

# ***PR 2001/131 - Income tax: ITC Hardwood Timber Project 2000***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *17 October 2001*



# Product Ruling

## Income tax: ITC Hardwood Timber Project 2000

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### Preamble

The number, subject heading, and the *What this Product Ruling is about* (including *Tax law(s)*, *Class of persons* and *Qualifications* sections), *Date of effect*, *Withdrawal*, *Arrangement* and *Ruling* parts of this document are a 'public ruling' in terms of Part IVAAA of the *Taxation Administration Act 1953*. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.

### No guarantee of commercial success

Participants may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

The Australian Taxation Office (ATO) **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.

Participants must form their own view about the commercial and financial viability of the product. This involves a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how this product fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for participants by confirming that the tax benefits set out below in the **Ruling** part of this document are available **provided that** the arrangement is carried out in accordance with the information we have been given and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, participants lose the protection of this Product Ruling. Participants may wish to seek assurances from the promoter that the arrangement has been carried out as described in this Product Ruling.

Participants should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

### Terms of Use of this Product Ruling

This Product Ruling has been given on the basis that the person(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

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## What this Product Ruling is about

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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 ITC Hardwood Timber Project 2000, or simply as 'the Project'.

### Tax law(s)

2. The tax law(s) dealt with in this Ruling are:
- Division 35 of the *Income Tax Assessment Act 1997* ('ITAA 1997').

### Goods and Services Tax

3. In this Ruling all fees and expenditure referred to include Goods and Services Tax ('GST') where applicable. In order for an entity (referred to in this Ruling as a Grower) to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

### Changes in the Law

4. The Government is currently evaluating further changes to the tax system in response to the *Ralph Review of Business Taxation* and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the taxation legislation 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 who are more specifically identified in the Ruling part of Product Ruling PR 2000/53 and who entered into the arrangement specified below between 10 May 2000 and the withdrawal date of that Product Ruling. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant Agreements until their term expires) and deriving assessable income from this involvement. 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 the Project.

**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.

10. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no Product Ruling may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Manager, Legislative Services, AusInfo, GPO Box 1920, Canberra ACT 2601.

**Date of effect**

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11. This Ruling applies prospectively from 10 May 2000. 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 that private ruling if the income year to which it relates has ended or has commenced but not yet ended. However if the arrangement covered by the private ruling

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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

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13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into the specified arrangement on or after 10 May 2000 during the term of Product Ruling PR 2000/53. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of PR 2000/53. This is subject to there being no material difference in the arrangement or in the persons' involvement in the arrangement.

## Arrangement

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14. The arrangement that is the subject of this Ruling is described below. This description incorporates the following documents:

- Application for Product Ruling dated 14 February 2000;
- Draft ITC Hardwood Timber Project 2000 Prospectus, undated, issued by ITC Project Management Limited (ITCPM);
- Draft ITC Hardwood Timber Project 2000 Constitution executed by ITCPM, undated.
- Draft Compliance Plan for the Project executed by ITCPM as the Responsible Entity, undated;
- **Draft Lease between ITCPM and the Grower;**
- **Draft Forest Right between ITCPM and the Grower;**
- **Draft Management Agreement between ITCPM (the 'Manager') and the Grower.**
- Draft pre-payment loan Application between ITC Finance Pty Ltd and the Grower.
- Additional correspondence dated 14 February 2000, 23 February 2000, 31 March 2000, 10 April 2000 and 9 April 2000.

**Note: certain information received from ITC Project Management Limited has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.**

15. The documents highlighted are those the Growers entered into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of the Grower, was a party to, with the exception of finance agreements, to which paragraph 41 applies. The effect of these agreements is summarised as follows.

### Overview

16. This arrangement is 'ITC Hardwood Timber Project 2000'.

Unit of investment	Plantation Unit
Locations	<ul style="list-style-type: none"> <li>• south west and southern coastal regions of Western Australia; and</li> <li>• sub-tropical region of central Queensland</li> </ul>
Type of business each participant (Grower) is carrying on	Commercial growing, and cultivation of Tasmanian blue gum ( <i>E. globulus</i> ) in Western Australia or flooded gum ( <i>E. grandis</i> ) and river red gum, a flooded gum hybrid, ( <i>E. grandis</i> x <i>E. camaldulensis</i> ) in Queensland for the purpose of producing timber for woodchipping, saw logs, veneer logs and any other suitable product.
Number of hectares under cultivation	1,500
Name used to describe the product	ITC Hardwood Timber Project 2000
Size of each Plantation Unit	1 hectare
Number of trees per hectare	800
Expected production @ Year 8	Pulpwood 152 m <sup>3</sup> /hectare

