vii) whether the activities may properly be described as the pursuit of a hobby or recreation (*Ferguson* (supra));

(viii) the degree of control held by the person over the development and maintenance of the land (*Case L1* 79 ATC 1; (1979) *Case 8* 23 CTBR (NS).

88. A person who plants, tends or fells trees but is not carrying on a business in these activities, is not conducting forest operations. This is so even though the person may be conducting another form of primary production business. For example, a farmer may plant and tend trees solely to provide shelter belts for stock. This will be part of the farming operations and will not amount to a separate business of forest operations.

89. As to whether a person who has invested in an afforestation scheme is carrying on a business, refer to Taxation Ruling IT 360.

### *Reafforestation grant or payment*

90. Although it depends on the facts of each case, as a general rule, if a person receives a reafforestation grant or payment, they are taken to be carrying on a business of forest operations: *Ashgrove's* case.

## Assessable income from forest operations

91. Income derived by a taxpayer in the ordinary course of carrying on a business of forest operations constitutes assessable income in the year of income in which it is derived (subsection 25(1) and section 48). Receipts which constitute assessable income may include:

- proceeds from the sale of felled timber;
- proceeds from the sale of standing timber;
- royalties received from granting rights to other persons to fell and remove timber;
- insurance recoveries;
- reafforestation incentive grants or payments.

92. The amount included in assessable income may be subject to the comments in paragraph 45.

### *Royalties*

93. Royalties received by a taxpayer from granting a right to fell timber on land acquired by the taxpayer are assessable income of the taxpayer (subsection 25(1)). Payments received by the grantor for a right to remove trees on the basis of the amount of timber cut or removed under a right to do so are receipts 'as or by way of royalty' and constitute assessable income (paragraph 26(f)): *McCauley v. FC of T* (1944) 69 CLR 235.

94. For example, payments received by a taxpayer who entered into an agreement with a contractor to remove burnt trees for a specified amount for each ton of millable timber removed, were amounts received 'as or by way of royalty' and constituted assessable income: *Case 26* (1956) 6 CTBR (NS) 169.

### *Insurance recoveries*

95. If trees in a plantation or forest planted or tended in the course of carrying on a business of forest operations are destroyed, insurance monies received for the loss of the profits or income that would have

been derived from the trees constitute assessable income in the year of income in which the amount is received (paragraph 26(j)).

96. If the trees are destroyed by fire, the taxpayer may elect to have the amount of the insurance recoveries spread over five years of income (section 26B). Only amounts received under a contract or policy of insurance, or like agreement, may be spread over five years of income. This concession does not extend to amounts received as compensation or damages received for the loss of trees.

97. If the taxpayer makes an election to spread the income over five years of income, one-fifth of the insurance received is assessable income in the year of income in which the amount was received, and one-fifth in each of the following four years of income (subsection 26B(6)). If a taxpayer is about to leave Australia, dies, becomes bankrupt, or in the case of a company, goes into liquidation, before the end of the fourth year of income, the whole of the unassessed insurance recovery will be assessable in the year of income in which the particular event occurs (subsection 26B(7)).

98. The portion of the insurance recovery carried forward to the four years of income following the year of receipt, is deemed to be income from primary production (subsection 26B(8)). Thus, even if the taxpayer ceases to carry on a business of primary production in those years, the averaging provisions continue to apply for those years unless the taxpayer has made an irrevocable election (section 158A) to withdraw from the averaging provisions.

## Allowable deductions from forest operations

99. The majority of deductions available to taxpayers in forest operations arise under section 124J and subsection 51(1) of the Act.

### *Section 124J*

100. In a year of income in which timber is felled for the purpose of sale or use in manufacture, the taxpayer will be able to claim a deduction for the proportion of the purchase price paid by the taxpayer to acquire the land carrying standing timber, or the right to fell standing timber, that is attributable to the timber felled (section 124J).

101. The deduction is allowable where:

(a) a taxpayer has acquired land carrying standing timber and during the year of income some or all of that timber is felled;

(b) the taxpayer has acquired a right to fell standing timber and during the year of income some or all of the timber is felled; or

(c) the timber is felled by another person who has acquired the right to fell the standing timber and royalties are paid to the taxpayer.

102. To qualify for a deduction under section 124J the taxpayer does not have to hold an intention to fell the timber at the time the standing timber or right is acquired.

103. The deduction is allowable in the year of income during which the timber is felled. Where the timber is felled over more than one year of income, the deduction allowable for each year is the amount of the cost of the timber that is attributable to the timber actually felled in that year.

