

# ***PR 2008/60A1 - Addendum - Income tax: 2009 Willmott Forests Premium Forestry Blend Project***

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## Addendum

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### Product Ruling

#### Income tax: 2009 Willmott Forests Premium Forestry Blend Project

This Addendum amends Product Ruling PR 2008/60 to reflect the decision of the Full Federal Court in *Hance v. FC of T; Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085, and the withdrawal of Draft Goods and Services Tax Ruling GSTR 2008/D1.

#### **PR 2008/60 is amended as follows:**

**1. Paragraph 20**

Omit paragraph 20, substitute:

20. All fees and expenditure referred to in this Product Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as a Grower) to be entitled to claim input tax credits for the GST included in any creditable acquisition that it makes it must be registered or required to be registered for GST and hold a valid tax invoice.

**2. Paragraph 21**

Omit the paragraph.

**3. Paragraph 24**

After the paragraph, insert:

**Carrying on a business**

24A. Although not relevant for the purposes of Division 394, a Grower (as described in paragraphs 4 to 6 of this Ruling) who will stay in the Project until it is completed will be considered to be carrying on a business of primary production. Such Growers who are individuals will be subject to the operation of Division 35 (see paragraphs 45A to 45B of this Ruling).

**PR 2008/60****4. Paragraph 28**

Omit the table and notes in paragraph 28, substitute:

<b>Fee</b>	<b>Amount</b>	<b>Year(s) deductible</b>
Establishment Services Fee	\$5,500 See Note (i)	2009
Land Rental Fee	5% of the net proceeds of sale of the Radiata Pine, the Silky Oak and the She-oak	Any year in which this amount is paid See Note (ii)
Maintenance Fee	4% of the net proceeds of sale of the Radiata Pine, the Silky Oak and the She-oak	Any year in which this amount is paid See Note (ii)
Marketing Fee	1% of the net proceeds of sale of the Radiata Pine, the Silky Oak and the She-oak	Any year in which this amount is paid See Note (ii)

**Notes:**

- (i) If the Grower is registered or required to be registered for GST, amounts of the outgoing would need to be adjusted as relevant for GST (for example, input tax credits): Division 27.
- (ii) Growers will be notified by WFL of the years in which these amounts are paid.

**5. Paragraph 29**

Omit the paragraph.

**6. Paragraph 45**

After the paragraph, insert:

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

***Section 35-55 – exercise of Commissioner’s discretion***

45A. A Grower who will stay in the Project until its completion will be considered to be carrying on a business of primary production. Such a Grower, who is an individual, and accepted into the Project in the year ended 30 June 2009, may make losses from the Project that may be affected by the loss deferral rule in section 35-10 in Division 35. Division 35 does not apply however, to Growers who do not carry on a business.

45B. The discretion in paragraph 35-55(1)(b) will be exercised for a Grower to whom the loss deferral rule would otherwise apply, for the income years ended 30 June 2009 to 30 June 2023. Exercise of the discretion in this case however is conditional on the Project being carried out in the manner described in paragraphs 47 to 111 of this Ruling, but will allow Growers referred to who make losses, to offset them against their other assessable income in the income years in which those losses arise.

**7. Paragraph 46**

(a) Omit heading; substitute:

**Prepayment provisions and anti-avoidance provisions**

(b) Omit the subheading; substitute:

***Sections 82KZL, 82KZM, 82KZME, 82KZMF and Part IVA***

(c) Omit second dot point.

**8. Paragraph 47**

Omit the second dot point; substitute:

- Additional correspondence received on 11 and 27 March 2008, 1, 2, 9, 14 and 26 May 2008, 13, 15, 16, 18, 25 and 30 June 2008, 1, 2, 9 and 15 July 2008 and 2, 3 and 17 March 2009;

**9. Paragraph 50**

Omit '\$5,000'; substitute '\$5,500'.

**10. Paragraph 91**

Omit '\$5,000'; substitute '\$5,500'

**11. Paragraph 110**

Omit '\$5,000'; substitute '\$5,500'.

**12. Paragraph 113**

After the paragraph, insert:

**Is the Grower carrying on a business?**

113A. The general indicators used by the Courts in determining whether an entity is carrying on a business are set out in Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?

113B. More recently, and in relation to a managed investment scheme similar to that which is the subject of this Ruling, the Full Federal Court in *Hance v. FC of T*; *Hannebery v. FC of T* [2008] FCAFC 196; 2008 ATC 20-085 applied these principles to conclude that 'Growers' in that scheme were carrying on a business of producing almonds (at FCAFC 90; ATC 90).

113C. Application of these principles to the arrangement set out above leads to the conclusion that a Grower as (described in paragraphs 4 to 6 of this Ruling), who stays in the Project until its completion will be carrying on a business of primary production involving afforestation activities.

## 13. Paragraph 150

After the paragraph, insert:

### **Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion**

150A. In deciding to exercise the discretion in paragraph 35-55(1)(b) on a conditional basis for the income years ended 30 June 2009 to 30 June 2023 the Commissioner has applied the principles set out in Taxation Ruling TR 2007/6 Income tax: non commercial business losses: Commissioner's discretion. Based on the evidence supplied, the Commissioner has determined that for those income years:

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

150B. A Grower who would otherwise be required to defer a loss arising from their participation in the Project under subsection 35-10(2) until a later income year is able to offset that loss against their other assessable income.

150C. The exercise of the Commissioners discretion under paragraph 35-55(1)(b) for Growers who will stay in the Project until its completion is conditional on the Project being carried out in the manner described in this Ruling during the income years specified. If the Project is carried out in a materially different way to that described in the Ruling, a Grower will need to apply for a private ruling on the application of section 35-55 to those changed circumstances.

**14. Paragraph 155**

## (a) Insert:

Carrying on a business	24A
Division 35 – deferral of losses from non-commercial business activities	45A
<i>Section 35-55 – exercise of Commissioner’s discretion</i>	45A
Is the Grower carrying on a business?	133A
Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner's discretion	150A

## (b) Omit:

Prepayment provisions, non-commercial losses and anti-avoidance provisions	46
<i>Division 35 of the ITAA 1997 and sections 82ZKL, 82KZM, 82KZME, 82KZMF and Part IVA of the ITAA 1936</i>	46

## Substitute:

Prepayment provisions and anti-avoidance provisions	46
<i>Sections 82KZL, 82KZM, 82KZME, 82KZMF and Part IVA</i>	46

**15. References**

## (a) Omit the Related Rulings/Determinations references; substitute:

TR 97/7; TR 98/22; TR 97/11; TR 2007/6

## (b) Insert into the Legislative references:

- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-55
- ITAA 1997 35-55(1)(b)

## (c) Insert into the Case references:

- Hance v. FC of T; Hannebery v. FC of T [2008] FCAFC 196; 2008 ATC 20-085

This Addendum applies on and from 1 April 2009.

# PR 2008/60

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## ATO references

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