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Expected production @ Year 18	<ul style="list-style-type: none"> <li>• Pulpwood 106 m<sup>3</sup>/hectare</li> <li>• Saw Logs 176 m<sup>3</sup>/hectare</li> <li>• Veneer Logs 70 m<sup>3</sup>/hectare</li> </ul>
Term of the investment in years	Approximately 18
Initial cost per hectare (for a minimum subscription of three (3) Plantation Units)	\$4,200
Ongoing costs (for a minimum subscription of three (3) Plantation Units)	<ul style="list-style-type: none"> <li>• Management: \$217 per Plantation Unit (indexed after the first (1<sup>st</sup>) year); and</li> <li>• Lease: \$250 per Plantation Unit (indexed).</li> </ul>

17. Growers who applied on or before 16 June 2000 had their application processed and agreements and leases executed by 30 June 2000. Agreements and leases were not executed prior to 30 June 2000 where applications were received after the 16 June 2000.

18. Growers executed a Power of Attorney enabling ITCPM as the Project Manager to act on their behalf as required when they made an application for Plantation Units. Growers applying under the Draft Prospectus entered into a Lease or Forest Right and a Management Agreement with ITCPM (the Project Manager). The lease/forest right gave a Grower a lease/forest right from ITCPM, over an identifiable area of land called a 'Plantation Unit' until the trees are harvested and sold, and net income distributed.

19. The Project Land is situated in two locations:

- south west and southern coastal regions of Western Australia; and
- sub-tropical region of central Queensland.

20. ITC estimated that approximately 75% of the land will be owned by ITC Timberlands Limited and the remainder will be leased.

21. ITC Timberlands Limited either leased the properties or granted a Forest Right to ITCPM. ITCPM then sublet or granted a Forest Right for the same land (as Plantation Units) to the Grower to carry on the Grower's business.

22. There was no minimum subscription for this Project. The Prospectus states that 1,000 hectares of land in Western Australia and 500 hectares of land in Queensland has been selected and further land may be acquired for planting if needed. Each investor was

required to subscribe for a minimum of three (3) Plantation Units of one hectare each in any combination of areas, at a cost of \$3,000 per Plantation Unit plus a fixed fee of \$3,000. The plantations are expected to qualify as “Kyoto Forests” and any sale of carbon credits will be sold for the benefit of the Growers (Draft Prospectus page 16). Trees will be planted during winter in Western Australia and during summer in Queensland.

23. Possible projected returns for Growers are outlined on pages 7 - 9 of the Draft Prospectus. The projected returns depend on a range of assumptions and the Project Manager does not give any assurance or guarantee whatsoever in respect of the future success of, or financial returns associated with, entering into the Project.

24. The Constitution established the responsibilities of ITCPM as the Responsible Entity. It set out the terms and conditions under which the Responsible Entity agreed to act for the Growers and to manage the Project. The Responsible Entity:

- ensured that Application Funds were not released until appropriate agreements etc were in place (cl 8);
- prepared the Management Agreement & lease documents (cl 6);
- distributes the profits (cl 30); and
- keeps a register of Growers (cl 27).

### **Compliance Plan**

25. The Project Manager prepared a Compliance Plan in accordance with the Corporations Law. Its purpose is to ensure that the Project Manager meets its obligations as the Responsible Entity of the Project and that the rights of the Growers are protected.

### **Interest in Land**

26. A Lease, or a Forest Right for the Queensland project, was granted by the Responsible Entity to the Grower under the terms of the Lease or Forest Right (cl 2). Growers were granted an interest in land in the form of a Lease or a Forest Right to use the said land for the purpose of conducting their afforestation business (cl 3). Growers could choose to either pre-pay the lease fees for the term of the project (18 years) with the Primary Services Fee or annually. Growers who chose to pay annually had to pay the grantor of the Lease or Forest Right a fee of \$250 per Plantation Unit per annum (cl 7) commencing 31 December 2000. This fee was/is indexed annually. The term of an annual payer’s Lease or Forest Right is up to the date the trees on the

Plantation Units have been harvested and sold and the Responsible Entity pays the proceeds into the Proceeds Fund. Growers that pre-paid, paid an amount of \$4,500 (\$250 x 18) per Plantation Unit together with the Primary Services Fee on application. In certain circumstances Growers are entitled to assign their Lease or Forest Right (cl 13).