***Subsection 51(1)***

104. Subsection 51(1) provides:

'All losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income.'

105. For an expense to satisfy the tests in subsection 51(1):

(a) it must have the essential character of an outgoing incurred in gaining assessable income or, in other words, of an income-producing expense (*Lunney v. FC of T; Hayley v. FC of T* (1958) 100 CLR 478; 11 ATD 404).

(b) there must be a nexus between the outgoing and the assessable income so that the outgoing is incidental and relevant to the gaining of assessable income (*Ronpibon Tin NL v. FC of T* (1949) 78 CLR 47; 8 ATD 431).

(c) it is necessary to determine the connection between the particular outgoing and the operations or activities by which the taxpayer most directly gains or produces his or her assessable income (*Charles Moore & Co (WA) Pty Ltd v. FC of T* (1956) 95 CLR 344; 11 ATD 147; *FC of T v. Cooper* (1991) 29 FCR 177; 91 ATC 4396; (1991) 21 ATR 1616, *Roads and Traffic Authority of NSW v. FC of T* (1993) 43 FCR 223; 93 ATC 4508; (1993) 26 ATR 76; *FC of T v. Hatchett* (1971) 125 CLR 494; 71 ATC 4184; (1971) 2 ATR 557).

106. For taxpayers conducting forest operations, deductions allowable under subsection 51(1) may include:

- costs of establishing a plantation or forest;

- costs of tending a plantation or forest;
- costs of felling and transporting timber.

107. Examples of the treatment of these costs are as follows:

(a) Where a taxpayer is commencing a business of forest operations the initial expenditure on clearing or preparing the land for planting is capital and not deductible, e.g., costs incurred in the initial pushing out and windrowing of stumps and debris. Costs incurred prior to mound ploughing or deep ripping of the land may also come at a point too early to be regarded as being incurred in carrying on a business of forest operations on that land. An example of this would be where they formed part of some merely preparatory or preliminary activities concerned with making a decision whether to commence such a business or not (see for example *Softwood Pulp & Paper Ltd v. FC of T* (1976) 76 ATC 4439; 7 ATR 101).

(b) Where a taxpayer is already conducting a business of forest operations on the land in question (e.g., the taxpayer has harvested timber from the land which has been sold as part of the business), then costs of clearing or preparing the land, such as pushing out and windrowing of stumps and debris, will be deductible under subsection 51(1) as they form expenditure incurred in carrying on a business.

(c) Non-capital site preparation costs, such as deep ripping, mound ploughing, stick picking, raking and levelling or weed control, are viewed as part of the planting operations and are deductible under subsection 51(1).

(d) Expenditure on curtailing regrowth or on weed control after the initial clearing is deductible under subsection 51(1).

(e) Expenditure incurred on seedlings and planting costs is incidental and relevant to carrying on a business and is deductible in the year of income in which it is incurred (Taxation Ruling IT 2296).

(f) Allowable expenditure will also include the cost of watering and fertilising. The expenditure is deductible in the year of income in which it is incurred. However, the cost of constructing a dam to provide water for the trees or for firefighting is expenditure of a capital nature that is not an allowable deduction under subsection 51(1). (The capital costs of conserving or conveying water may be deductible over three years under section 75B).

(g) Deductions may be allowable under subsection 51(1) for felling and transportation costs incurred in respect of

diseased trees or trees felled in thinning operations in the year of income in which the trees are felled.

108. In cases where capital costs of preparing the site are incurred, such costs may be deductible outright in the year the expenditure is incurred under section 75D. Capital expenditure on site preparation costs will be deductible under section 75D providing the costs are incurred primarily and principally for the purpose of combating land degradation and the taxpayer claiming the expense is carrying on a business on the land. Qualifying costs under section 75D may include costs incurred primarily for the purpose of combating soil erosion, loss of soil fertility, the degradation of natural vegetation and the effects of deposits of eroded materials and of salinity (Taxation Ruling IT 2394).

### *Taxpayer appropriates land and trees to a new business*

109. If land and the native forest thereon, originally acquired and used as a farm, is later ventured into a business of forest operations, the net profit from the sale of the timber when felled will be assessable income of the taxpayer under subsection 25(1). In calculating the net profit, the sale proceeds are reduced by an appropriate amount based on the market value of the timber at the time the trees were ventured into the business.

