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Attention: Martin Baumgartner



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Dear Martin

Forestry MIS Amendments: Exposure Draft Legislation and Explanatory Material

Thank you for the opportunity to comment on the draft legislation and Explanatory Memorandum to amend the four year holding period rule for forestry managed investment schemes.

A3P welcomes the Assistant Treasurer's intention to enact this amendment, and for it to be retrospective to 1 July 2007. It is one of a number of unintended consequences that have arisen in the new Division 394 of ITAA 1997, which were brought to the Government's attention as far back as 2008, and again most recently in a letter from A3P to the Assistant Treasurer on 16 October 2009.

I would appreciate the opportunity to have further discussions of the other matters soon.

General comment

The exposure draft bill offers a simple and workable solution to the unintended consequence created by the Tax Commissioner having no discretion to not deny the forestry MIS investors' their tax deduction in cases where the four year holding period rule is failed for reasons beyond the control of the investors and which the investors could not reasonably have foreseen.

The draft bill also quite reasonably maintains the exposure of the forestry MIS promoter to the second limb of the 'promoter penalty' provisions of TAA 1953, and proposes a workable way to ensure the proposed amendments to the four year holding period rule don't prevent the promoter penalty provisions from operating as they were intended.

We therefore recommend only minor edits and revisions to the draft bill and the draft EM, primarily to improve consistency and readability.

Specific comments on the draft bill

1 After subsection 82KZMGA(1) [of ITAA 1936]

- The Example in paragraph (1A)(a) should read “the **forestry** interest is compulsorily acquired”, to be consistent with the similar example for the insertion after subsection 394-10(5) of ITAA 1997.

3 After subsection 290-50(2) in Schedule 1 [of TAA 1953]

- Note 2 to the inserted paragraph (2A) demands close study to understand that the explanation does in fact make sense. Is there a clearer way to express it? The words “only because” are critical and should stand out more than they do in what is a very long sentence, either by emboldening the two words, or by restructuring the sentence.

Specific comments on the draft EM

Para 1.4 contains an incorrect date. Section 82KZMG of ITAA 1936 actually took effect “on or after **2 October** 2001”, not 1 July 2001.

Para 1.6 would more accurately reflect the temporal reality if it said “In order for an initial investor to claim **and retain** a deduction...”

In all relevant paragraphs from para 1.7 onwards, consistency and clarity would be improved by always using the terms “**four year holding period rule**” and “**minimum holding period rule**”.

In para 1.7, insert a **comma** after “This is called the four year holding period rule”, and insert “**at least**” before “four years” at the end of the first sentence.

Para 1.8 should read “...interpretation of the **existing** law...”

For a clearer and less confusing explanation of the matters covered by paras 1.8 to 1.11, I would recommend emboldening “**and who satisfy section 82KZMG of ITAA 1936**” in para 1.10, in order to distinguish these taxpayers from those who may have the fallback solution of carrying on a business under section 8-1 within schemes covered by Division 394.

To the same end, para 1.11 should be amended to read “Unlike investors in schemes subject to Division 394 **where the investors may still be carrying on a business under section 8-1,**...” (but not in bold).

Para 1.16 is grammatically incorrect, and should read “...because of which any tax outcome **is capable of being or is likely to be** different from...”

In para 1.19, correct use of punctuation requires there to be no comma after “deduction”, thereby to read “...denial of **a deduction where** this failure is for reasons...”

The same punctuation rule applies in para 1.25, which should read “such that the four year holding period rule **is failed in circumstances** genuinely outside...”

I can appreciate that there may be some value in Example 1.4 (para 1.28), to draw attention to one way in which forestry MIS investors might “reasonably



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anticipate” a CGT event. However, I cannot imagine a forestry MIS promoter deliberately endangering investors’ tax deductions by writing its constitution so as to allow a compulsory buyback in less than the minimum holding period. Compulsory buyback in itself would not trigger a CGT event—only a buyback in less than four years.

I assume that ATO is preparing to withdraw and reissue the relevant Draft TDs once this amendment has been enacted.

Thank you again for the opportunity to comment. I’m happy to discuss any of these recommended changes, should you feel it necessary. I can be readily reached on 02 6273 8111, 0407 488 927, and alan.cummine@a3p.asn.au.

Yours sincerely



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