### **Management Agreement**

27. A Management Agreement was entered into between the Responsible Entity and the Grower for each Plantation Unit. The termination of the Project is after completion of the harvest of all plantations comprising the Project (item 4 of schedule 1).

28. Growers contracted with the Responsible Entity to establish and maintain the plantation until maturity. Growers paid/pay the Management Fees for the term of the Project. The initial Management Fee was \$3,000 per Plantation Unit plus a fixed fee of \$3,000 for plantation preparation and establishment costs including the provision of Management Plan and seedlings (item 1 of schedules 2 & 3). The fee for planting was \$200 for each Plantation Unit payable on the 31 December 2000 (item 2 of schedule 3). The annual Management fee per Plantation Unit was/is \$150 (indexed after the first payment) plus a fixed fee of \$200 commencing 31 December 2000 for the year ended 30 June 2001 (item 3 of schedule 3). Growers who chose to pre-pay the Planting and Management fees paid \$200 per Plantation Unit for planting, \$3,600 (\$200 x 18) for the fixed component of the Management Fee and \$2,700 (\$150 x 18) per Plantation Unit for Management Fees. These pre-paid amounts were paid together with the Primary Services Fee on application.

29. The Responsible Entity purchased and planted *Eucalyptus globulus* trees in Western Australia and *Eucalyptus grandis* and *Eucalyptus grandis* x *Eucalyptus camaldulensis* hybrid trees in Queensland. It has also and will continue to cultivate, maintain, replant, fertilise, water, prune, tend, maintain and otherwise care for the Plantation Unit as and when required according to good silvicultural and forestry practices to produce mature trees suitable for woodchipping.

30. The Responsible Entity guaranteed that if the Grower invested in the Project by 16 June 2000 and providing that land was available for investment the Primary Services consisting of the preparation of a Management Plan, obtaining all necessary approvals, purchase of seedlings, supervision & management of work and administration (item 1 of schedule 2 to the Management Agreement) would be provided by 30 June 2000 (Draft Prospectus page 2).

31. The Responsible Entity will harvest and sell the timber produce on the Growers' behalf (item 4 of schedule 2). The Grower may elect to market and arrange for the sale of the Tree Crop (cl 9). The Responsible Entity will arrange insurance for the Growers at their request and cost (item 3(t) of schedule 2).

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

- is in breach of the Management Agreement and has not remedied the breach (cl 6); or
- has retired or is removed as the Responsible Entity (cl 6).

### **Fees**

33. Growers had the option of either paying fees annually or on application, pre-paying the Planting Fee for the work to be done by 30 June 2001, and pre-paying the Management & Lease fees for 18 years. A summary of the fees payable, exclusive of any GST that may be applicable, under clause 5 of the Management Agreement is:

### **Pre-payment option not taken**

	<b>Year 1</b>	<b>Year 2</b>	<b>Year 3</b>
Primary Services – fixed fee	\$ 3,000		
Primary Services – per Plantation Unit	\$ 3,000		
Planting – per Plantation Unit		\$ 200	
Management Fee – fixed amount		\$ 200	\$200
Management Fee – per Plantation Unit		\$ 150	\$150 (indexed)
<b>Total for three (3) Plantation Units</b>	<b>\$12,000</b>	<b>\$1,250</b>	<b>\$650</b>

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	<b>Year 1</b>	<b>Year 2</b>	<b>Year 3</b>
Primary Services – fixed fee	\$3,000		
Primary Services – per Plantation Unit	\$3,000		
Planting – per Plantation Unit	\$200		
Management Fee – fixed amount	\$3,600		
Management Fee – per Plantation Unit	\$2,700		
Lease Fee – per Plantation Unit	\$4,500		
Total for three (3) Plantation Units	\$37,800	Nil	Nil

34. The initial primary Services fee of \$3,000 per Plantation Unit plus a fixed fee of \$3,000 was for the preparation of a Management Plan for the Plantation Units, obtaining all necessary approvals, purchase of seedlings, supervision & management of work and administration (item 1 of schedule 2 to the Management Agreement). These initial fees were payable upon application to the Project.

35. The Planting Services fee of \$200 per Plantation Unit was for planting and supervision and management of the seedlings. These amounts were due and payable on 31 December 2000 or on execution of the Management Agreement if later than 31 December 2000 (item 2 of schedule 3 to the Management Agreement). Where the pre-payment option is taken this fee was payable upon application to the Project.