110. Neither the land nor the trees are trading stock and, therefore, the trading stock provisions do not apply. The land is not trading stock because it was not originally acquired for resale, a view confirmed by Jacobs J in *St. Hubert's Island Pty Ltd v. FC of T* (1977-78) 138 CLR 210; 78 ATC 4101; (1977) 8 ATR 452. In any event, it is not intended to dispose of the land as part of the business of forest operations.

### Assessable income from trees not in forest operations

111. A taxpayer who is not in the business of forest operations may also derive assessable income from the sale of timber. Assessable income may include:

- proceeds from the sale of standing timber;
- royalties received from granting rights to other parties to fell and remove timber;
- profits from isolated transactions.

### *Royalties*

112. Timber royalties derived by a taxpayer in forest operations may be assessable under paragraph 26(f). The meaning of royalty is discussed at paragraphs 93 to 94.

### *Profits from isolated transactions*

113. A taxpayer although not carrying on a business of forest operations, may dispose of trees or standing timber at a profit in circumstances where the amount received is not a royalty. If the taxpayer makes a profit in these circumstances, that profit is income if:

(a) the intention or purpose of the taxpayer in entering into the profit-making transaction or operation was to make a profit or gain; and

(b) the transaction or operation was entered into, and the profit was made, in carrying out a business operation or commercial transaction (paragraph 16 of Taxation Ruling TR 92/3).

## Capital Gains Tax and *Profits à Prendre*

114. Where the owner of pre-CGT land and trees sells timber according to one or more post-CGT contracts providing:

- a contract for the sale of the uncut timber; and
- a contract for granting the purchaser of the timber the right to enter the taxpayer's property over a period of time and remove timber as and when required;

the transactions taken together **may** constitute the grant of a *profit à prendre*. A *profit à prendre* is an interest in land and is an asset separate from the land. It is created at the time of its grant.

115. The question of what sort of an agreement will give rise to a profit a prendre was considered at length by Hill J in *Ashgrove's* case. He concluded that the tests in *Marshall v. Green* [1875] 1 CPD 35 were the appropriate ones to apply to the contracts before him, which involved the sale of standing timber. In short, where at the time of the contract it is contemplated that the purchaser will derive a benefit from the further growth of the thing sold, then the purchaser acquires an interest in the land, i.e., a *profit à prendre*.

116. In the case of the sale of predominantly mature timber, it is likely that the purchaser desires to acquire only the timber 'warehoused' on the land rather than a benefit from the land itself. Therefore, it is not a *profit à prendre*. In this type of case, the length

of the term of the agreement is unlikely to be determinative: *Ashgrove's* case.

117. The terms of each individual agreement must be examined to determine the intent of the parties regarding the benefit of any future growth, i.e., whether it is an agreement for the sale of goods to which the right to enter and sever the timber is ancillary, or whether it is an agreement for the sale or creation of an interest in land (a *profit à prendre*).

# Examples

**Forest operations as primary production**

***Example 1***

118. An individual carries on a business of transporting felled timber in his/her own truck to a timber mill. The truck is used exclusively for this purpose. The trees have been felled by someone else. The person, for tax purposes, will not be a primary producer as the person is transporting timber that he/she has not felled and, in accordance with the definition of forest operations (see paragraph 5), this activity will not qualify as a primary production activity.

119. The tax treatment of the income the person receives will depend upon whether the person can be classified as an employee at common law or whether the income payment comes under the extended definition as contained in paragraph (a) of the definition of 'salary or wages' in subsection 221A(1) of the Act (namely, whether the contract is wholly or principally for their labour). Where the person provides his/her own equipment (the truck) and the income received is principally (more than 50%) to maintain and operate the truck, it cannot be said that he/she has been employed wholly or principally for labour.

120. Such a person, although not classified as an employee for income tax purposes, will be liable, however, to have tax instalments deducted under the Prescribed Payments System (PPS) of taxation as a road transport worker (Income Tax Regulation 126 and paragraph 221A(1)(q) of the Act).

***Example 2***

121. An individual contracts with a mill to supply timber and provides all his/her own equipment in felling, snigging and transporting the timber to the mill. Provided the person is carrying on a business, the person will be classified as a primary producer for income tax purposes. This is because all the activities being carried out by the person, including the transport of felled timber to the mill, are forest operations in accordance with the definition of that term (see paragraph 5).

122. Provisional tax will be payable on the income earned as a primary producer and the income will also be subject to the averaging provisions. The person will not be classified as an employee for income tax purposes because he/she is supplying all the equipment necessary to carry out forestry activities and on this basis it cannot be said that the payments to the person are wholly or principally for the person's labour.

