

PR 2008/73A1 - Addendum - Income tax: Rewards Group Premium Timber Project 2009

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Addendum

Product Ruling

Income tax: Rewards Group Premium Timber Project 2009

This Addendum amends Product Ruling PR 2008/73 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 2008/73 is amended as follows:

1. Paragraph 20

Omit the paragraph; 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 43A and 43B of this Ruling).

4. Paragraph 29

Omit the paragraph.

PR 2008/73A**5. Paragraph 31**

Omit the table and notes; substitute:

Fee	Amount	Year(s) deductible
Initial Fee	\$6,050 See Note (i)	2009
Maintenance Fee	13.42% of net Teak sales proceeds plus 13.53% of net Sandalwood sales proceeds	Any year in which this amount is paid See Note (ii)
Licence Fees	22.33% of net Teak sales proceeds plus 17.05% of net Sandalwood sales proceeds	Any year in which this amount is paid See Note (ii)
Pruning Fee (Teak)	See Note (iii)	Any year in which this amount is paid See Note (iii)

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 Rewards Projects Ltd of the years in which these amounts are paid. Harvest and thinnings are expected to occur from 2016.
- (iii) The Pruning Fee is payable in respect of each Harvest conducted on the Teak Block. The Pruning Fee is initially set at \$66 and will be indexed from 1 July 2010.

6. Paragraph 43

After the paragraph, insert:

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

Section 35-55 – exercise of Commissioner’s discretion

43A. 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.

43B. 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 2027. Exercise of the discretion in this case however is conditional on the Project being carried out in the manner described in paragraphs 45 to 88 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 44

(a) Omit the heading; substitute:

Prepayment and anti-avoidance provisions

(b) Omit the subheading; substitute:

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

(c) Omit the second dot point.

8. Paragraph 45

Omit the first dot point, substitute:

- Application for a Product Ruling as constituted by documents provided on 16 September 2008 and 3 December 2008 and additional correspondence between Rewards Projects Ltd and the Tax Office dated 30 October 2008, 6 and 12 November 2008, 3, 9 and 11 December 2008 and 3 March 2009;

9. Paragraph 48

Omit '\$5,500'; substitute '\$6,050'.

10. Paragraph 78

Omit '\$5,500'; substitute '\$6,050'.

11. Paragraph 80

(a) Omit '12.2%'; substitute '13.42%'.

(b) Omit '12.3%'; substitute '13.53%'.

12. Paragraph 81

Omit '\$60'; substitute '\$66'.

13. Paragraph 82

- (a) Omit '20.3%'; substitute '22.33%'.
- (b) Omit '15.5%'; substitute '17.05%'.

14. Paragraph 87

- (a) Omit fourth dot point, substitute:
 - where the Grower elects for a fixed interest rate, the interest rate will be fixed at a specific rate on acceptance of the loan application;
- (b) Omit the sixth dot point; substitute:
 - monthly repayments of principal and interest are due in the manner indicated by the loan application and in accordance with the Loan Agreement, commencing on or before 3 August 2009;

15. Paragraph 90

After the paragraph; insert:

Is the Grower carrying on a business?

90A. 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?

90B. 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).

90C. 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.

16. Paragraph 124

After the paragraph; insert:

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

124A. 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 2027 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.

124B. 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.

124C. 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.

17. Paragraph 129

(a) Insert:

Carrying on a business	24A
Division 35 – deferral of losses from non-commercial business activities	43A
<i>Section 35-55 – exercise of Commissioner’s discretion</i>	43A
Is the Grower carrying on a business?	90A
Sections 35-10 and 35-55 – deferral of losses from non-commercial business activities and the Commissioner’s discretion	124A

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- (b) Omit:
- Prepayment provisions, non-commercial losses and anti-avoidance provisions 44
- Division 35 of the ITAA 1997 and sections 82ZKL, 82KZM, 82KZME, 82KZMF and Part IVA of the ITAA 1936* 44
- Substitute:
- Prepayment provisions and anti-avoidance provisions 44
- Sections 82KZL, 82KZM, 82KZME, 82KZMF and Part IVA* 44

18. 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 Div 27
 - 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 18 March 2009.

Commissioner of Taxation

18 March 2009

ATO references

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