36. The annual Management Fee was \$150 per Plantation Unit plus a fixed amount of \$200 commencing 31 December 2000 for the year ended 30 June 2001. For annual payers the \$150 amount was/will be increased yearly after the first payment by the percentage increase in the Consumer Price Index Australia from the immediately preceding year (item 3 of schedule 3 to the Management Agreement). The Management Fee is in respect of the management of the crop including fertilisation, weed & pest control, fire control, arranging insurance (when requested), inspection and preparation of reports. Where the pre-payment option was a taken the Management Fee for 18 years was payable upon application to the Project.

37. The Independent Forester stated in its report that “The claims made in the Prospectus and in supporting documents concerning growth rates are based on a mixture of actual experience and professional judgement and appear achievable on a Project level, provided the same high level of management applied to their existing estate is applied to the Project” (p 33 of the Draft Prospectus).

38. The Application Monies were banked in the Application Bank Account formed under the Project’s Constitution (cl 3.3(b) of the Constitution). Upon acceptance of an Application the Responsible Entity released the relevant application monies from the Application Fund trust bank account and applied them in payment of the fees under the Management Agreement in respect of the Primary Services of the Management Agreement (cl 9 of the Constitution).

### **Planting**

39. *Eucalyptus globulus* trees were planted in winter in the south west and southern coastal regions of Western Australia and *Eucalyptus grandis* and *Eucalyptus grandis* x *Eucalyptus camaldulensis* hybrid trees were planted in summer in the sub-tropical region of central Queensland. After planting the Responsible Entity has/will maintain the trees in accordance with good silvicultural practice. The services that have or will be provided by the Responsible Entity over the Project’s term are outlined in the Management Agreement (cl 3). Unless the Grower elected to market and arrange for the sale of the Tree Crop (cl 9) the Responsible Entity will be responsible for arranging the marketing and sale of the timber produce (cl 3). The Responsible Entity is entitled to a Harvest Fee of 5% of the Harvest Proceeds (item 4 of schedule 3 to the Management Agreement).

40. The proceeds of sale of the timber produce will be banked in the Proceeds Fund bank account formed under the Project’s Constitution (cl 3.3(c)). Proceeds received by the Responsible Entity are to be distributed to the Grower after deductions for:

- any amount due under a Management or Land Right agreement; and
- any other amounts of tax or duty which is payable by the Responsible Entity on behalf of the Grower (cl 31.1 of the Constitution).

### **Finance**

41. Growers investing in the Project could either fund their investment personally, arrange finance themselves or, subject to satisfying certain criteria, use a financing facility provided by

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ITC Finance Pty Ltd (ITCF), an associate of ITCPM. It was proposed that ITCF would borrow funds from a bank, and possibly ITC, and on-lend these funds to Growers who request finance. The term of the loan would be for 18 years from 30 June 2000. All funding was on a full recourse basis.

42. The terms of the ITC pre-payment loan offered by ITCF was for 18 years. Interest was/is 9% for the first 8 years then 11% per annum, interest free to 30 June 2000. Repayments were interest only for the first payment on 30 September 2000, 1/11<sup>th</sup> of the principal on 31 October 2000, 31 quarterly interest payments commencing on 31 December 2000 followed by 40 quarterly principal & interest repayments. Security for the loan is the interest in the Plantation Units and borrowers provided ITCF with authority to debit their bank account for repayments. Interest payments made under an ITC pre-payment loan is not considered to have any pre-payment element attached.

43. This Ruling does not apply if a Grower entered into a finance agreement that includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- entities associated with the Project, other than ITC Finance Pty Ltd, are involved in the provision of finance for the Project;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' will be granted to the borrowers for the purpose of section 82KL, or the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- the loan terms or rate of interest are of a non-arm's length nature;
- repayments of the principal and interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism) back to the lender or any associate; or
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

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## **Ruling**

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### **Division 35 – Deferral of losses from non-commercial business activities**

#### **Section 35-55 – Commissioner’s discretion**

44. For a Grower who is an individual and who entered the Project on or after 10 May 2000 and prior to the withdrawal of Product Ruling PR 2000/53 the rule in section 35-10 may apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner has decided for the income years ended 30 June 2001 to 30 June 2007 that the rule in section 35-10 does not apply to this business activity provided that the Project has been, and continues to be carried on in a manner that is not materially different to the arrangement described in this Ruling.

45. This exercise of the discretion in subsection 35-55(1) will not be required where, for any year in question:

- a Grower’s business activity satisfies one of the objective tests in sections 35-30, 35-35, 35-40 or 35-45; or
- the ‘Exception’ in subsection 35-10(4) applies (see paragraph 51 in the Explanations part of this ruling, below).