***Example 3***

123. An individual is employed to fell trees and cut them into log lengths, and the equipment the person provides is limited to chain saws, saws and axes and a vehicle to transport the equipment. If the person is not a common law employee but the payments are wholly or principally for the person's labour, tax instalment deductions will be required to be made by the employee's employer from the employee's salary or wages, under paragraph (a) of the definition of 'salary or wages' in subsection 221A(1). As the person is considered to be an employee of the principal contractor of the mill, he/she is not regarded as carrying on a business and consequently the averaging provisions will not apply to the salary or wage income received (see Taxation Ruling IT 235).

**Assessable income and allowable deductions from forest operations**

***Example 4***

124. A taxpayer, carrying on a business of forest operations, purchases land and trees for $60,000 ($20,000 of which is attributable to the timber). During the year 1992-93 the taxpayer fells all the timber and incurs $10,000 in felling and transportation costs. In 1993-94 the taxpayer sells all the timber for $100,000 and incurs $5,000 in selling costs. The tax treatment of these activities are outlined below.

**1992-93 Year of income**

| **Assessable income** | | $ |
|---|---|---|
| Sales of timber | | Nil |
| Closing stock* | 30,000 | |
| Less opening stock | Nil | 30,000 |
| **Gross income** | | **30,000** |
| **Less: Allowable deductions** | | |
| Purchase price of land and trees attributable to timber felled in 1992-93 year of income | 20,000 | |
| Felling and transportation costs | 10,000 | 30,000 |
| **Net income from forest operations** | | **Nil** |

**1993-94 Year of income**

| **Assessable income** | | $ |
|---|---|---|
| Sales of timber (subsection 25(1)) | | **100,000** |
| Closing stock | Nil | |
| Less: opening stock | 30,000 | -30,000 |
| **Gross income** | | **70,000** |
| **Less: Allowable deductions** | | |
| Selling costs | | 5,000 |
| **Net income from forest operations** | | **$65,000** |

125. **Closing stock is valued at cost.

***Example 5***

126. A taxpayer purchases land for $80,000 and during that year of income, plants trees intended for felling. During that year the taxpayer incurred the following expenditure:

| | |
|---|---|
| Clearing the land | $10,000 |
| Ploughing for tree planting | $5,000 |
| Fertilisers | $10,000 |
| Weed control | $500 |
| Irrigation fees | $10,000 |
| Seedlings | $4,500 |

127. Fifteen years later, the taxpayer fells all the timber and sells it for $100,000. Expenditure of $10,000 is incurred in felling and transportation costs. The tax treatment of these activities is outlined below.

**Year one**

| | | |
|---|---|---|
| **Assessable Income** | | Nil |
| **Less: Allowable deductions:** | $ | |
| Ploughing for tree planting | 5,000 | |
| Fertilisers | 10,000 | |
| Weed control | 500 | |
| Irrigation fees | 10,000 | |
| Seedlings | 4,500 | $30,000 |
| **Net loss from forest operations** | | **$30,000** |

(**Note:** the cost of clearing the land is capital expenditure and therefore, not deductible.)

**Year fifteen**

| | |
|---|---|
| **Assessable Income:** | $ |
| Sales of timber (subsection 25(1)) | 100,000 |
| **Less: Allowable Deductions:** | |
| Transportation and felling costs | 10,000 |
| **Net income from forest operations** | **$90,000** |

**Assessable income from trees not in a forest operation**

***Example 6***

128. A taxpayer, carrying on business as a dairy farmer on land purchased prior to September 1985, decides to sell the standing timber from one native forest area of the property. It is established that there are 10,000 tonnes of recoverable timber in that area. During the year 1992-93 the taxpayer enters into a lump sum contract to sell the entire 10,000 tonnes for $50,000 calculated at a rate of $5 per tonne payable as the timber is removed. In that year, the purchaser removes 1,000 tonnes and pays the taxpayer $5,000 in accordance with the contract rate. During the year 1993-94 the purchaser removes a further 6,000 tonnes but, due to buoyant markets, pays the taxpayer $36,000 calculated at $6 per tonne. During the year 1994-95 the purchaser removes the remaining 3,000 tonnes but, due to the still buoyant markets, pays the taxpayer $21,000 calculated at $7 per tonne. The tax treatment of these activities is outlined below.

**1992-93 Year of income**

| | | |
|---|---|---|
| **Assessable Income:** | | |
| Sales of timber | | Nil |
| (total receipts to date | $5,000) | |
| (contract amount | $50,000) | |
| (assessable excess | Nil) | |
| **Less: Allowable Deductions:** | | Nil |

**1993-94 Year of income**

| | | |
|---|---|---|
| **Assessable Income:** | | |
| Sales of timber | | Nil |
| (total receipts to date | $41,000) | |
| (contract amount | $50,000) | |
| (assessable excess | Nil) | |
| **Less: Allowable Deductions:** | | Nil |

| | | |
|---|---|---|
| | **1994-95 Year of income** | |
| **Assessable Income:** | | |
| Sales of timber (subsection 25(1)) | | $12,000 |
| (total receipts to date | $62,000) | |
| (contract amount | $50,000) | |
| (assessable excess | $12,000) | |
| **Less: Allowable Deductions:** | | Nil |
| **Net income (NOT from forest operations)** | | **$12,000** |

129. No section 124J deduction is allowable in any year to the taxpayer as none of the purchase price of the farm was attributable to the existing timber.

130. See paragraphs 57 and 58. It is accepted in this case that the contract price is a non assessable lump sum. The excess payments constitute assessable income under subsection 25(1) and are assessable at the time that the contract price is exceeded.

### Treatment of thinnings and diseased trees for section 124J purposes

***Example 7***

131. A taxpayer carrying on a business of forest operations purchases land carrying standing timber for $2,000,000 ($1,000,000 of which is attributable to the timber). At the time of purchase the taxpayer assessed the potential of the forest and realised that some of the trees would need to be thinned to allow the others to grow properly. The taxpayer estimates there to be 2,500,000 trees on the land.

132. During the 1981-82 year of operations, 500,000 of the trees were thinned to waste. Felling costs amounted to $10,000.

133. 10 years later, out of the remaining standing timber, half are felled for sale or use in manufacture and sold for $8,000,000. Felling and transportation costs amount to $60,000. The following year the rest of the standing timber is felled for sale or use in manufacture for $6,000,000. However, a quarter of these are found to be diseased and therefore unsaleable. Insurance proceeds from claims for disease total $30,000 and felling and transportation costs $50,000.

**1981-82 Year of Income**

| | | |
|---|---|---|
| **Assessable Income** | | |
| Gross Income | | Nil |
| **Less: Allowable deductions** | | |
| ** Purchase price of land attributable to timber felled for sale or use in manufacture in 1981-82 | Nil | |
| Felling costs | 10,000 | 10,000 |
| **Net loss from forest operations** | | 10,000 |

134. ** The trees weren't felled for sale or use in manufacture, therefore no deduction is available to the taxpayer under section 124J.

**1991-92 Year of Income**

| | | |
|---|---|---|
| **Assessable Income** | | |
| Sales of timber | | 8,000,000 |
| Gross Income | | 8,000,000 |
| **Less: Allowable deductions** | | |
| Felling and transportation costs | 60,000 | |
| ** Purchase price of land attributable to timber felled for sale or use in manufacture in 1991-92 | 500,000 | 560,000 |
| **Net income from forest operations** | | 7,440,000 |

135. ** The proportion of the purchase price attributable to the felled timber is calculated as follows:

$$\frac{\text{Trees felled for sale or use in manufacture}}{\text{Total trees available for felling}} \times \text{Total purchase price of land attributable to standing timber at time of purchase.}$$

$$= \frac{1{,}000{,}000}{2{,}000{,}000} \times \$1{,}000{,}000$$

$$= \$500{,}000$$

| | | |
|---|---|---|
| | **1992-93 Year of Income** | |
| **Assessable Income** | | |
| Sales of timber | | 6,000,000 |
| Insurance proceeds | | 30,000 |
| Gross Income | | 6,030,000 |
| **Less: Allowable deductions** | | |
| Felling and transportation costs | 50,000 | |
| ** Purchase price of land attributable to timber felled in 1992-93 year of income | 500,000 | 550,000 |
| **Net income from forest operations** | | 5,480,000 |

136. ** The balance of the purchase price of the land and trees that was attributable to the felled timber at the time of purchase is allowable to the taxpayer even though on a quantity basis not all of the timber is actually felled for sale or use in manufacture. The remaining trees have been felled either as thinning to waste or because they are diseased. These trees are excluded from the calculation of the deduction allowable under section 124J.

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