46. Where, either the Grower’s business activity satisfies one of the objective tests, the discretion in subsection 35-55(1) is exercised, or the Exception in subsection 35-10(4) applies, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of deductions attributable to their business activity in excess of any assessable income from that activity, i.e., any ‘loss’ from that activity, to a later year. Instead, this ‘loss’ can be offset against other assessable income for the year in which it arises.

47. Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner’s decision to exercise the discretion in paragraph 35-55(1)(b) as an indication that the Tax Office sanctions or guarantees the Project or the product to be commercially viable. An assessment of the Project or the product from this perspective has not been made.

## **Explanations**

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### **Division 35 – Deferral of losses from non-commercial business activities**

48. Under the rule in subsection 35-10(2) a deduction for a loss incurred by an individual from certain business activities will not be allowable in an income year unless:

- the ‘Exception’ in subsection 35-10(4) applies;
- one of four objective tests in sections 35-30, 35-35, 35-40 or 35-45 is met; or
- if one of the objective tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

49. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer’s allowable deductions attributable to the business activity over that taxpayer’s assessable income from the business activity.

50. Under the loss deferral rule in subsection 35-10(2) the relevant loss is not able to be taken into account in the calculation of taxable income in the year that loss arose. Instead, in a later year it may be offset against any income from the same or similar business activity, or, if one of the objective tests is passed, or the Commissioner’s discretion exercised, against other income.’

51. For the purposes of applying the objective tests, subsection 35-10(3) allows taxpayers to group business activities ‘of a similar kind’. Under subsection 35-10(4), there is an ‘exception’ to the general rule in subsection 35-10(2) where the loss is from a primary production business and the individual taxpayer has other assessable income for the income year from sources not related to that activity, of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

52. In broad terms, the objective tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);
- (b) that the business activity results in a taxation profit in 3 of the past 5 income years (including the current year)(section 35-35);
- (c) at least \$500,000 of real property is used on a continuing basis in carrying on the business activity in that year (section 35-40); or

- (d) at least \$100,000 of certain other assets is used on a continuing basis in carrying on the business activity in that year (section 35-45).

53. A Grower who was accepted into and who has participated in the Project since 10 May 2000 is carrying on a business activity that is subject to these provisions.

54. Information provided with the application for this Product Ruling and additional information provided since, indicates that a Grower who acquires the minimum allocation of 3 Plantation Units in the Project is unlikely to have their business activity pass one of the objective tests until the income year ended 30 June 2008. Growers who acquired more than 3 Plantation Units in the Project may however, find that their activity meets one of the tests in an earlier income year.

55. Therefore, prior to this time, unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

56. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, the second arm of the discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where:

- (i) the business activity has started to be carried on;
- (ii) because of its nature, it has not satisfied one of the objective tests; and
- (iii) there is an objective expectation that the business activity of an individual taxpayer will either pass one of the objective tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

57. A Grower who acquires the minimum allocation of 3 Plantation Units in the Project is expected to be carrying on a business activity that will either pass one of the objective tests, or produce a taxation profit, for the year ended 30 June 2008. The Commissioner has decided for such a Grower that it would be reasonable to exercise the second arm of the discretion until the year ended 30 June 2007. Subsection 35-55(2) prevents the Commissioner exercising the discretion for these Growers beyond the year ended 30 June 2007.

58. Information provided by the applicant states that the business activity comprised by a Grower's involvement in this Project has started to be carried on, and will continue to be carried on in a manner that is not materially different to that described in the Arrangement in

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this Product Ruling. If, however, the Project is not carried on during the income years specified above (see paragraph 44), in the manner described in the Arrangement (see paragraphs 14 to 43), this Ruling, and specifically the decision in relation to paragraph 35-55(1)(b), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) not apply, may be affected, because the Ruling no longer applies (see paragraph 9). Growers may need to apply for private rulings on how paragraph 35-55(1)(b) will apply in such changed circumstances.

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

- the report of the independent expert and scientific evidence provided by the Responsible Entity with the application and subsequently, in further information requested by the Commissioner;
- independent, objective, and generally available information relating to the afforestation industry which substantially supports cash flow projection and other claims, including prices and costs, in the Product Ruling application submitted by the Responsible Entity.

## **Detailed contents list**

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

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## **Commissioner of Taxation**

17 October 2001

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*Previous draft:*

Not previously issued in draft form

*Related Rulings/Determinations:*

PR 1999/95; TR 92/1; TR 97/16;  
TR 92/20; TR 98/22; TD 93/34;  
PR 2000/53

*Subject references:*

- carrying on a business
- commencement of a business
- management fees
- primary production
- producing assessable income
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